IN THE SUPREME COURT OF THE STATE OF NEVADA

ADOLFO JAVIER VILLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55388

FILED

JAN 13 2011

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of burglary, possession of burglary tools, and malicious destruction of property. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Sufficiency of the evidence

Appellant Adolfo Javier Villa contends that insufficient evidence was adduced at trial to support his convictions because there is no evidence that he entered the bank or was anywhere other than the fire riser room and the roof. 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 bank security system was tripped at night. The security system was set up to allow the security company employees to hear what was going on inside of the bank. They

heard the sound of drilling and called 911. The police responded to the call in about a minute and set up a perimeter around the commercial building in which the bank was located. They did not see anyone leave the building. A canine team entered the bank suite; the officer observed two holes cut into the bank ceiling and the dog detected human scent coming from above. The police discovered that the door to the building's fire riser room had been pried open. Inside, they found that a hole had been cut through the drywall, and they observed a ladder leading to the roof and an open roof hatch. The police found Villa hiding on the roof. He was dressed in black and was covered in drywall dust and insulation material. Nearby, were a pair of gloves, a stopwatch, and a black bag containing a breathing mask, saw, screwdrivers, and prying tools. A red and black bag of tools was found in the suite located next to the bank and a vehicle was found illegally parked near the building. The police conducted an inventory of the vehicle and found Villa's wallet and various tools. A bank employee testified that the repairs to the holes in the ceiling cost $350. The jury heard a recording of the 911 call that included the sound of drilling or machinery coming from the bank and saw the red and black bag of tools and photographs of the damage to the building that were admitted into evidence.

We conclude that a rational juror could reasonably infer from this evidence that Villa entered the bank with the intent to commit larceny, possessed burglary tools, and maliciously destroyed property of another. See NRS 193.0145; NRS 205.060(1); NRS 205.080; NRS 206.310.

It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction).

Double jeopardy and redundancy

Villa contends that his convictions for burglary and malicious destruction of property violate the Double Jeopardy Clause and are redundant because they punish the same illegal act. "The Double Jeopardy Clause . . . protects defendants from multiple punishments for the same offense. This court utilizes the test set forth in Blockburger v. United States to determine whether multiple convictions for the same act or transaction are permissible." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (internal footnotes omitted). And even if multiple convictions for the same act are permitted under Blockburger, "we will reverse redundant convictions that do not comport with legislative intent." Id. (internal quotation marks omitted). We conclude that each of Villa's convictions punishes a separate criminal act and therefore this contention is without merit. See NRS 205.060(1); NRS 205.070; NRS 206.310; Allen v. State, 99 Nev. 485, 489, 665 P.2d 238, 241 (1983).

Batson challenge

Villa contends that the district court erred by denying his Batson objection to the State's use of a peremptory challenge to remove a

Hispanic woman from the jury venire. See Batson v. Kentucky, 476 U.S. 79 (1986). We conclude that the district court did not err in overruling Villa's Batson objection because the record supports the district court's determination that Villa failed to make a prima facie showing of discrimination. See Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006) (identifying three-step analysis for evaluating Batson objection).

Presumption of innocence

Villa contends that the district court violated his due process right to a fair trial by forcing him to appear dressed in black during the first day of trial and thereby depriving him of the presumption of innocence. The presumption of innocence is a basic component of a fair trial, Estelle v. Williams, 425 U.S. 501, 503 (1976), and a defendant cannot be compelled to stand trial in prison attire because it undermines that presumption, see id. at 504-05. Here, Villa was dressed in civilian clothing, the black shirt did not indicate his incarcerated status, and it was only worn on the first day of trial. Under these circumstances, we conclude that the black shirt did not deprive Villa of the presumption of innocence or a fair trial.

Jury instructions

Villa contends that the district court erred by not instructing the jury on the limited use of uncharged bad act evidence that he cut holes in the riser room and the suites adjacent to the bank. Villa did not object to the admission of this evidence, so we review for plain error. See NRS 178.602; Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

The record does not reveal whether the uncharged bad act evidence was admitted under NRS 48.045(2) (evidence of other crimes, wrongs, or acts may be admitted for limited purposes) or NRS 48.035(3) (the res gestae statute). If the evidence was admitted under NRS 48.045(2), the district court had a duty to give a limiting instruction pursuant to Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), modified on other grounds by Mclellan, 124 Nev. at 270, 182 P.3d at 111. However, if the evidence was admitted under NRS 48.035(3), Villa had the burden to seek a cautionary instruction pursuant to NRS 48.035(3). Because the alleged error was not plain or clear from the record, we conclude that it does not constitute plain error. See Mclellan, 124 Nev. at 269, 182 P.3d at 110.

Villa also contends that the district court erred by rejecting his proposed instructions on trespass because they supported his theory of defense. Although a defendant is entitled to a jury instruction on his theory of the case if some evidence supports it, Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990), a defendant is not entitled to instructions that are "misleading, inaccurate or duplicitous," Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). Villa's proposed instructions are misleading and inaccurate because trespass is not a lesser-included offense of burglary, Villa was not charged with trespass, and the instructions incorrectly suggest that the jury could find Villa guilty of trespass. See Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) (a defendant is not entitled to an instruction on a lesser-related offense), overruled on other grounds by Rosas v. State, 122 Nev. 1258,

1269, 147 P.3d 1101, 1109 (2006); Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) ("trespass is not a lesser-included offense of burglary"). Accordingly, we conclude that the district court did not abuse its discretion by rejecting Villa's proposed instructions. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Villa further contends that the district court erred by rejecting his proposed instruction on the State's failure to preserve the clothing he was wearing and the presumption that this evidence was favorable to the defense. Here, the district court heard argument and determined that there was insufficient negligence to warrant the instruction. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). We conclude that the district court did not abuse its discretion by rejecting the proposed instruction.

Inventory search

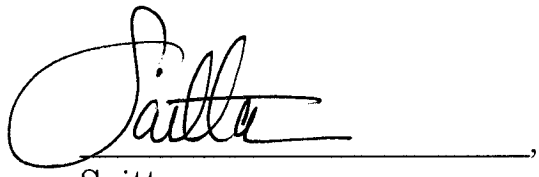
Villa contends that the inventory search of the vehicle was invalid under the Fourth Amendment and therefore his convictions must be reversed. The State contends that Villa lacks standing to challenge the validity of the search. Because Villa did not challenge the validity of the search below, the record is inadequate for our review of these contentions and we decline to consider them. See Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record." (internal citation omitted)).

Speedy trial

Villa contends that his constitutional right to a speedy trial was violated. "[T]o trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Meegan v. State, 114 Nev. 1150, 1153, 968 P.2d 292, 294 (1998) (internal quotation marks omitted), clarified on other grounds by Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001); see also Barker v. Wingo, 407 U.S. 514, 530 (1972) (establishing a four-part test to determine whether a defendant's right to a speedy trial was violated). Villa was indicted on March 13, 2009, and his trial began on October 26, 2009. We conclude that the 228-day delay was not presumptively prejudicial. See Doggett v. U.S., 505 U.S. 647, 652 n.1 (1992).

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

ORDER the judgment of conviction AFFIRMED.



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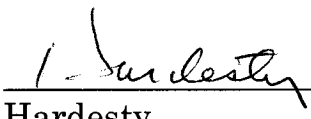

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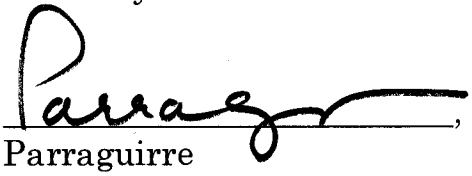

_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk