IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALD JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58157

FILED

APR 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of grand larceny of a motor vehicle and possession of a controlled substance with the intent to sell. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Sufficiency of the evidence

Appellant Jerald Jackson contends that insufficient evidence supports his convictions because the State failed to prove that he was the one who stole the car, the value of the car, and he intended to sell the marijuana found in his possession.[1] 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 crimes beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[1]To the extent that Jackson also claims that the district court erred by denying his motion for a directed verdict on grounds that the State failed to prove the value of the car, we note that there is no provision in Nevada law for the entry of a directed verdict in a criminal case.

The victim testified that he paid about $23,000 for the 2006 Hyundai Sonata, it was clean and undamaged, and it had a blue book value of around $13,200. A valet attendant testified that a man approached a valet booth and said he lost the claim check for his car, the car was a Hyundai, and it was under the name "Jackson." The man filled out a missing claim form and handed the completed form and his driver's license to the attendant. A security guard verified the information on the form and cleared the man. Whereupon, the attendant gave the man the car keys and watched him drive away. The attendant described the man as an African-American male, about five feet five inches tall, with some sort of marking on the right side of his face, and identified Jackson as the man. The jury viewed a video recording of the incident. A police detective testified that he staked out the stolen car, observed Jackson drive away in it, and stopped and arrested Jackson. Jackson admitted to the detective that he was carrying marijuana and retrieved a sandwich baggie containing 12 individually packaged baggies of marijuana from his buttocks area. A narcotics detective, testifying as an expert, stated that based on his training and experience a person carrying 12 individually packaged baggies of marijuana intended to sell the marijuana and was not carrying it for personal use.

We conclude that a rational juror could infer from this evidence that Jackson stole the victim's car, the car was worth more than $2,500, and Jackson intended to sell the marijuana found in his possession. See 1997 Nev. Stat., ch. 150, § 9, at 340 (NRS 205.228(1), (3)); NRS 205.0831 (defining value); NRS 453.337(1); Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) ("intent . . . is inferred by the jury from the individualized, external circumstances of the crime"); Dugan v.

Gotsopoulos, 117 Nev. 285, 288, 22 P.3d 205, 207 (2001) (jury may consider property owner's testimony regarding the value of his property when the value is relevant to the case). 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, sufficient evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Jury instructions

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

First, Jackson contends that the district court erred by refusing to instruct the jury on the lesser-included offense of unlawful possession of a controlled substance. As a general rule, a defendant is entitled to an instruction on a lesser-included offense. Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966). Because the offense of possession of a controlled substance with the intent to sell cannot be committed without also committing unlawful possession, unlawful possession is a lesser-included offense.[2] See NRS 453.336(1); NRS 453.337(1); Lisby, 82 Nev. at 187, 414 P.2d at 594. We note that there was some evidence "tending to reduce the greater offense" and conclude that the district court

[2]The quantity of the narcotic is not an element of unlawful possession, see NRS 453.336(1); Uppinghouse v. Sheriff, 86 Nev. 659, 661, 474 P.2d 148, 149 (1970), but may be relevant to the penalty imposed, see NRS 453.336(4).

abused its discretion by refusing to instruct the jury on the lesser offense. Lisby, 82 Nev. at 188, 414 P.2d at 595 (emphasis omitted). However, we further conclude that the error did not substantially affect the jury's verdict. See Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (defining nonconstitutional harmless error); Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003) (reviewing jury instruction issues for harmless error).

Second, Jackson contends that the district court erred by refusing to give his proposed instruction on the reliability of eyewitness identifications. We have previously held that "specific eyewitness–identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt." Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985); see Lee v. State, 107 Nev. 507, 509, 813 P.2d 1010, 1011 (1991) ("Eyewitness identification instructions are not required in Nevada."). We note that the jury was instructed on the credibility of witnesses and reasonable doubt and conclude that the district court did not abuse its discretion by rejecting Jackson's proposed eyewitness identification instruction.

Third, Jackson contends that the district court erred by refusing to give his proposed absence of flight instruction. While flight is circumstantial evidence of guilt, see Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005), the absence-of-flight is not evidence of innocence, see United States v. Scott, 446 F.2d 509, 510 (9th Cir. 1971); State v. Jennings, 562 A.2d 545, 549 (Conn. App. Ct. 1989) (failure to flee does not as a matter of law infer innocence). Accordingly, we conclude

that the district court did not abuse its discretion by rejecting Jackson's proposed absence-of-flight instruction.

Finally, Jackson contends that the district court erred by overruling his objection to the use of the term "until" in the presumption of innocence instruction. Jackson argues that the word "until" should have been replaced with "unless" because "until" suggests a sense of inevitability and has the effect of lessening the State's burden of proof. We conclude that the district court did not abuse its discretion by giving this instruction because, when read as a whole, it contemplates that a defendant's guilt might not be proven and accurately reflects the law. See NRS 175.191; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

Motion for a mistrial

Jackson contends that the district court abused its discretion by denying his motion for a mistrial because the State presented evidence of a prior bad act that the district court had previously ruled was inadmissible. We review a district court's decision to grant or deny a motion for a mistrial for an abuse of discretion. Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). During direct examination, the State asked Detective Joseph Bonaguidi whether Jackson said "he just had to get to work." The detective answered that "[t]here was a question about a previously stolen vehicle." Jackson immediately moved for a mistrial. The district court found that the detective's statement was not solicited by the State and was completely non-responsive. The district court instructed the State to lead the detective through the rest of this area of testimony and Jackson declined the district court's offer to admonish the jury to disregard the unsolicited statement. We conclude from these circumstances that the district court did not abuse its

discretion by denying Jackson's motion for a mistrial. See id. at 264-65, 129 P.3d at 680 (spontaneous, inadvertent references to inadmissible material can be cured by an immediate admonishment); Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008) (observing that "a defendant may have strategic reasons for waiving a limiting instruction").

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

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

/ Hardesty, J.
Hardesty

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