IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELTON CASTINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67702

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, assault with a deadly weapon, and possession of a controlled substance. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

On the night of Friday, September 12, 2014, and into the early morning hours of Saturday, September 13, 2014, Kara Craig and her long-time friend, Lashayda Barnes, went out together. Lashayda drove the two in her mother's two-door SUV.

Toward the end of the night, Kara and Lashayda pulled into the parking lot of the Fantasy Girls strip club. Shortly after they arrived, Lashayda got out of the car to go talk to a friend she saw in the parking lot; Kara stayed in the passenger seat of the car with the windows rolled about half-way down. A black jeep then pulled up and parked in front of the car. Henry Edwards and Appellant Elton Castine, Kara's estranged husband, got out of the jeep and walked toward Kara.

Kara testified that Henry approached the driver's side of the car and asked Kara where Lashayda was.[1] Kara told him she did not know. Kara then turned her attention to Appellant, who was at the passenger window. Appellant proceeded to grab Kara's hair with one hand and hit Kara repeatedly in the head and on the side of her face with the other. Appellant then pointed a black handgun at Kara, with the end of the barrel approximately 1-2 inches from her face. After pointing the gun at Kara, Appellant began walking back to the jeep he arrived in and fired the gun into the air. As Appellant walked away, Kara leaned out of the car and yelled after him. The gunshots continued as the jeep drove away.

Lashayda testified that, meanwhile, Henry noticed Lashayda and approached the vehicle Lashayda was sitting in. Henry swung through the half-open window and hit Lashayda in the mouth. Henry then walked away from Lashayda and said to Appellant, "Jay Rock,[2] get on him. Get on him. Get the gun. Where is the gun." Lashayda's friend started to drive away (with Lashayda still in the car), and Lashayda heard three shots fired before they were out of the parking lot. The black jeep followed them.

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[1]When Lashayda saw the black jeep pull up, she got into her friend's car to avoid Henry. Lashayda saw Henry and Appellant exit the vehicle and walk toward her mother's car, where Kara was sitting; however, Lashayda could not see the car because the jeep was blocking her view. Lashayda did not see or hear what transpired between Appellant and Kara.

[2]Both Kara and Lashayda testified that "Jay Rock" is Appellant's nickname.

After the jeep drove away, Kara ran to a nearby motel and tried to find Lashayda. Kara was able to reach Lashayda on the phone and learned that Lashayda was at a gas station on Neil Road. Kara took a taxi to the gas station to pick up Lashayda, and the two went in the taxi to Lashayda's mother's house. After they arrived, Lashayda's mother called the police. As a result of the incident, Kara suffered a concussion, had cuts on her face around her mouth, and had some redness around her right eye. Lashayda had a tooth knocked out.[3]

Appellant was charged with burglary, assault with a deadly weapon, discharging a firearm in a public place, and possession of a controlled substance. The jury found Appellant guilty of burglary, assault with a deadly weapon, and possession of a controlled substance. On appeal, Appellant challenges his convictions for burglary and assault with a deadly weapon only. In particular, Appellant asserts that: 1) the evidence was insufficient to support his burglary conviction; and 2) the district court erred by admitting testimony regarding Kara's prior consistent statements such that Appellant's convictions for burglary and assault with a deadly weapon should be vacated. We disagree.

Appellant's burglary conviction is supported by substantial evidence

In reviewing a challenge to the sufficiency of the evidence, this court considers "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." *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*,

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

443 U.S. 307, 319 (1979)) (internal quotation marks omitted). "It is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, "[i]n a criminal case, a verdict supported by substantial evidence will not be disturbed . . . ." *Id.*

Under NRS 205.060(1), "a person who, by day or night, enters any . . . vehicle . . . with the intent to commit . . . assault or battery on any person . . . is guilty of burglary." "'Enter,' when constituting an element or part of a crime, includes the entrance of the offender, or the insertion of any part of the body of the offender, or of any instrument or weapon held in the offender's hand and used or intended to be used to threaten or intimidate a person. . . ." NRS 193.0145. No "breaking" or forcible entry is required. *See* NRS 205.060(1); *State v. White*, 130 Nev. ___, ___, 330 P.3d 482, 485 (2014) ("Breaking is no longer an essential element of burglary. Further, the entry does not need to be a forcible entry. . . ." (internal citations omitted)). Moreover, even a momentary entry will suffice. *See Merlino v. State*, 131 Nev. ___, ___, 357 P.3d 379, 387 n.10 (Ct. App. 2015) (citing *Hebron v. State*, 627 A.2d 1029, 1038 (Md. 1993)).

Here, viewing the evidence in the light most favorable to the prosecution, substantial evidence supports the jury's verdict. Kara testified that Appellant "was reaching through the window to hit [her]," and that she did not get out of the car or lean out of the window until after the physical altercation with Appellant ended. There was no evidence introduced at trial demonstrating that any part of Kara's body was outside

of the vehicle when Appellant struck her.[4] Accordingly, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of burglary beyond a reasonable doubt.[5]

The district court did not abuse its discretion by admitting testimony regarding Kara's prior consistent statements

"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). "Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and is inadmissible unless [it falls] within an exemption or exception." *Coleman v. State,* 130

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[4]Appellant points to Kara's testimony that she was not "knocked back" in the vehicle by Appellant's blows as evidence that some portion of her head or face could have been outside the vehicle. However, Kara also testified that Appellant held her by the hair with one hand while striking her with the other. Consequently, the jury could reasonably have concluded that Kara could not have been "knocked back" from outside to inside the vehicle and thus Kara could have been inside the vehicle the entire time. Therefore, there was sufficient evidence for the jury to find entry into the vehicle.

[5]The Appellant argues that, under our recent holding in *Merlino v. State*, the "entry" must have lasted for a lengthy period of time in order to interfere with the owner's "permanent possessory interest" in the vehicle. But this is a fundamental misunderstanding of *Merlino*. The "reasonable belief" test articulated in *Merlino* defines the outer boundary of the property or vehicle, not the length of time needed to commit a burglary. In *Merlino*, we specifically observed that even a "slight" or "momentary" entry into the outer boundary would suffice to constitute the crime of burglary. *Merlino v. State*, 131 Nev. ___, ___, 357 P.3d 379, 387 n.10 (Ct. App. 2015). Appellant also argues that his burglary conviction is void because he did not commit a "breaking," but Nevada has abolished the common law requirement of "breaking" as an element of the crime of burglary. *See White,* 130 Nev. at ___, 330 P.3d at 485.

Nev. ___, ___, 321 P.3d 901, 905 (2014) (internal quotation marks and citation omitted). "Hearsay errors are evaluated for harmless error." *Id.* at ___, 321 P.3d at 911.

Here, Appellant argues that the district court erred by permitting Lashayda to testify regarding Kara's statements during the taxi ride to Lashayda's mother's house because those statements constitute inadmissible hearsay. The State maintains that the statements were admissible either as prior consistent statements (as the prosecutor argued at trial) or excited utterances, and that, to the extent the district court erred, any error was harmless. We conclude that the district court did not abuse its discretion by admitting the testimony under the prior consistent statement exemption and that, even if the district court erred, any error was harmless.

Prior consistent statements

"A prior consistent statement is not hearsay if: (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony at trial; and (4) the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive." *Runion v. State*, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000); *see also* NRS 51.035(2)(b). Further, the prior consistent statement "must have been made at a time when the declarant had no motive to fabricate." *Runion*, 116 Nev. at 1052, 13 P.3d at 59. Whether a prior consistent statement was made at a time when the declarant had a motive to lie is a question of fact to be determined by the trial court according to the particular circumstances of each case. *See United States v. Prieto*, 232 F.3d 816, 821 (11th Cir. 2000); *United States v. Roach*, 164 F.3d 403, 410 (8th Cir. 1998), *cert. denied sub nom., Tail v. United States*, 528 U.S. 845

(1999) (affirming admission of prior consistent statements made in a post-arrest interview). The district court is vested with considerable discretion in determining, as a factual matter, whether a prior statement was tinged by a motive to lie. *See Prieto*, 232 F.3d at 821 (the trial court has "considerable discretion" because "[q]uite simply, the trial court is in the best position to make that determination and its determination deserves great deference").

Here, Kara (the declarant) testified at trial and was subject to cross-examination; Kara's statements to Lashayda (to the effect that Appellant had a gun and that he pointed the gun at Kara) are consistent with Kara's trial testimony; and Kara's prior statements were offered to rebut Appellant's implied charge of fabrication or improper motive stemming from Kara's separation and pending divorce from Appellant. Nonetheless, Appellant maintains that Kara's prior statements were inadmissible hearsay because the statements were made at a time when Kara had a motive to lie. In particular, Appellant asserts that Kara had a motive to lie because she had recently separated from Appellant and was "jockeying for position" to obtain sole custody of their two young daughters.[6] Thus, the Appellant argues that if Kara's motives were as he suggests, Kara's statements to Lashayda during their taxi ride were made when she had a motive to lie.

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[6]Appellant also asserts on appeal that Kara needed to somehow compensate for the fact that she and her friend were loitering in the parking lot of a strip club late at night, as these circumstances suggest Kara and Lashayda were looking for drugs and might affect Kara's ability to obtain sole custody.

However, before Lashayda took the stand, Kara testified that she was not "trying to use this against [Appellant]" and that she has "never stopped him from seeing his children." Further, Kara testified that she was not bitter toward Appellant on the night of the incident and that she is happier separated from him. While the Appellant urges us not to believe this testimony or give it any weight, the only question before us on appeal is whether the district court abused its discretion in factually concluding that the statement was not contaminated by a motive to lie. We conclude that the district court acted within its discretion when it determined, as a factual matter, that Kara's statements were not made at a time when she had a motive to lie. While the district court could have believed Appellant's alternative version of events and excluded the testimony, that choice lay within the district court's discretion. *See Prieto*, 232 F.3d at 821 (holding that the trial court's "determination deserves great deference.").

Excited utterance exception

Even if, *arguendo*, Kara's out of court statements should not have been admitted as prior consistent statements, the statements were also admissible under the excited utterance exception. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." NRS 51.095. "The proper focus of the excited utterance inquiry is whether the declarant made the statement while under the stress of the startling event. The elapsed time between the event and the statement is a factor to be considered but only to aid in determining whether the declarant was under the stress of the startling event when he or she made the statement." *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006).

Here, Kara's statements were made soon after the incident while still under the stress of the event. Lashayda testified that when she got into the taxi with Kara, she noted that Kara was upset, and she and Kara "just started crying to each other because of what [they] were going through." Kara further testified that while the two waited for police to arrive at Lashayda's mother's house, they "were both trying to calm each other down. . . . [E]verything was kind of hysterical until the police got there." Additionally, Officer Nicholas Smith testified that Kara and Lashayda appeared "reasonably terrified" when he spoke with them that night. Consequently, the district court could have admitted Kara's prior statements under the excited utterance exception, and no error occurred. *See Picetti v. State,* 124 Nev. 782, 790, 192 P.3d 704, 709 (2008) (this court may affirm a decision that reaches the right result for the wrong reason).

Harmless error

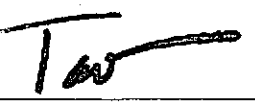
Moreover, even if any error occurred in relation to Kara's statements, the error would have been harmless because Appellant's burglary conviction is supported by substantial independent evidence. The jury heard substantial evidence supporting the burglary conviction as well as the conclusion that Appellant wielded a firearm while committing it. In particular, Kara testified that Appellant held a black handgun very close to her face and fired the gun as he walked away from her, and Lashayda separately testified that she heard Henry tell Appellant to "get the gun" and then heard shots fired. Police discovered shell casings at the scene which appeared to have been fired from a Glock — a black handgun. Therefore, even if the district court had erred in admitting Kara's prior consistent statement (which it did not), any error would have been

harmless. *See, e.g., Patterson v. State*, 111 Nev. 1525, 1533-34, 907 P.2d 984, 989-90 (1995).

We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
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cc: Hon. Scott N. Freeman, District Judge
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