IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE MANUEL GARCIA-GAONA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63255

FILED

MAR 1 2 2014

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 trafficking in a controlled substance and two counts of possession of a controlled substance. First Judicial District Court, Carson City; James Todd Russell, Judge.

First, appellant Jose Manuel Garcia-Gaona contends that insufficient evidence was adduced to support the jury's verdict on the two counts related to the drugs found in the trunk of the vehicle (count I: trafficking in a controlled substance; count II: possession of a controlled substance). 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).

Trial testimony indicated that Garcia-Gaona purchased a 1988 Honda Accord from Brian Ordaz and took possession of it in late June or early July of 2012. At the time Garcia-Gaona purchased the vehicle, the title was lost and not transferred. Ordaz later obtained a new title from the DMV and waited for the opportunity to give it to Garcia-Gaona. On August 3rd, the vehicle was towed by Valley Towing to their yard from an

apartment complex at the request of the property manager "basically for being abandoned there." The Valley Towing dispatcher testified that on the morning of August 4th, she received a telephone call from an unidentified female who inquired about the Honda and "wanted to know if the contents that were in the vehicle would still be in the vehicle when she came to pick it up." The dispatcher testified that the female caller "was very adamant about making sure that we did not take anything out" of the vehicle. Approximately 45-60 minutes after the call, Garcia-Gaona and another male appeared at Valley Towing and asked for access to the same vehicle in order to "get his prescriptions out of the car." The dispatcher described Garcia-Gaona's behavior at the time as suspicious and nervous. Garcia-Gaona was eventually turned away because he could not prove ownership of the vehicle.

After Garcia-Gaona left the yard, the dispatcher asked the tow driver, Matt Kernodle, to search the Honda. Kernodle returned to the office with a "green lunch pail" containing over 580 grams of methamphetamine and small bindles of cocaine. As a result, they called the Carson City Sheriff's Office. The responding officers decided to have Kernodle return the green bag to the Honda where it was found. Soon after, Garcia-Gaona returned to the yard with Ordaz, who provided Garcia-Gaona with the title to the Honda, Francisco Solis-Ledezma, and a fourth individual. Garcia-Gaona did not possess a valid driver's license or photo identification so he asked Solis-Ledezma to sign the title as owner of the vehicle, thus allowing them to access the vehicle. Kernodle escorted Garcia-Gaona, Solis-Ledezma, and Ordaz to the vehicle and the trunk was opened. Kernodle and Ordaz testified that Garcia-Gaona grabbed the bag with the drugs—Garcia-Gaona testified that Ordaz instructed him to grab

the bag—and closed the trunk, and while the four were walking away, Garcia-Gaona handed the bag to Ordaz. As they approached the front gate, officers intervened and arrested Garcia-Gaona, Solis-Ledezma, and Ordaz. During a search incident to the arrest, a small amount of cocaine and $2,000 were discovered in Garcia-Gaona's possession. Solis-Ledezma eventually pleaded guilty to one count of trafficking in a controlled substance. The charges against Ordaz were dismissed. No charges were ever brought against the fourth individual.

Circumstantial evidence alone may sustain a conviction. *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). 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 453.3385(3) (level-three trafficking); NRS 453.336(1), (2)(a) (possession). Therefore, we conclude that Garcia-Gaona's contention is without merit.

Second, Garcia-Gaona contends that the warrantless search and seizure of evidence from his vehicle parked at a private tow yard was unconstitutional. There is no indication in the record that Garcia-Gaona moved to suppress the evidence seized from his vehicle at any point in the proceedings below. *See Hardison v. State*, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968) (failure to file motion to suppress generally precludes appellate consideration of issue). Additionally, at no point during the 3-day jury trial did Garcia-Gaona object to the admission of the evidence seized from his vehicle. *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (failure to object to the admission of evidence precludes appellate

review absent plain error). In fact, on multiple occasions during the trial, counsel for Garcia-Gaona affirmatively stated on the record that he did not object to the admission of evidence he now challenges. Based on our review of the trial transcript, we conclude that Garcia-Gaona fails to demonstrate plain error entitling him to relief. *See* NRS 178.602; *Mendoza-Lobos v. State*, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009) (discussing plain-error analysis); *see also State v. Miller*, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (recognizing that the Fourth Amendment is inapplicable to searches or seizures conducted by private individuals not acting as government agents (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984))).

Third, Garcia-Gaona contends that the district court erred by not sua sponte instructing the jury on conspiracy and accomplice testimony. "Failure to . . . request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial." *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998). Here, Garcia-Gaona was charged with trafficking and one of the two possession counts on alternative theories: directly committing the acts, conspiracy, and aiding and abetting. The jury returned a general verdict. In light of the overwhelming evidence that Garcia-Gaona directly committed the offenses, we conclude that any error by the district court in failing to sua sponte instruct the jury on conspiracy was harmless beyond a reasonable doubt. *See Anderson v. State*, 121 Nev. 511, 515, 118 P.3d 184, 186 (2005) ("A unanimous general verdict of guilt will support a conviction so long as there is substantial evidence in support of one of the alternate theories of culpability."); *see also Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d

315, 324 (2008) ("[H]armless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability."). Additionally, Garcia-Gaona fails to demonstrate that he was entitled to an accomplice instruction pursuant to NRS 175.291; therefore, we conclude that the district court did not err in this regard.

Fourth, Garcia-Gaona contends that the district court erred by providing a mere-presence instruction which "limited the mere presence defense to only that theory of aiding and abetting." Garcia-Gaona concedes that he did not object to the mere-presence instruction provided to the jury and we conclude that he fails to demonstrate plain error entitling him to relief. *See Berry v. State*, 125 Nev. 265, 282-83, 212 P.3d 1085, 1097 (2009) (challenges to unobjected-to jury instructions are reviewed for plain error), *abrogated on other grounds by State v. Castaneda*, 126 Nev. ___, 245 P.3d 550 (2010); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (reviewing for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

Fifth, Garcia-Gaona contends that his right to due process was violated by the investigating officers' failure to gather fingerprint and DNA evidence from the bag containing the drugs taken from the trunk of the vehicle. Garcia-Gaona claims that the "[f]ailure to do so within the ample time period assuredly reaches gross negligence, if not bad faith." We once again note there is no indication in the record that Garcia-Gaona moved to dismiss, requested an adverse inference jury instruction, or raised this issue in any manner below. *See* NRS 178.602. Further, "[i]n a criminal investigation, police officers generally have no duty to collect all potential evidence." *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Regardless, Garcia-Gaona fails to demonstrate that the

evidence not gathered was exculpatory, material, or that the investigating officers were grossly negligent. *See id.*; *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998); *see also Klein v. Warden*, 118 Nev. 305, 314, 43 P.3d 1029, 1035 (2002) (stating that in determining whether lost evidence is material, the evidence "'must be evaluated in the context of the entire record'" (quoting *Sparks v. State*, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988))). Therefore, we conclude that Garcia-Gaona's contention is without merit.

Finally, Garcia-Gaona contends that the two counts of possession of a controlled substance "should merge as a matter of law." Once again, we note that Garcia-Gaona failed to object to the charging document, request a jury instruction, or raise this issue in any manner below. *See* NRS 178.602. Further, the two counts do not merge or violate the proscriptions against double jeopardy because the charges are based on two distinct offenses: one count is based on the cocaine seized from the trunk of the vehicle and the other from the cocaine found in his pants during the search incident to his arrest at the jail. Therefore, we conclude that Garcia-Gaona's contention is without merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. James Todd Russell, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk