IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL AGUIRRE A/K/A RAUL AGUIRRECORIAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58383

FILED

MAY 10 2012

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, grand larceny auto, and child endangerment. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Sufficiency of the evidence

Appellant Raul Aguirre contends that insufficient evidence was adduced to support the jury's verdict. We disagree because 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).[1]

LVMPD VIPER detectives set up a bait vehicle, a 2003 Chevy Avalanche, equipped with an automated video and audio recording system which notifies them and activates when an individual gains illegal entry to the vehicle. The vehicle was left on Lincoln Street, unlocked, and with the keys inside. On two occasions that night, the doors were briefly opened

[1]Aguirre does not contend the State failed to prove that the value of the stolen vehicle exceeded $2,500. See 1997 Nev. Stat., ch. 150, § 9(3), at 340 (former NRS 205.228(3)).

and closed; the second illegal entry was made by an individual seen approaching the vehicle from what was later determined to be Aguirre's residence. The following morning, detectives received notice that after another illegal entry, the vehicle was driven and parked three blocks from its previous location. Detective Darren Paul testified that he reviewed the videotape which captured the driver and a young male passenger, approximately six to eight years old. The audio recording captured the driver talking on his cell phone, stating to an unknown individual soon after entering the vehicle, "It's on now. Uh, it's like, like two thousand and, two thousand, six, two thousand seven. It doesn't have it fool. It doesn't have it. No." The young boy was identified by school officials who provided Det. Paul with his Lincoln Street address and paperwork indicating that Aguirre was the father.

The following day, Det. Paul surveilled the Lincoln Street residence and eventually confronted Aguirre after conducting a traffic stop. Aguirre initially denied any knowledge of the vehicle, but ultimately admitted to driving it. Aguirre told Det. Paul that he only intended "to move the vehicle so that he would not be accused of stealing the vehicle." Aguirre stated that when he saw officers responding to the scene of the parked vehicle, he took the keys, threw them in a bush, and with his son, went to a nearby friend's house. Det. Paul also provided testimony regarding the procedures used during typical felony stops of stolen vehicles in order to illustrate how dangerous the situation is for those involved.

Circumstantial evidence alone may sustain a conviction. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); 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."). It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a 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); see also NRS 200.508(2)(b)(1); NRS 205.060(1); NRS 205.228(1). Therefore, we conclude that Aguirre's contention is without merit.

Evidentiary issues

First, Aguirre contends that the district court erred by denying his motion in limine to suppress statements he made during a cell phone conversation recorded by the surveillance system inside the bait vehicle. Aguirre claims the recording was overly prejudicial and lacked probative value. See NRS 48.035(1). "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Here, the district court conducted a hearing on Aguirre's motion, heard arguments from counsel, and admitted the statements after finding that the relevance outweighed the potential prejudice. The district court also found that Aguirre's statements on the recording constituted non-hearsay pursuant to NRS 51.035(3)(a). We agree and conclude that the district court did not abuse its discretion by denying Aguirre's motion in limine.

Second, Aguirre contends that the district court erred by overruling his objections to Det. Paul's testimony "regarding his experiences in unrelated car chases." Aguirre claims the testimony was irrelevant, see NRS 48.015, inflammatory, speculative in nature, and lacking in probative value. We disagree. In Hughes v. State, 112 Nev. 84,

88, 910 P.2d 254, 256 (1996), we approved the admission of similar testimonial evidence, noting that it was relevant to support a charge of child endangerment, because "[w]ithout such testimony, the jury might not have been fully aware of the dangerousness of the situation in which appellant placed his daughter by transporting her in a stolen vehicle." Therefore, we conclude that the district court did not abuse its discretion by overruling Aguirre's objections to Det. Paul's testimony. See Mclellan, 124 Nev. at 267, 182 P.3d at 109.

Third, Aguirre contends that the district court erred by overruling his objections to the admission of his statement to detectives that he previously was accused by a neighbor of stealing vehicles. Aguirre claims the prejudicial statement amounts to the admission of a prior bad act requiring a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), and the jury should have received a limiting instruction prior to the statement's admission, see Rhymes v. State, 121 Nev. 17, 23, 107 P.3d 1278, 1282 (2005). The district court, however, ruled that Aguirre's statement was admissible non-hearsay. See NRS 51.035(3)(a). We further note that the statement was not offered to prove the truth of the matter asserted, it was merely offered as Aguirre's own explanation for why he drove the bait vehicle; and, the State offered no evidence pertaining to whether Aguirre was ever accused of stealing vehicles. We conclude that the statement did not implicate a prior bad act requiring a Petrocelli hearing and a limiting instruction, and the district court did not abuse its discretion by overruling Aguirre's objections to its admission. See Mclellan, 124 Nev. at 267, 182 P.3d at 109.

Prosecutorial misconduct

Aguirre contends that the prosecutor committed misconduct during closing arguments by alluding to facts not in evidence, mischaracterizing the evidence, and engaging in inflammatory speculation. Aguirre did not object to any of the alleged instances of prosecutorial misconduct 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.

Jury instructions

First, Aguirre contends that the district court erred by rejecting as duplicative his proposed inverse instructions on burglary, grand larceny, and abuse and neglect. "[S]pecific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." Crawford v. State, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005). A "'positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased'" instruction. Id. (quoting Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987)). Here, even assuming the district court erred by not giving Aguirre's proposed instructions, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case." Id. at 756, 121 P.3d at 590.

Second, Aguirre contends that the district court erred by overruling his objection to part of the burglary instruction which was "too

general and confusing." We disagree. "This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion." Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). Here, the burglary instruction was a correct statement of the law and we conclude that the district court did not abuse its discretion by overruling Aguirre's objection.

Third, Aguirre contends that the district court erred by rejecting his proposed instruction on "abuse or neglect." The district court found that Aguirre's proposed instruction, which was based on NRS 200.508(4)(a), was "not pertinent to the facts here" and the State's child endangerment instructions were "more appropriately tailored" to the case. As a result, the jury did not receive any instruction defining "abuse or neglect" despite the use of the terms in jury instructions 25 and 26, and we conclude that the district court erred in this respect. We further conclude, however, in light of the overwhelming evidence of Aguirre's guilt, that the error was harmless beyond a reasonable doubt. See Crawford, 121 Nev. at 756, 121 P.3d at 590.

Fourth, Aguirre 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 774, 220 P.3d at 1129.

Double jeopardy/redundancy

Aguirre contends that his conviction on the counts of burglary and grand larceny auto violates double jeopardy and redundancy

principles. In his post-verdict motion to dismiss filed in the district court, however, Aguirre conceded that the two convictions survived the Blockburger test for double jeopardy purposes. See 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."). An appellant "cannot change [his] theory underlying an assignment of error on appeal." Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); see also 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). Additionally, we conclude that the convictions were not redundant because "the material or significant part of each charge" was not the same. Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003) (internal quotation marks omitted); see also Stowe v. State, 109 Nev. 743, 745, 857 P.2d 15, 17 (1993) ("[A] person can be convicted of . . . burglary and grand larceny, which arise out of the same incident."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Valorie J. Vega, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk