IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN DELEON MANNING A/K/A JUAN MANNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56797

FILED

SEP 14 2011

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Sufficiency of the evidence

Appellant Juan Deleon Manning contends that insufficient evidence was adduced to support the jury's verdict. We disagree and conclude that 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. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

A Wal-Mart loss prevention employee testified that she stopped Manning as he attempted to leave the store without paying for the diapers and dog food in his shopping cart. The arresting officer testified that Manning admitted to him that he needed money for rent, and that he searched for discarded Wal-Mart receipts in the parking lot prior to entering the store with the goal of selecting those items and then returning them for cash. At the time of his arrest, Manning possessed $6

and no other way of paying for the items. It is for the jury to determine the weight and credibility to give conflicting testimony, and a jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See NRS 205.060(1); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence.").

Double jeopardy/redundancy

Manning contends that his burglary conviction violates the Double Jeopardy Clause because he previously pleaded guilty to trespassing for the same conduct. See U.S. Const. amend. V. We disagree. "[T]respass is not a lesser-included offense of burglary," Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004), and we conclude that the two offenses were based upon separate and distinct acts, see NRS 205.060(1); NRS 207.200(1), see also Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

Manning also contends that his burglary conviction is impermissibly redundant for the same reason. See Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003) (convictions are impermissibly redundant if the charges involve a single act so that "the material or significant part of each charge is the same" (quotation marks omitted)). Manning did not raise this argument below. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (this court need not consider

arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004); see also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (an appellant "cannot change [his] theory underlying an assignment of error on appeal"). Additionally, Manning has not provided this court with the charging document in his trespassing case and, therefore, he cannot demonstrate that the two charges were impermissibly redundant. See Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))).

Jury instructions

Manning contends that the district court erred by rejecting his petit larceny jury instruction and refusing to include petit larceny on the verdict form. We disagree. "[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (internal quotation marks omitted). A defendant, however, is not entitled to an instruction on a lesser-related, uncharged offense. See 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). Here, the jury was provided with proper instructions regarding burglary, intent, and larceny and we conclude that Manning failed to demonstrate that the district court abused its discretion. See Ouanbengboune v. State, 125 Nev. ___, ___, 220 P.3d 1122, 1129 (2009).

Manning contends that the district court erred by rejecting his "two reasonable interpretations" jury instruction because it supported his defense theory. We conclude that the district court did not abuse its discretion because the jury was properly instructed on reasonable doubt. See NRS 175.211(1); Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); see also Ouanbengboune, 125 Nev. at ___, 220 P.3d at 1129.

Motion for a mistrial

Manning contends that the district court erred by denying his motion for a mistrial after a Wal-Mart loss prevention employee referred to seeing him in the store the day before the burglary. Manning claims the jury could infer from the testimony that he was "involved in some prior wrongdoing" and "was a person of bad character."

We will not reverse a district court's decision to deny a motion for a mistrial absent an abuse of discretion. Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). Here, the district court found that the witness' statement, not elicited by the prosecution, had "little to no" prejudicial effect and denied the motion. See NRS 178.598; see generally Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (the test for determining whether a witness has referred to a defendant's "criminal history is whether a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity" (internal quotation marks omitted)). We agree and conclude that the district court did not abuse its discretion by denying Manning's motion for a mistrial.

Prosecutorial misconduct

Manning contends that the prosecutor committed misconduct during rebuttal closing argument by disparaging the defense on two occasions. See Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004).

First, Manning claims that the prosecutor insinuated that defense counsel encouraged the jurors to "violate the law and [their] oaths" in response to the State's alleged overcharging. Manning did not object to the challenged statement and we conclude that he failed to demonstrate reversible plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (challenges to unobjected-to prosecutorial misconduct are reviewed for plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when reviewing for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice"); see also NRS 178.602.

Second, Manning contends that the prosecutor, through body language and voice inflection, mocked defense counsel's suggestion that the arresting officer may have misunderstood his confession. The district court overruled Manning's objection and found there was no misconduct. We agree and conclude that Manning's contention is without merit.

Cumulative error

Manning contends that cumulative error deprived him of a fair trial and requires the reversal of his conviction. Balancing the relevant factors, we conclude that Manning's contention is without merit. See Valdez, 124 Nev. at 1195, 196 P.3d at 481. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

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