

IN THE SUPREME COURT OF THE STATE OF NEVADA

THAD MONOLETTI AUBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58550

FILED

NOV 15 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge. Appellant Thad Aubert raises multiple arguments on appeal.

First, Aubert claims that the district court erred because the evidence was insufficient to support a guilty verdict because the victim gave various accounts as to how much money was taken from her and less than twenty dollars was recovered. Although the victim's testimony as to the exact amount of money taken varied, 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, substantial evidence supports the verdict. 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). We thereby conclude that the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See NRS 200.380, 193.165; see also Jackson v. Virginia, 443 U.S.

307, 319 (1979); Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, Aubert claims that the district court erred by not granting his motion for a new trial based upon juror misconduct when it discovered that a juror drew a stick figure with a rope extending from its neck and showed it to another juror during Aubert's testimony. Aubert claims that the drawing was racially motivated and therefore the juror who drew it concealed racial bias during voir dire. We review the district court's decision to deny Aubert's motion for an abuse of discretion. See Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) ("A denial of a motion for a new trial based upon [intrinsic] juror misconduct will be upheld absent an abuse of discretion by the district court.")

In this case, the district court held a hearing, listened to testimony, and found that there was no reasonable likelihood that juror misconduct influenced the verdict or prejudiced Aubert.¹ See id., 119 Nev. at 563-64, 80 P.3d at 455 (providing that in order to receive a new trial, a defendant must show the occurrence of juror misconduct and that the misconduct was prejudicial). In finding that there was no prejudice, the

¹Along with the district court, we have excluded from our consideration arguments regarding portions of the affidavits which dealt with the effect of the alleged misconduct on jurors during deliberation and have considered only the objective facts regarding the drawing without regard to jurors' statements as to its subjective meaning. See Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979).

district court considered how the drawing was introduced, the length of time it was discussed, the timing of its introduction, whether it was ambiguous, cumulative, material, and inadmissible, and whether the average juror would be influenced by it. See id. at 566, 80 P.3d at 456 (listing the relevant factors to consider in resolving issues of juror misconduct). Even assuming that the incident constituted misconduct, we conclude that the district court did not abuse its discretion in finding that Aubert failed to demonstrate prejudice. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (“An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” (internal quotations omitted)).

Third, Aubert claims the district court failed to remove, for cause, jurors who showed a bias towards those with felony convictions, forcing him to use peremptory challenges to exclude those members. “The test for evaluating whether a juror should have been removed for cause is whether a prospective juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (internal quotations omitted). We conclude that the district court did not err in denying the challenges for cause because no juror held views toward prior convictions that would substantially impair his duties. Moreover, Aubert excused the jurors with his challenges. Id. at 581, 119 P.3d at 125

(finding no prejudice where appellant removed biased jurors with peremptory challenges and accepted the remaining panel).²

Fourth, Aubert claims that the district court erred by allowing the prosecution to misstate the strength of its DNA evidence. Because Aubert did not object at trial, we grant relief only if there was plain error affecting his substantial rights. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Because Aubert testified at trial that he held the firearm, we conclude that the district court did not plainly err by allowing a statement that his DNA was conclusively linked to the weapon.

Fifth, Aubert claims that the district court erred by allowing the State to call the victim in rebuttal. The admission of rebuttal evidence is within the discretion of the trial court, and constitutes evidence “which explains, contradicts, or disproves evidence introduced by a Defendant during his case in chief.” Lopez v. State, 105 Nev. 68, 81, 769 P.2d 1276, 1285 (1989) (quoting Morrison v. Air California, 101 Nev. 233, 235-36, 699 P.2d 600, 602 (1985)). The district court concluded that it would be unfair to allow the defense to accuse the victim of lying without permitting the State to put on the victim in its rebuttal case to testify that she made a mistake in her earlier testimony. Because this testimony directly explained the defense’s evidence, it was appropriate to be raised in the

²We note that Aubert alleges that a racially biased juror was ultimately empaneled. However, Aubert does not allege that he would have exercised a peremptory challenge to strike this juror yet was unable to do so, and in fact the juror’s alleged bias did not emerge until after the trial.

State's rebuttal case. Accordingly, we conclude that the district court did not abuse its discretion in admitting the rebuttal testimony.

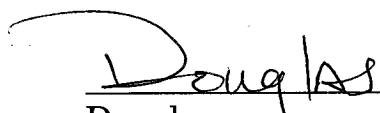
Next, Aubert argues the State committed prosecutorial misconduct in its closing argument by arguing that if the jury believed the defendant, it must also believe in Santa Claus, the Tooth Fairy, and the Easter Bunny. Although the comment was inappropriate, we note that the district court immediately struck it and instructed the jury to disregard it. The jury was also instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence, and we presume that jurors followed the instructions that they were given. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). We thereby conclude that Aubert failed to demonstrate prejudice resulting from the inappropriate comments and is not entitled to relief. See Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) (“[P]rejudice from prosecutorial misconduct results when a prosecutor’s statements so infect the proceedings with unfairness as to make the results a denial of due process.” (alteration omitted) (internal quotation marks omitted)).

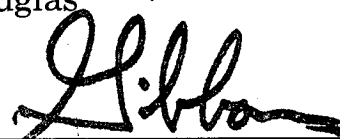
Finally, Aubert argues that the State failed to inform the defense that it would be seeking habitual offender treatment until after his conviction, adversely affecting his preparation and pretrial negotiations and violating Apprendi v. New Jersey. 530 U.S. 466 (2000). We note that this argument is wholly without merit as throughout the record the State, the district court, and the defense itself indicated that habitual offender treatment would be sought—in fact, the defense used it as a justification to ask for a pretrial continuance. Moreover, Apprendi does not stand for the proposition that the defense must be put on notice

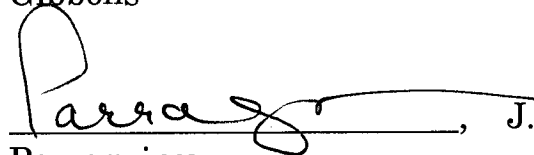
prior to trial that habitual offender treatment is a possibility. See O'Neill v. State, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007) (concluding that NRS 207.010 and the case law interpreting it does not violate Apprendi); see also NRS 207.016(2) (a count of habitual criminality may be filed after conviction of the underlying offense). Accordingly, we conclude that Aubert is not entitled to relief on this claim.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Jennifer P. Togliatti, District Judge
The Kice Law Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk