IN THE SUPREME COURT OF THE STATE OF NEVADA

OCIE GWIN, JR. A/K/A OCIE GWIN WATKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55025

FILED

SEP 09 2010

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sufficiency of the evidence

Appellant Ocie Gwin, Jr., contends that insufficient evidence was adduced to support the jury's verdict. We disagree because when viewed in the light most favorable to the State, the evidence is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Wal-Mart loss prevention officers testified that Gwin took two liquor bottles and hid them in his pockets, produced a Wal-Mart shopping bag out of his pocket and placed baby products in it, and attempted to exit the store without paying for the items. The jury watched the surveillance videotape. Gwin possessed $13 and the items stolen were worth $93.18. Gwin told one of the arresting officers that he stole the baby products to sell for cash so he could add minutes to his cell phone. It is for the jury to determine the

weight and credibility to give conflicting testimony, and a jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See NRS 205.060(1); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence.").

Jury selection

First, Gwin contends that the district court erred by denying his challenge of juror no. 128 for cause based on his conservative, pro-law enforcement bias. "Because such rulings involve factual determinations, the district court enjoys broad discretion in ruling on challenges for cause." Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005). Our review of the record supports the conclusion that the juror would be fair and impartial and his political views would not prevent or substantially impair the performance of his duties. Therefore, we conclude that the district court did not abuse its discretion. See NRS 175.036(1); Nelson v. State, 123 Nev. 534, 543-44, 170 P.3d 517, 524 (2007) ("The test for determining if a veniremember should be removed for cause is whether a veniremember's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.") (quotation omitted).

In a related argument, Gwin contends that the district court should have removed juror no. 128 when informed that the defense, through a clerical error, failed to include him on their list of peremptory strikes and mistakenly struck another juror. After the district court refused the request, Gwin asked the court to appoint juror no. 128 as an

alternate. The district court refused the second request. We have stated that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice." Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996). Because Gwin has failed to demonstrate that the impaneled jury was not impartial, we conclude that he is not entitled to the reversal of his conviction. See Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (recognizing that as long as the impaneled jury is impartial, the loss of peremptory challenges is not a constitutional violation); see also Rivera v. Illinois, 556 U.S. ___, ___, 129 S. Ct. 1446, 1453 (2009) (stating that "there is no freestanding constitutional right to peremptory challenges").

Second, Gwin contends that the district court erred by granting the State's for-cause challenge of juror no. 164 after initially denying the request. When the district court was informed that the juror was not previously forthcoming about her criminal history, the district court questioned her and ultimately granted the State's renewed request for removal based on her failure to disclose, when asked, that she had been charged, years earlier, with two serious crimes. We conclude that the State established sufficient cause for removal and the district court did not abuse its discretion by granting the request. See Blake, 121 Nev. at 795, 121 P.3d at 577.

Third, Gwin contends that the district court erred by overruling his objection to the State's use of a peremptory challenge to remove the only remaining African-American juror because the prosecutor's reason was a pretext for racial discrimination. See U.S. Const. amends. VI; XIV, § 1; Nev. Const. art. 1, §§ 3, 8; Batson v. Kentucky, 476 U.S. 79, 84 (1986). We disagree.

When reviewing a Batson challenge, we give great deference to "[t]he trial court's decision on the ultimate question of discriminatory intent." Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (internal quotation marks omitted). Here, the record supports the court's determination that the prosecutor's explanation for removing the juror did not contain an inherent intent to discriminate and Gwin failed to prove purposeful discrimination. See Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) ("'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991))). Therefore, we conclude that the district court did not err by rejecting Gwin's Batson challenge.

Witness list/untimely endorsement

Gwin contends that the district court erred by permitting the untimely endorsement of a State witness. We review "a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion." Mitchell, 124 Nev. at 819, 192 P.3d at 729. Here, the district court heard argument from counsel and granted the State's motion to endorse the witness, specifically finding that Gwin was aware of the witness' involvement as one of the arresting officers and the information his testimony would provide. Additionally, Gwin refused the court's offer to continue the trial in order to alleviate any possible prejudice. We conclude that although the State inadvertently violated the notice provision in NRS 174.234(1)(a)(2), Gwin failed to demonstrate that the nondisclosure caused substantial prejudice or that the district court abused its discretion by endorsing the witness. See NRS 174.295(2); Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001).

Juror misconduct

Gwin contends that the district court erred by denying his motion for a new trial based on newly discovered evidence—specifically, juror misconduct—without conducting an evidentiary hearing. See NRS 176.515(1). A district court's denial of a motion for a new trial based on alleged juror misconduct is reviewed for an abuse of discretion. Zana v. State, 125 Nev. ___, ___, 216 P.3d 244, 248 (2009). Here, the district court conducted a hearing and found that the brief, non-case related conversation between two jurors and Officer Michael Sage of the Henderson Police Department, a State witness, did not amount to misconduct and that Gwin failed to demonstrate prejudice. We agree and conclude that the district court did not abuse its discretion by denying Gwin's motion for a new trial. See Meyer v. State, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003) (in order to "prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial").

Evidentiary rulings

First, Gwin contends the district court erred and violated NRS 47.120(1) by allowing Officer Sage to testify that Gwin told him that his intent was to steal and then sell the stolen diapers without also allowing him to present, through Officer Sage, contrary statements made to Officer Gutierrez. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Here, the district court found that NRS 47.120(1) did not apply because written or recorded statements were not at issue and that Gwin's conversations with the two officers were "not part

of the same statement." See Patterson v. State, 111 Nev. 1525, 1530-31, 907 P.2d 984, 988 (1995). We agree and conclude that the district court did not abuse its discretion by sustaining the State's objection to Gwin's line of questioning.

Second, Gwin contends that the district court erred by denying his motion for a mistrial after Officer Sage testified that Gwin acted as if he knew one of the investigating officers "from . . . a prior incident." We will not reverse a district court's denial of a motion for a mistrial absent an abuse of discretion. McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998). Here, the district court denied the motion and instructed the jury to disregard the officer's comment. We conclude that the ambiguous comment was not prejudicial and, considering the overwhelming evidence of Gwin's guilt, the district court did not abuse its discretion. See Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (the test for determining if a witness has referred to a defendant's "criminal history is whether a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity" (internal quotation marks omitted)); see also Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996) (discussing factors to consider when evaluating the prejudicial effect of an inadvertent reference to prior criminal activity).

Third, Gwin contends that the district court erred by allowing the State to ask Officer Sage about Gwin's home address and introduce an exhibit detailing its location in relation to two Wal-Mart stores. The district court found the evidence relevant and probative and overruled Gwin's objection. See NRS 48.015; NRS 48.025. We conclude that the district court did not abuse its discretion by allowing the line of

questioning and the admission of the exhibit. See Mclellan, 124 Nev. at 267, 182 P.3d at 109.

Jury instructions

First, Gwin contends that the district court erred by overruling his objection and providing a misleading and prejudicial instruction on the presumption of innocence. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Here, the jury instruction was a correct statement of the law and we conclude that the district court did not abuse its discretion. See NRS 175.191; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005) (rejecting challenge to use of the word "until" in instruction).

Second, Gwin contends that the district court erred by rejecting his proposed jury instruction regarding specific intent to commit larceny. The jury instructions pertaining to burglary and the specific intent required, however, were accurate statements of the law and specifically covered the language requested by Gwin. Therefore, we conclude that the district court did not abuse its discretion. See Crawford, 121 Nev. at 748, 121 P.3d at 585; see also NRS 205.060(1).

Third, Gwin contends that the district court erred by rejecting his proposed instruction on petit larceny as a lesser-related offense and his theory of the defense. "[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (internal quotation marks omitted). A defendant, however is not entitled to an instruction on a lesser-related

offense. See Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Here, the jury was provided with proper instructions regarding intent and we conclude that Gwin failed to demonstrate that the district court abused its discretion. See Crawford, 121 Nev. at 748, 121 P.3d at 585.

Fourth, Gwin contends that the district court erred by rejecting his proposed instruction on inverse flight. Our review of the record reveals that Gwin was apprehended and then detained by Wal-Mart loss prevention officers as he attempted to leave the store without paying for the stolen items. Therefore, we conclude that Gwin was not entitled to an inverse flight instruction and that the district court did not abuse its discretion. See Crawford, 121 Nev. at 748, 121 P.3d at 585.

Prosecutorial misconduct

Gwin contends that the prosecutor committed misconduct during closing arguments by misstating the evidence and minimizing the State's burden of proof. Gwin failed to object to the challenged comments and has failed to satisfy his burden and demonstrate reversible plain error. See NRS 178.602; Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); see also Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) ("A prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" (quoting United States v. Young, 470 U.S. 1, 11 (1985))).

Cumulative error

Gwin contends that cumulative error requires the reversal of his conviction. Balancing the relevant factors, we conclude that Gwin's

contention is without merit. See Valdez, 124 Nev. at 1195, 196 P.3d at 481.

Having considered Gwin's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Elissa F. Cadish, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk