IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM ROBERT GILBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58240

FILED

OCT 31 2012

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 11 counts of theft. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant William R. Gilbert, a former employee of College of Southern Nevada (CSN), was charged with multiple theft crimes following an investigation into whether Gilbert had been making personal use of CSN property and personnel.[1]

A jury convicted Gilbert of all charges, and he now appeals, raising the following arguments: (1) evidence obtained as a result of unconsented-to photographs taken by investigators at Gilbert's Mt. Charleston ranch should have been suppressed because it was the product of an unconstitutional search, (2) his Confrontation Clause rights were violated when he was prohibited from fully cross-examining an investigator, and (3) none of his 11 convictions were supported by sufficient evidence. We affirm.

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

Gilbert's Fourth Amendment rights were not implicated during the investigators' photo shoot

Following up on a newspaper article pertaining to Gilbert, investigators from the Attorney General's office went to Gilbert's ranch while Gilbert was not present and took numerous photographs of what appeared to be CSN property. Based in part on these photographs, investigators were able to obtain a search warrant for Gilbert's ranch and his CSN office. On appeal, Gilbert contends that this photo shoot constituted an unconstitutional search and that the district court should have suppressed the photographs and all evidence obtained therefrom. We disagree.

When reviewing a district court's decision on a motion to suppress, this court accepts the district court's findings of fact unless they are clearly erroneous. Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157 (2008). This court reviews de novo the question of whether a constitutional violation occurred. Id. at 441, 187 P.3d at 157-58.

Although the Fourth Amendment prohibits the government from engaging in unreasonable searches, not every government intrusion into private affairs amounts to a "search." Whether evaluated under the reasonable-expectation-of-privacy test from Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), or the trespass test applied by the majority in United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012), the ultimate question in this case is the same: whether the photographed area was within the home's "curtilage"—i.e., "the land immediately surrounding and associated with the home." Oliver v. United States, 466 U.S. 170, 180 (1984); see also Jones, 565 U.S. at ___, 132 S. Ct. at 953 & n.8 (explaining that trespass on an open field addressed in Oliver did not implicate the

Fourth Amendment because, unlike a home's curtilage, it was not an area enumerated in the Fourth Amendment). The Supreme Court has adopted a four-factor test to determine whether an intruded-upon area is part of the home's curtilage:

> [(1)] the proximity of the area claimed to be curtilage to the home, [(2)] whether the area is included within an enclosure surrounding the home, [(3)] the nature of the uses to which the area is put, and [(4)] the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

Applying these factors to the facts of this case leads to the conclusion that the photographed areas of Gilbert's ranch were not part of his home's curtilage. First, the record demonstrates that the photographed equipment and materials were in the front of his ranch, while his home was in the back. Given that his property spanned four acres and that the investigators drove from Gilbert's home to the area where the equipment and materials were located, the record suggests that the photographs were taken at a significant distance from Gilbert's home.

To be sure, the junk yard was "included within an enclosure surrounding the home," id., as Gilbert's entire ranch was surrounded by a six-foot-high wall. Counteracting this factor, however, is the third factor regarding "the nature of the uses to which the area is put." Id. It is undisputed that the photographed materials and equipment were surrounding a partially constructed second home in an area of Gilbert's ranch described by his own attorney as a "junk yard."

As for the steps Gilbert took to protect the junk yard from observation, Gilbert's six-foot-high wall again suggests some protective measures. Nonetheless, the district court expressly found that "the materials and equipment . . . could be seen by anyone visiting the property

or standing outside the property." Moreover, it is undisputed that the investigators drove through an open gate to get to the location where they took the photographs.[2]

In sum, analysis of the Dunn factors leads to the conclusion that the investigators were not within the curtilage of Gilbert's home when they engaged in their photo shoot. Consequently, the investigators' intrusion into the areas photographed did not implicate his Fourth Amendment rights.[3] Accordingly, the district court properly denied Gilbert's motion to suppress.

Gilbert's Confrontation Clause rights were not violated

At trial, in order to raise an inference that the investigation into his misconduct had been biased, Gilbert sought to cross-examine

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[2]Although Gilbert had posted a sign reading "Private Property, Keep Out," that alone does not turn the junk yard into curtilage that is protected by the Fourth Amendment. Rieck v. Jensen, 651 F.3d 1188, 1191-93 (10th Cir. 2011) (concluding that a "No Trespassing" sign did not automatically transform non-curtilage into curtilage); see also Jones, 565 U.S. at ___ & n.8, 132 S. Ct. at 953 & n.8, (explaining that "Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates," and therefore trespass on non-curtilage area, such as an open field, "is of no Fourth Amendment significance").

[3]Gilbert also argues that the act of photographing the equipment's serial numbers constituted a "seizure" of the equipment. This argument lacks merit, as "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984).

The mere recording of serial numbers did not interfere with Gilbert's ability to possess the equipment. Arizona v. Hicks, 480 U.S. 321, 324 (1987). Thus, Gilbert's reliance on United States v. Jefferson, 571 F. Supp. 2d 696 (E.D. Va. 2008), is misplaced, and no seizure occurred for Fourth Amendment purposes.

investigator Anthony Ruggiero regarding why he failed to pursue certain potentially exculpatory leads. Specifically, Gilbert sought to question Ruggiero regarding why he failed to interview a former CSN president who had conducted his own internal investigation of Gilbert and who had given Gilbert a ringing endorsement after the internal investigation turned up no evidence of wrongdoing.[4]

The district court denied Gilbert's request to pursue this line of questioning on the grounds that it was irrelevant and misleading. On appeal, Gilbert contends that this denial violated his Confrontation Clause rights. We disagree.

"[T]he district court has less discretion to curtail cross-examination where potential bias is at issue. Nevertheless, and consistent with the Confrontation Clause, trial judges retain wide latitude to restrict cross-examination to explore potential bias based on concerns about . . . confusion of the issues . . . or interrogation that is repetitive or only marginally relevant." Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001) (quotations and citations omitted). "Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de novo." Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006).

The record demonstrates that CSN's internal investigation was not specifically directed toward the equipment or materials that formed the

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[4]Gilbert's appellate briefs allege generally that he was prevented from cross-examining all investigators regarding their failure to follow up on all potentially exculpatory leads. However, because Ruggiero was the only investigator who had not yet testified at the time Gilbert raised this issue with the district court, we address what appears to have been Gilbert's desired line of questioning.

basis for the charges against Gilbert. Similarly, the former president's endorsement spoke only in general terms about Gilbert being permitted to use CSN equipment for CSN-related projects. Thus, the relevance of Gilbert's proffered line of questioning was marginal at best.

Perhaps more importantly, however, was that Gilbert wanted to use this line of questioning to suggest to the jury that Ruggiero had an affirmative duty to follow up on all potentially exculpatory leads.[5] Given the marginal relevance of his line of questioning and its potential to mislead the jury, the district court was within its "wide latitude" in prohibiting Gilbert from cross-examining Ruggiero regarding his failure to interview the former CSN president. Leonard, 117 Nev. at 72, 17 P.3d at 409.

Even assuming Gilbert was wrongly prevented from pursuing this specific line of questioning, his Confrontation Clause rights still were not violated. Namely, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). Gilbert's opening brief provides a laundry list of questions that he was permitted to ask Ruggiero and other investigators, and after comparing this list of questions with the questions he sought to ask, Gilbert had ample opportunity for effective cross-examination. Thus, no Confrontation Clause violation occurred.

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[5]Gilbert's reliance on Kyles v. Whitley, 514 U.S. 419 (1995) is misplaced. If the Supreme Court meant to impose a constitutional duty upon investigators to pursue potentially exculpatory leads, it stands to reason that the Court would have provided more explanation regarding the confines of this duty than that provided in the out-of-context passages cited by Gilbert.

Gilbert's convictions were supported by sufficient evidence

At trial, Gilbert was convicted of 11 counts of theft. Specifically, he was convicted of seven theft-of-property counts and four theft-of-services counts. On appeal, Gilbert makes the broad assertion that none of his 11 convictions were supported by sufficient evidence.

When considering a sufficiency-of-the-evidence argument on appeal, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quotation omitted). As explained below, sufficient evidence supported all 11 of Gilbert's convictions.

The theft-of-property convictions

Gilbert's seven theft-of-property convictions were based on violations of NRS 205.0832(1)(b), which provides, in pertinent part:

> [A] person commits theft if, without lawful authority, the person knowingly: (b) [c]onverts . . . or without authorization controls any property of another person . . . ."

Below, we summarize the evidence supporting each of the seven theft-of-property convictions under this statute.

1. Cinderblock

At trial, the State introduced the following evidence:

- Photos of 28 pallets of cinderblock with a Home Depot order number affixed to several of the pallets. The pallets were located near Gilbert's partially constructed house.
- A Home Depot invoice showing that this same order number was placed by CSN, and CSN records showing that CSN paid the invoice.

- Testimony that on the date of the warrant execution, roughly 22 pallets of cinderblock were found in the same location as they were on the day of the investigators' photo shoot.
- Testimony that on the day of the warrant execution, Gilbert's partially constructed house had higher cinderblock walls than on the day of the photo shoot.
- Testimony from an investigator who spoke with Gilbert while the warrant was being executed. Gilbert told the investigator that the cinderblock pallets had been delivered to his ranch (rather than to a CSN campus) by mistake.

Gilbert defended on the ground that this evidence failed to show that the cinderblock was actually CSN's property. However, the record provides sufficient evidence to support the jury's conclusion beyond a reasonable doubt that the cinderblock was CSN's, that Gilbert made unauthorized use of it, and that its value exceeded $2,500.[6]

2. Forklift and scissor lift

At trial, the State introduced the following evidence:

- Invoices showing that CSN had rented a forklift and a scissor lift from Ahern Rental Company beginning in April 2007 and May 2007, respectively.

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[6]The State explained to the jury that multiplying the cost per cinderblock by the number of cinderblocks per pallet by the number of converted pallets (28) would equal $2,696. On appeal, Gilbert makes two arguments contesting this calculation: (1) because there was not a Home Depot order number affixed to all the photographed pallets, no evidence supports the State's contention that all the pallets were CSN's property; and (2) no evidence supports the State's contention that there were 28 converted pallets.

As for Gilbert's first argument, the State's photographic evidence demonstrates that all of the pallets were tightly clustered. Thus, the jury reasonably could have concluded that Gilbert did not comingle his own pallets with CSN's. As for his second argument, the State's photographic evidence indicates that the pallets were in either a 4-by-7 or 4-by-8 cluster. Thus, sufficient evidence supported the value element.

- The invoices showed that CSN was billed $7,200 for the forklift rental and $607 for the scissor lift rental.
- Investigators found a forklift and a scissor lift inside Gilbert's partially constructed house when they executed the search warrant. The serial numbers for both items matched those of the items rented to CSN.
- Two days after the warrant was executed, one of Gilbert's CSN employees went to Ahern Rental Company. While at Ahern, the CSN employee opened up a new Ahern personal rental account for Gilbert.
- During the same visit to Ahern, the CSN employee transferred the forklift and scissor lift rental agreements from CSN's account to Gilbert's new account and backdated both transfers to two days before the warrant was executed.

Gilbert defended on the ground that he may have been using the rental equipment for a CSN-related project, but there was no evidence to support such a theory, and the fact that Gilbert transferred the rental agreements to his personal account completely contradicts this theory. This, along with the fact that both pieces of equipment were found inside his partially constructed house, provided the jury with sufficient evidence to conclude beyond a reasonable doubt that Gilbert converted over $2,500-worth of rental equipment.

3. Manlift

At trial, the State introduced the following evidence:

- Investigators found a manlift on Gilbert's property while executing the search warrant.
- The manlift's serial number matched the serial number on CSN's ownership documents.
- The manlift was disconnected and immobilized, suggesting it was not being used at all, let alone for a CSN-related project.
- From 2001 through 2004, the CSN employee in charge of conducting an annual inventory was unable to account for the manlift's whereabouts.

- After 2004, the manlift was put on "inactive" status, meaning that nobody at CSN knew what happened to it.
- CSN purchased the manlift for $16,000 in 1987.
- The State's valuation expert valued the manlift in its condition as of the 2010 trial at $2,500 to $4,500.

Gilbert defended on the ground that this evidence failed to exclude the possibility that he may have bought the manlift at a surplus sale. Although some witnesses did testify that CSN occasionally conducted surplus sales, there was no evidence to suggest that Gilbert bought the manlift at such a sale. It is for the jury to determine what weight and credibility to give to conflicting testimony. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, sufficient evidence supported the jury's conclusion that the manlift was CSN's, that Gilbert exercised unauthorized control over it, and that its value significantly exceeded $250.[7]

4. Paint sprayer

At trial, the State introduced the following evidence:

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[7]On appeal, Gilbert argues that the State's valuation expert was not "qualified" to opine on the value of the manlift and two other pieces of equipment.

In Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008), this court held that district courts have discretion in determining whether a witness should be qualified as an expert and that, in exercising this discretion, a nonexhaustive list of factors should be considered. 124 Nev. at 499, 189 P.3d at 650-51. Here, before qualifying the State's witness as an expert, the district court heard testimony regarding the witness's 10-plus years of experience in buying and selling used construction equipment. Given this testimony, the district court was within its discretion in qualifying the State's witness as an expert. See id. at 499, 189 P.3d at 651 (indicating that "practical experience" is a factor to consider).

- Investigators found a paint sprayer on Gilbert's property while executing the search warrant.
- The paint sprayer's serial number matched the serial number on CSN's ownership documents.
- CSN bought the paint sprayer in 2004. Upon its discovery in 2007, the paint sprayer had no paint in its tubes and appeared to still be in "brand new" condition.
- The State's valuation expert valued the paint sprayer in its condition as of the 2010 trial date at $1,000.

Gilbert defended on the ground that he was using the paint sprayer for an unspecified CSN-related project. There was no evidence of such a project. A rational juror could conclude beyond a reasonable doubt that, based on the evidence presented, the paint sprayer was CSN's, that Gilbert exercised unauthorized control over it, and that it was worth at least $250.

5. Chain hoist

At trial, the State introduced the following evidence:

- Investigators found a chain hoist on Gilbert's property while executing the search warrant.
- The chain hoist's serial number matched the serial number on CSN's ownership documents.
- The chain hoist was found in Gilbert's garage dangling above a car engine.
- CSN bought the chain hoist in 2004 for $1,430. The State's expert valued the chain hoist as of the 2010 trial date at $500 to $1,000.

Again, Gilbert defended on the ground that he was using the chain hoist for a CSN-related project. Similar to the paint sprayer, there was no evidence as to what this project might be, and the location of the chain hoist near a car engine in Gilbert's garage strongly suggests that Gilbert was making personal use of it. Based on the evidence presented, a

rational juror could conclude beyond a reasonable doubt that the chain hoist was CSN's, that Gilbert made unauthorized use of it, and that it was worth at least $250.

6. Two-by-fours and Versabond

At trial, the State introduced the following evidence:

- Investigators found a stack of 50 two-by-fours and 20 bags of Versabond on Gilbert's property while executing the search warrant.
- The two-by-fours and Versabond bags were found inside Gilbert's partially constructed house.
- An invoice showing that Home Depot billed CSN $462 for an order of 50 two-by-fours and 20 bags of Versabond two days before the search warrant was executed.

Gilbert defended on the ground that this evidence failed to establish that the seized materials were the same materials purchased by CSN two days earlier. Given the close timing, along with the fact that the amounts of each the seized materials matched the amounts purchased by CSN, the jury was entitled to draw such an inference. Thus, sufficient evidence supported the jury's conclusion beyond a reasonable doubt that Gilbert converted over $250-worth of CSN-owned construction materials.

7. Lock sets

At trial, the State introduced the following evidence:

- Testimony from a CSN locksmith that CSN installed "Best" brand lock sets on its doors. The locksmith testified that a "set" consisted of a lock, a core, and a door handle.
- The locksmith testified that a set cost approximately $130.
- The locksmith testified that, while he was employed by CSN, he installed roughly 12 Best brand lock sets on various doors at Gilbert's ranch.
- One of the investigators who helped execute the search warrant testified that he obtained a master key from CSN. He then

used the master key at Gilbert's ranch to successfully remove several lock cores from various doors.

- While this investigator was testifying, the State introduced 11 photos of lock cores that were removed from doors on Gilbert's ranch.

Gilbert defended on the ground that this evidence failed to establish that he used CSN-owned lock sets on his property. However, the fact that the CSN master key successfully removed several of the cores contradicts Gilbert's stance. Thus, the jury was entitled to infer that each removed core was part of a CSN-owned set, and sufficient evidence therefore supported the jury's conclusion that Gilbert converted over $250-worth of CSN-owned lock sets.

B. Theft-of-services convictions

Gilbert's four theft-of-services convictions were based on violations of NRS 205.0832(1)(f), which provides:

> [A] person commits theft if, without lawful authority, the person knowingly: (f) diverts the services of another person to his or her own benefit . . . . without lawful authority to do so.

In essence, the State alleged that Gilbert diverted at least $250-worth of CSN services during four separate timeframes by having CSN employees work at his ranch during their normal CSN hours.

To establish these charges, the State instructed the jury that it could compare the subject employee's work schedule with his cellphone records. By making this comparison, the State argued that the jury could conclude that each time a cellphone call was routed through the tower

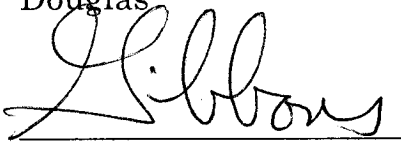
nearest Gilbert's ranch, the employee had spent at least one hour's worth of CSN work time working for Gilbert.[8]

A review of the record demonstrates that the jury could have followed the State's argument and concluded that Gilbert misappropriated at least $250-worth of CSN services during the four alleged timeframes.[9] Thus, sufficient evidence supports Gilbert's four theft-of-services convictions.

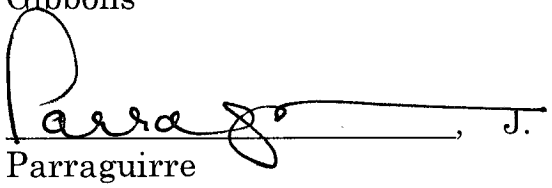
Consistent with the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas



_____, J.
Gibbons



_____, J.
Parraguirre

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[8]Although Gilbert identifies a list of potential flaws in the State's evidence, he does not argue on appeal that the district court erred by admitting the work schedules and cellphone records into evidence. Thus, while the State's evidence did require the jury to draw inferences, there was an evidentiary basis for each inference drawn.

[9]This holds true, even without counting the holidays and weekend days that Gilbert alleges were improperly considered.

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