

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMAR SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60029

**FILED**

**MAR 12 2014**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, conspiracy to commit larceny, grand larceny, conspiracy to commit robbery, burglary while in possession of a deadly weapon, and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Nancy L. Alf, Judge. Appellant Jamar Smith raises six contentions on appeal.

First, Smith contends that the evidence presented at trial was insufficient to support the jury's finding of guilt for burglary and grand larceny for the events that occurred on April 17. This claim lacks merit 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 Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

James Pazos, an asset protection specialist for the Target store on Craig Road, testified that on April 24, 2010, he was informed that on April 17, 2010, register 5 in the store had a shortage of \$789.45. Mr. Pazos testified that he reviewed the entire days' worth of surveillance videos that showed register 5 to see if he could see any activity happening at that register. The surveillance video for the camera above register 5 was missing footage for the time period between 1:56 p.m. and 2:34 p.m. Despite this, Mr. Pazos determined that the shortage must have occurred during this time period because none of the other video footage showed any suspicious activity at register 5 and the last image of the register till available before the missing footage showed a significant amount of cash in the register and the next available image showed less money in the register. Mr. Pazos testified that for the time period between 1:56 p.m. and 2:34 p.m. a different overhead camera recorded a broader view of the store, which included the store entrance and register 5. The jury was shown the relevant portion of the surveillance video from this camera. Mr. Pazos testified that this footage showed Smith and two other individuals enter the store and "hang around" the area of register 5; one of the individuals lean toward or reach into register 5 while the other two individuals acted as lookouts or attempted to conceal his movements; and all three individuals

leave the store at the same time.<sup>1</sup> Mr. Pazos testified that during the time period in question no cashier was working at register 5.

The jury could reasonably infer from the evidence presented that Smith committed grand larceny by taking, or aiding and abetting another in taking, property with a value of more than \$250 from the store, see 1997 Nev. Stat., ch. 150, §12, at 341; and that Smith committed burglary by entering the store with the intent to commit grand larceny, see 2005 Nev. Stat., ch. 126, §1, at 416. It is for the jury to determine the weight and credibility to give conflicting testimony, *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981), and circumstantial evidence is enough to support a conviction, *Lisle v. State*, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), holding limited on other grounds by *Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). We will not disturb the jury's verdict on appeal where, as here, substantial evidence supports the verdict. See *Bolden*, 97 Nev. at 73, 624 P.2d at 20.

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<sup>1</sup>A copy of the video was not provided to this court for review on appeal. See NRAP 30(d) (providing that parties may request this court to have exhibits that are incapable of being reproduced in the appendix to be transmitted to this court for review on appeal).

Second, Smith contends that insufficient evidence supports the jury's finding that he possessed and used a deadly weapon during the April 22 events. We agree.

Asset protection specialist Greg Pochowski testified that he observed Smith enter a Target store on Decatur Boulevard on April 22, 2010, and take money out of a cash register. He further testified that, although it appeared Smith had something in his hand when he was tampering with the cash register, he did not see Smith with a knife or any sort of weapon.<sup>2</sup> Mr. Pochowski also testified that, after he chased Smith into the parking lot, Smith confronted him, took up a fighting stance, and threatened to cut Mr. Pochowski with a knife if he did not back off. Mr. Pochowski testified that Smith appeared to have something in his right hand and he presumed it was a knife based on Smith's stance and statement, but he could not fully see Smith's hand or identify what the object was because Smith had his hand angled behind his back. No other

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<sup>2</sup>Although a surveillance video showing Smith's actions while in the store was admitted and published to the jury, a copy of the video was not provided to this court for review on appeal. We note, however, that nothing in the record indicates that the video depicts Smith possessing or using a knife or other deadly weapon while in the store and the State does not allege that a knife or any other deadly weapon can be identified in the video.

person testified that they observed Smith with a knife or other weapon. And officers testified that, upon Smith's arrest, no knife or deadly weapon was found. Smith's stance and statements to Mr. Pochowski, standing alone, were not sufficient to demonstrate that Smith possessed a knife or deadly weapon during the burglary or that he used a knife or deadly weapon during the robbery. Therefore, we reverse the deadly weapon portion for the April 22 burglary conviction (count 5) and the deadly weapon enhancement for the April 22 robbery conviction (count 6).

Third, Smith contends that the district court abused its discretion by allowing James Pazos to give a narrative of his perception of what was taking place while the April 17 surveillance video was published to the jury. Mr. Pazos' narrative testimony was admitted as lay witness testimony under NRS 50.265, rather than expert testimony under NRS 174.234; therefore, we decline to consider Smith's assertion that because Mr. Pazos was never endorsed as an expert the testimony was improper. And, because Smith failed to provide this court with a copy of the surveillance video, we are unable to determine whether the narration was "[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265(2); see *Thomas v. State*, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (appellant is ultimately

responsible for providing this court with portions of the record necessary to resolve his claims on appeal). We conclude Smith has failed to demonstrate that the district court abused its discretion by admitting Mr. Pazos' narrative testimony under NRS 50.265 or that the testimony invaded the province of the jury. *See Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006) (we review a district court's decision to admit evidence for an abuse of discretion).

Fourth, Smith contends that the district court violated his 5th, 6th, and 14th Amendment rights by improperly vouching for the credibility of law enforcement and commenting on his custody status while giving initial instructions to the jury about the burden of proof. Smith did not object to the instructions at the time they were given,<sup>3</sup> therefore we review for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We conclude the district court did not commit any error. The district court correctly instructed the jury about the presumption of innocence and that it

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<sup>3</sup>Smith moved for a mistrial at the first break, arguing that the instructions constituted vouching for the prosecution and endorsement for the police. To the extent Smith asserts that the district court abused its discretion by denying his motion for a mistrial, we conclude the claim lacks merit. *See Rose v. State*, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007) (we review a district court's denial of a motion for mistrial for an abuse of discretion).

was the State's burden to prove, beyond a reasonable doubt, that Smith committed the alleged crimes. The judge's comments while giving the instructions, when viewed in context, did not constitute improper vouching for the prosecution, were not a reference to Smith's custody status, and did not suggest that the jury could consider other interpretations of the term "presumption of innocence."

Fifth, Smith contends that the district court abused its discretion by denying his motion to sever the charges against him. We disagree.

"The decision to join or sever charges is within the discretion of the district court, and an appellant carries the heavy burden of showing that the court abused that discretion." *Weber v. State*, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005). The district court denied Smith's motion to sever, citing as bases judicial economy, completeness of the story, and this court's holding in *Weber*.<sup>4</sup> Because the witnesses could have described the events at each store without referring to the events at the other store, we conclude the evidence would not have been cross-admissible under NRS 48.035(3) and the district court abused its discretion by denying the motion to sever

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<sup>4</sup>The Honorable Valorie J. Vega, District Judge, denied the motion to sever.

on the basis that joinder was appropriate to tell the complete story. *See id.* at 574, 119 P.3d at 121. However, we further conclude that joinder was appropriate under NRS 173.115(2), which allows joinder if the charged offenses are based on “acts or transactions connected together or constituting parts of a common scheme or plan.” *See id.* at 572-73, 119 P.3d at 120 (defining “scheme or plan” and “connected together”). Judicial economy was served by the joinder of the charges and the jury was properly instructed that it had to consider the charges separately. Smith has failed to meet his burden of showing that he was unfairly prejudiced by the denial of his motion to sever. *See id.* at 574-75, 119 P.3d at 121. Therefore, we conclude the district court did not abuse its discretion by denying Smith’s motion to sever on this basis. *See id.*

Sixth, Smith contends that the cumulative impact of the above alleged errors, along with the district court’s refusal to strike the jury venire and denial of his motion to strike a juror for cause, deprived him of his right to a fair trial. Initially, we note that Smith’s counsel provides no cogent argument or citation in support of these additional claims of error. Rather, he asserts that, because this appeal was subject to the provisions of NRAP 3C and this court denied his motion for full briefing, he lacked the space to fully brief the issues. We disagree. While full briefing was denied,



see NRAP 3C(k)(2)(C) (providing that full briefing will not be granted “[i]f the issues or facts are numerous but not complex”), counsel was still permitted to, and in fact did, move for leave to file a brief that exceeded the page and type-volume limitations for briefs filed pursuant NRAP 3C, see NRAP 3C(e)(1)(B), (k)(2)(C); NRAP 32(a)(7)(D). The fast track statement filed is 54 pages and contains over 11,000 words. Because the additional claims are not supported by cogent argument or legal authority, we decline to consider them. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). And because Smith failed to demonstrate that the district court erred, there are no errors to cumulate.

We conclude that Smith is only entitled to the relief granted herein, and we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

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