

IN THE SUPREME COURT OF THE STATE OF NEVADA

THELUS EUGENE EDMOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55170

FILED

SEP 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count each of burglary and grand larceny. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Sufficiency of the evidence

Appellant Thelus Eugene Edmond contends there was insufficient evidence to support his conviction because the State failed to prove his intent upon entering the store and that he carried the merchandise away from the store. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The jury heard testimony that a loss prevention officer monitoring the store's surveillance cameras observed and recorded Edmond as he walked through the store with a basket full of clothes, grabbed shopping bags from a closed cash register, concealed shampoo and hair conditioner under the clothes in the basket, selected a duffle bag and concealed the shampoo in the duffle bag, placed the clothes and other

merchandise into the shopping bags, concealed the duffle bag under the shopping bags, proceeded past all of the points of sale, and exited the store. The surveillance camera recording was played for the jury. There was also testimony that the value of the stolen merchandise was \$405.11, Edmond was apprehended and searched in the store parking lot, and Edmond had less than a dollar's worth of change in his pocket and no other method of payment in his possession.

We conclude from this evidence that a rational juror could infer that Edmond committed the crimes of burglary and grand larceny. See NRS 193.200; NRS 205.060(1); NRS 205.220(1); Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (observing that “intent can rarely be proven by direct evidence of a defendant’s state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime, which are capable of proof at trial”). The jury’s verdict will not be disturbed where, as here, it is supported by substantial evidence. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Bad acts evidence

Edmond contends that the district court erred by admitting evidence of a subsequent bad act because the evidence was prejudicial and irrelevant. We review the district court’s decision to admit evidence of other bad acts for an abuse of discretion and will not reverse that decision absent manifest error. Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). Here, the district court conducted a hearing on the State’s pretrial motion to admit evidence of a subsequent bad act and found that the evidence was admissible to show intent, plan, and knowledge. See NRS 48.045(2). We conclude that the Tinch factors for determining the admissibility of other bad acts evidence were met, see

Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), and that the district court's decision to admit the other bad act evidence did not constitute manifest error.

Habitual criminal adjudication

Edmond contends that the district court erred by adjudicating him a habitual criminal because it relied upon constitutionally infirm judgments of conviction. However, the record on appeal reveals that the State met its burden by providing certified copies of the felony convictions that were used to adjudicate Edmond a habitual criminal, the district court found that the convictions did not facially raise a presumption of constitutional infirmity, and the district court concluded that Edmond had not overcome the presumption of regularity that is afforded to criminal convictions. See NRS 207.016(5); Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). We conclude that Edmond has failed to demonstrate that the district court erred in this regard.

Edmond also contends that the district court erred by failing to conduct a jury trial on the habitual criminal allegation. However, the district court was not required to submit the habitual criminal allegation to a jury because habitual criminal adjudication does not require fact-finding beyond the fact of a prior conviction. See NRS 207.010(1); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

Jury selection and juror misconduct

Edmond contends that the district court abused its discretion by refusing to dismiss the jury venire after a venireman made prejudicial and inflammatory comments. We review a district court's ruling on a challenge for cause for abuse of discretion. Leonard v. State, 117 Nev. 53,

67, 17 P.3d 397, 406 (2001). Here, a venireman stated that he could not be an impartial juror because of traumatic experiences his sister experienced as a loss prevention officer and the majority of shoplifters his sister dealt with were African American. The district court excused the venireman, canvassed the remaining venire regarding the venireman's statements, and determined that the venire could set aside any bias and render a verdict based strictly on the evidence and the court's instructions. We conclude that the district court did not abuse its discretion by denying Edmond's motion to dismiss the entire venire. See Nelson v. State, 123 Nev. 534, 543-44, 170 P.3d 517, 524 (2007) (identifying the test for determining whether a veniremember should be excused for cause).

Edmond also contends that the district court abused its discretion by denying his motion to remove a juror who expressed disagreement during opening statements by shaking his head. We review a district court's determination regarding juror misconduct for an abuse of discretion. See Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151 (1997). Here, the district court heard argument on the motion, denied the motion, and reinstructed the jury not to form or express any opinion before the case is submitted for deliberations. We conclude that Edmond failed to establish the occurrence of misconduct, show that the misconduct was prejudicial, or demonstrate that the district court abused its discretion by denying his motion. See Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 455 (2003) (identifying the test for prevailing on a claim of juror misconduct).

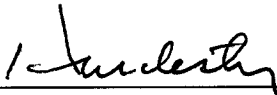
Proposed defense instructions

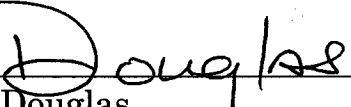
Edmond contends that the district court erred by rejecting his proposed instructions on the lesser-related offense of trespass because

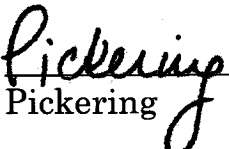
they supported his theory of defense. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and brackets omitted). However, a defendant is not entitled to an instruction on a lesser-related offense because the fairness of a verdict for a crime the State did not attempt to prove would be questionable. 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). Accordingly, we conclude that the district court did not err by rejecting Edmond's proposed instructions.

Having considered Edmond's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk