IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARENCE RAGLAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55344

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for attempted burglary and conspiracy to commit larceny. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. Appellant Clarence Ragland raises seven issues on appeal.

First, Ragland argues that insufficient evidence was adduced to support the jury's verdict. This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The jury heard testimony that Ragland's accomplice, Hector Gallegos, repeatedly knocked on Mary Dunfee's door, but she did not answer. Later, Dunfee heard glass breaking in her home and saw Ragland peering through her patio doors. Startled, Ragland ran upon seeing Dunfee. Police arrested Ragland and Gallegos running several blocks away. Gallegos's fingerprints were found on the patio door. Based on this evidence, we conclude that a rational juror could reasonably find that Ragland tried to enter Dunfee's residence

with the intent to commit a felony therein but was unsuccessful and that he agreed to commit larceny with Gallegos. See NRS 205.060(1); NRS 193.330(1); NRS 199.480(3)(a).

Second, Ragland argues that the district court erred in refusing to give jury instructions on the offenses of destruction of property, peeping, and unlawful trespass. We disagree. While a defendant is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence to support it, Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990), he is not entitled to misleading and inaccurate instructions, Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). The proposed instructions are misleading and inaccurate because Ragland was not charged with those crimes. Further, trespass is not a lesser-included offense of burglary. Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004). Similarly, as NRS 206.040 only prohibits destruction of property that occurs "under circumstances not amounting to a burglary," the crime is not a lesser-included offense of burglary. See Smith, 120 Nev. at 946, 102 P.3d at 571 (providing that trespass is not a lesser-included offense of burglary because the statutory definition excludes acts amounting to burglary). And, as peeping requires the intent to conceal oneself on the property of another, and burglary does not, it is not a lesser-included offense of burglary. NRS 200.603(1); see Wilson v. State, 121 Nev. 345, 358-59, 114 P.3d 285, 294-95 (2005) (providing that all the elements of the lesser-included offense must be included in the greater offense). In addition, Ragland's proposed instructions did not lay out his mistaken identity theory of defense, see Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987), or discuss the significance of findings

made under that position or theory, see Carter, 121 Nev. at 767, 121 P.3d at 597. Under these circumstances, Ragland has not demonstrated that the district court erred in rejecting his proposed instructions.

Third, Ragland argues that the district court erred in admitting testimony that Ragland and Gallego gave different names for Ragland at the time of their arrest. He asserts that this evidence was irrelevant evidence of an uncharged bad act that was admitted through hearsay. We disagree with both contentions. First, the evidence was not irrelevant but instead tended to show that Ragland knew Gallego, whose prints were found at the scene. The fact that Ragland gave a false name also showed consciousness of guilt. See United States v. Birges, 723 F.2d 666, 672 (9th Cir. 1984). Moreover, Ragland even admitted at trial that he gave a false name to the police. Second, the testimony did not constitute hearsay as the testimony about Gallego's statement was not offered for the truth of the matter asserted but to show the effect on Ragland when he heard it. See Wallach v. State, 106 Nev. 470, 473, 796, P.2d 224, 227 (1990). Therefore, the district court did not abuse its discretion in admitting the evidence.[1]

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[1]Ragland also argues that the admission of the statement violated Crawford v. Washington, 541 U.S. 36 (2004) and Bruton v. United States, 391 U.S. 123 (1968). As the statement was not offered for the truth of the matter asserted, it was not hearsay and did not offend Crawford. See Crawford, 541 U.S. at 68. As the statement did not implicate Ragland in the charged crimes, it did not offend Bruton. See Bruton, 391 U.S. at 135-36.

Fourth, Ragland argues that the district court abused its discretion in denying his request for a mistrial based on a witness's statement that he contends alluded to Ragland's past criminal activity. We discern no abuse of discretion. See Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). The witness's comment did not specifically identify Ragland as having a prior criminal record. Further, the prosecution did not solicit the statement, the defense immediately objected to it, and prosecution redirected the witness, and, as the witness did not even finish his statement, it was not "clearly and enduringly prejudicial." See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996). In addition, Ragland declined a cautionary instruction. See Dias v. State, 95 Nev. 710, 714, 601 P.2d 706, 709 (1979) (holding that when defense counsel makes a tactical decision not to move to strike hearsay or request a cautionary instruction, defendant is deemed to have waived his right to confront the hearsay declarant).

Fifth, Ragland argues that the district court erred in limiting the scope of a defense expert witness's testimony by stating that some testimony provided could invite cross-examination with some otherwise inadmissible information the State had concerning the crime. We conclude that this argument lacks merit. The district court informed the defense of the parameters in which the expert's testimony was admissible consistent with our opinion in Echavarria v. State, 108 Nev. 734, 746, 839 P.2d 589, 597 (1992). The court did not limit the testimony but informed counsel that testimony as to the specific factors affecting Ragland's identification could invite more pointed cross-examination. However, it declined to address specific areas of examination other than to state that

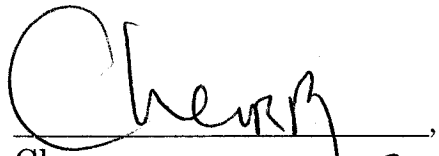
the scope of cross-examination would be limited by what occurs on direct examination. Therefore, we conclude that Ragland failed to demonstrate an abuse of discretion. See Emmons v. State, 107 Nev. 53, 56, 807 P.2d 718, 720 (1991), overruled on other grounds by Harte v. State, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

Sixth, Ragland argues that the district court abused its discretion at sentencing by adjudicating him as a habitual criminal based on remote, nonviolent prior convictions. Ragland enjoyed a lengthy criminal history, sustaining seven felony convictions beginning in 1979, all appearing to be nonviolent. See Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (providing that habitual criminal adjudication "makes no special allowance for non-violent crimes or for the remoteness of convictions"). Nothing in the record suggests that the district court abused its discretion in sentencing Ragland. See Rendell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). And although Ragland's sentence is substantial, it falls within statutory limits, see NRS 207.010, and is not cruel and unusual. See Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

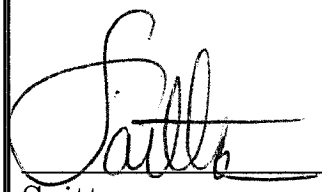
Lastly, Ragland claims that cumulative error warrants reversal of his convictions. Based on the foregoing discussion, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002); Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (defendant is "not entitled to a perfect trial, but only to a fair trial").

Having considered Ragland's contentions and concluding that they lack merit, we

ORDER the judgment of conviction AFFIRMED.[2]



_____, J.
Cherry



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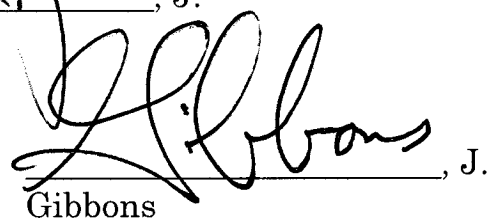

_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
The Eighth District Court Clerk
Attorney General/Carson City
Bush & Levy, LLC
Clark County District Attorney
Clarence Ragland

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[2]Because appellant is represented by counsel in this matter, we decline to grant appellant permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents appellant has submitted to this court in this matter.