IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 55873

FILED

DEC 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

Appellant Andrew Epsilantis first contends that the district court erred by refusing his requests for new counsel and failing to hold an evidentiary hearing outside the presence of the prosecutor. Under the specific facts of this case, we cannot conclude that the district court's denial of Epsilantis' motions for new counsel or decision not to hold an evidentiary hearing was an abuse of discretion. See Garcia v. State, 121 Nev. 327, 336-39, 113 P.3d 836, 842-44 (2005), holding modified on other grounds by Mendoza v. State, 122 Nev. 267, 270 n.2, 130 P.3d 176, 177 n.2 (2006). To the extent Epsilantis contends that he was denied effective assistance of counsel at the calendar call, see Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (claims of ineffective-assistance may be addressed on direct appeal if an evidentiary hearing is unnecessary), we disagree because the calendar call was not a critical stage of the proceedings and Epsilantis was therefore not entitled to effective

assistance at that proceeding, see Brinkley v. State, 101 Nev. 676, 678-79, 708 P.2d 1026, 1028 (1985).[1]

Second, Epsilantis contends that the district court erred by determining that testimony from casino security officer Claudio DiFalco describing the chips used in the offense as "novelty chips" with no value and testimony from security officer Nathan Coulson and Detective Russell Lee characterizing the offense as a "distract and grab" type crime constituted lay witness testimony. We conclude that the district court did not abuse its discretion by allowing DiFalco to characterize the chips as "novelty chips" and that any error in admitting Coulson's and Lee's testimony was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt. See NRS 50.265 (lay witness opinion testimony); NRS 50.275 (expert testimony); Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (non-constitutional harmless error); Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978) ("The admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court."); Martin v. State, 80 Nev. 307, 310, 393 P.2d 141, 143 (1964) (once made, an objection is not

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[1]Epsilantis contends that his waiver of his preliminary hearing was not voluntarily and intelligently made. However, when Epsilantis proceeded to trial without raising any objection to the adequacy of the proceedings in justice court, he waived any irregularities that may have occurred. See Pinana v. State, 76 Nev. 274, 286, 352 P.2d 824, 831 (1960), receded from on other grounds by In re Application of Shin, 125 Nev. ___, ___, 206 P.3d 91, 97-98 (2009); cf. Dettloff v. State, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (holding that conviction by a jury "under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings").

waived because it was not repeatedly asserted). To the extent Epsilantis contends that the district court erred by allowing Coulson and Lee to describe a "distract and grab" crime in general, Epsilantis did not object on that basis below, and we conclude that he has failed to demonstrate plain error. See Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (defining plain error).

Third, Epsilantis contends that the district court erred by denying his motion for a mistrial because evidence from which the jury could have reasonably inferred that he had previously engaged in criminal activity was erroneously admitted. The district court determined that any prejudicial affect of the admission of the evidence was outweighed by its probative nature and we conclude that Epsilantis has failed to demonstrate an abuse of discretion. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007) (the district court's denial of a motion for a mistrial is reviewed for an abuse of discretion).

Fourth, Epsilantis contends that the district court erred by not sua sponte giving a limiting instruction to the jury when defense counsel brought attention to his decision not to testify. We conclude that Espilantis has failed to demonstrate plain error in this regard. See Gaxiola, 121 Nev. at 648, 119 P.3d at 1232.

Fifth, Epsilantis contends that the district court erred by failing to give his requested jury instructions. We disagree with Epsilantis' contention that, because the State proceeded, in part, on a conspiracy theory of liability, conspiracy was an element of grand larceny. Therefore, we conclude that the district court properly determined that conspiracy to commit grand larceny is not a lesser-included offense of grand larceny and Epsilantis was not entitled to an instruction on that

offense. Compare NRS 199.480 with NRS 205.220(1)(a); see Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (defining conspiracy); Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) (defining a lesser-included offense). To the extent Epsilantis contends that the district court erred by refusing to give his proposed instruction on conspiracy to obtain money under false pretenses, we disagree because that offense is not a lesser-included offense of grand larceny. Compare NRS 199.480 and NRS 205.380 with NRS 205.220(1)(a).

Sixth, Epsilantis contends that the district court erred by denying his motion for a mistrial based on the State's use of incorrect jury instructions in its PowerPoint presentation during closing argument. The district court determined that the differences between the State's representation of the jury instructions and the actual instructions were not prejudicial considering that (1) the jury was read the correct instructions, (2) the jury had a copy of the correct instructions, (3) one error was corrected orally by the State, and (4) the erroneous instructions were only displayed for a few seconds, and denied the motion for a mistrial. We conclude that Epsilantis has failed to demonstrate an abuse of discretion. See Rose, 123 Nev. at 206-07, 163 P.3d at 417.

Seventh, Epsilantis contends that the district court abused its discretion by adjudicating him as a habitual criminal because some of the prior convictions submitted were not certified judgments of conviction, were stale, or were sustained after the proceedings in this case began. Epsilantis also notes confusion as to what documents were submitted to the court. We conclude that Epsilantis has failed to demonstrate an abuse of discretion. See NRS 207.010(2). Among other documents, the State provided copies of two judgments of conviction—one from Nevada and one

from Mississippi. Both of these convictions were sustained prior to the instant offense and were proven beyond a reasonable doubt. See NRS 207.010(1)(a); Hymon v. State, 121 Nev. 200, 215, 111 P.3d 1092, 1103 (2005). Further, "NRS 207.010 makes no special allowance for . . . the remoteness of convictions." Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

Having considered Epsilantis' contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

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