IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW EPSILANTIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55387

FILED

APR 28 2011

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, commission of a fraudulent act in a gaming establishment, and two counts of conspiracy to commit a crime (burglary and larceny). Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

The State charged appellant Andrew Epsilantis with four crimes stemming from his role in a theft perpetrated at the Venetian Hotel and Casino in March 2009.[1] The jury convicted him of all four charges. On appeal, Epsilantis contends that: (1) his dual conspiracy convictions violate the Double Jeopardy Clause, (2) the State provided him with inadequate notice of its intent to call his coconspirator as a witness, (3) the district court improperly permitted two lay witnesses to provide expert opinions, and (4) he was improperly convicted of committing a fraudulent act in a gaming establishment.[2]

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

[2]Epsilantis also contends that the district court erred when it refused to give his proffered jury instructions, that his convictions were

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For the reasons stated below, we conclude that Epsilantis' Double Jeopardy argument has merit. We therefore reverse his conspiracy-to-commit-larceny conviction and remand this case to the district court for entry of a corrected judgment of conviction. We further conclude, however, that Epsilantis' remaining arguments lack merit, and we therefore affirm his remaining convictions and sentence.[3]

Epsilantis' dual conspiracy convictions violated his Double Jeopardy rights because both charges were based on the same agreement

Epsilantis contends that his dual conspiracy convictions violate the Double Jeopardy Clause of the Fifth Amendment. We agree.

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Double Jeopardy protects a criminal defendant from multiple punishments for the same offense in a single trial. Garcia v. State, 121 Nev. 327, 342, 113 P.3d 836, 845 (2005) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

Nevada follows the Blockburger test to determine whether multiple convictions violate the Double Jeopardy Clause. See Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). Under Blockburger v.

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not supported by sufficient evidence, and that the district court erred in sentencing him as a habitual criminal. After reviewing the record, we conclude that these arguments lack merit.

[3]Epsilantis' two conspiracy convictions were to run concurrently, and our reversal of his conspiracy-to-commit-larceny conviction does not affect the propriety of the district court's sentencing on his remaining three convictions.

United States, 284 U.S. 299 (1932), multiple convictions are permissible so long as each conviction requires the prosecution to prove an element that is not required to be proved in the other. 284 U.S. at 304. In order for multiple conspiracy convictions to satisfy the Blockburger test, the State must establish that the defendant entered into more than one agreement and that each agreement envisioned the commission of a separate crime. See Garcia, 121 Nev. at 343, 113 P.3d at 846–47 ("[I]t is constitutionally permissible to convict [a defendant of two conspiracy charges] provided that the State was capable of proving that two separate and distinct agreements to commit the two different crimes existed." (emphasis added)).

In Garcia, we addressed a situation similar to that at issue here. The Garcia defendant was charged with conspiring to enter a store with the intent to commit a larceny therein and with conspiring to rob someone once he had entered the store. 121 Nev. at 343, 113 P.3d at 846. In other words, the State in Garcia alleged that the defendant did not agree to rob someone until he had already entered the store. We concluded that if the State had introduced evidence that the defendant had entered into two "separate and distinct" agreements, his dual conspiracy convictions would have been constitutionally permissible. Id.

Here, Epsilantis' second conspiracy charge (larceny) simply reiterated what he conspired to do in the first charge (enter the Venetian intending to commit larceny). Thus, while Epsilantis and his coconspirator had not yet decided upon the details of how they planned to commit larceny, they had already conspired to commit the crime by the time they entered the casino. Epsilantis and his coconspirator did nothing to change the legal significance of what they were trying to accomplish

simply by picking out a specific victim. As such, this second agreement was not "separate and distinct" for purposes of complying with Garcia's Double Jeopardy analysis. Cf. State v. Stevenson, 858 A.2d 876, 878–79 (Conn. App. Ct. 2004) (concluding that a conspiracy-to-commit-burglary conviction with larceny as the underlying crime and a conspiracy-to-commit-larceny conviction "must be combined").

Because Epsilantis' two conspiracy convictions were based on the same agreement in violation of his Double Jeopardy rights, we reverse his conspiracy-to-commit-larceny conviction.

The district court did not abuse its discretion in permitting Epsilantis' coconspirator to testify

Epsilantis contends that the district court erred in permitting the State to call his coconspirator, Steven Rash, as a witness after providing Epsilantis with only one day's notice of its intent to do so. We disagree.

A district court's decision regarding whether to permit a witness to testify is reviewed for an abuse of discretion. See Grey v. State, 124 Nev. 110, 119–20, 178 P.3d 154, 161 (2008). Pursuant to NRS 174.234(3)'s notification provisions, the district court shall prohibit a witness from testifying only if it determines that the State "acted in bad faith" by not providing the defendant with five days' notice. NRS 174.234(3).

Here, although the State did not notify Epsilantis of its intent to call his coconspirator as a witness until the day before trial, the State's notification came one day after the district court denied its motion to call a security guard as an identification witness. In light of Epsilantis' ostensible attempt to disguise his identity by growing a beard and the slot machine victim's uncertainty as to Epsilantis' identity at his preliminary

hearing, the State's desire to call a witness at trial for identification purposes was legitimate. Given the chain of events that led to the State's last-minute notification, the district court did not abuse its discretion when it determined that the State was not acting in bad faith.

Epsilantis' substantial rights were not affected by the district court's failure to strike sua sponte the opinion testimony of two lay witnesses

Without objecting at trial, Epsilantis now contends that the district court committed plain error when it permitted two lay witnesses to opine that the theft in this case resembled a "distracting grab" or "distract theft." Specifically, he contends that he was unable to adequately prepare his cross-examination of these two witnesses because the State failed to provide him with the statutorily required notice and documentation as set forth in NRS 174.234(2).

Even if we accept Epsilantis' argument that these witnesses provided expert opinions, he has failed to show how such testimony affected his substantial rights.[4] See Green v. State, 119 Nev. 542, 545, 80

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[4]The testimony of these two witnesses more closely resembles lay opinion testimony than it does expert opinion testimony. Lay witnesses may offer opinion testimony if their opinions are "[r]ationally based on the[ir] perception." NRS 50.265(1). If, however, a witness's opinion is based on "scientific, technical or other specialized knowledge," he or she must first be qualified as an expert. NRS 50.275. Here, while the witnesses' past work-related experiences may have enabled them to provide shorthand descriptions of what they saw in the videos, this does not change the fact that their testimony revolved around what they perceived while watching the videos. Cf. Thompson v. State, 125 Nev. ___, ___, 221 P.3d 708, 714 (2009) (concluding that a witness testifying as to what she perceived was not an "expert" simply because her ability to perceive may have been enhanced by training she had received as an artist).

P.3d 93, 95 (2003) ("In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights."). Epsilantis' main contention on appeal is that the testimony of these two witnesses was what enabled the jury to conclude that Steven Rash and the other man in the videos were acting in concert. However, the slot machine victim's own testimony and narration of the surveillance videos provided the jury with a sufficient basis to conclude as much.

Moreover, we note that while Epsilantis' theory on appeal may be that no evidence supported the inference that the two men in the videos were acting in concert, his theory of defense during trial appears to have been that the second man in the videos was not him at all. Since neither of the two opinions involved an identification of Epsilantis as the second man in the videos, Epsilantis has not shown how his substantial rights were affected by this testimony.

Epsilantis was properly convicted of committing a fraudulent act in a gaming establishment

For the first time on appeal, Epsilantis argues that he was impermissibly convicted under NRS 465.070 for committing a fraudulent act in a gaming establishment. Specifically, he contends that the victim of a crime under NRS 465.070 must be the actual casino, rather than one of the casino's patrons. We conclude that this argument lacks merit.

NRS 465.070 proscribes an array of conduct, only some of which envisions the casino as the ultimate victim. For instance, it prohibits a person from manipulating the outcome of a game or changing a bet on a game so as to gain an advantage over other players. NRS 465.070(1), (2). In both of these instances, the ultimate victims of the defendant's conduct are other casino patrons and not the casino itself.

What sets the conduct proscribed under NRS 465.070 apart from ordinary thefts or frauds is not that the casino is the victim of the crime, but rather that the casino's gaming services are being used as the means through which the crime is committed.

The provision of NRS 465.070 under which Epsilantis was convicted provides: "It is unlawful for any person . . . [t]o claim, collect or take . . . anything of value in or from a gambling game, with intent to defraud, without having made a wager contingent thereon . . . ." NRS 465.070(3). By working in concert with Rash to deceive the casino patron into walking away from the Venetian's slot machine and then taking her voucher from the slot machine, Epsilantis' conduct fits squarely within that which is proscribed by NRS 465.070(3). Consequently, he was properly convicted of committing a fraudulent act in a gaming establishment.[5]

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[5]In a related argument, Epsilantis also contends that the State's charging document was constitutionally infirm because it failed to allege that the victim of his crime was the actual casino. This argument lacks merit. Because the victim of a crime under NRS 465.070 does not need to be the actual casino, the State sufficiently apprised Epsilantis of the conduct that constituted his alleged crime by stating in its charging document that he stole a voucher from a slot machine. State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998) (indicating that a charging document provides a defendant with adequate due process if it "sufficiently apprises the defendant of what he must be prepared to meet" (quotation omitted)).

For similar reasons, Epsilantis' void-for-vagueness argument lacks merit. "A statute is void for vagueness and therefore repugnant to the Due Process Clause of the Fourteenth Amendment if it fails to sufficiently define a criminal offense such that a person of ordinary intelligence would be unable to understand what conduct the statute prohibits." Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). Assuming Epsilantis

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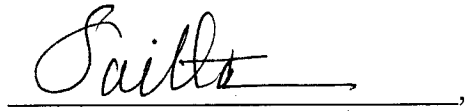
For the foregoing reasons, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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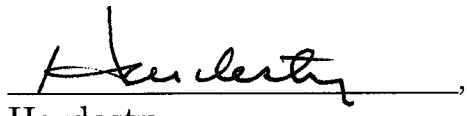

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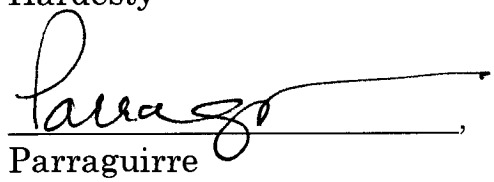

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cc: Hon. Linda Marie Bell, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth District Court Clerk

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was uncertain as to whether taking a casino patron's voucher from a slot machine without her consent constituted a crime, NRS 465.070(3)'s plain language makes clear that such conduct is, in fact, punishable.