IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY DONAHUE OLIVERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68398

FILED

MAY 31 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature] DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Troy Donahue Olivera was found guilty by a jury of burglary.[1] On appeal, Olivera argues: 1) the district court erred by denying his *Batson*[2] challenges, 2) the district court abused its discretion by denying his motion for mistrial, 3) several improper jury instructions warrant reversal, 4) the district court erred by failing to notify the parties of a note with a legal question from the jury during deliberations, 5) the district court lacked jurisdiction because the State changed the date of the crime in the information,[3] and 6) cumulative error warrants reversal.

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[1]We do not recount the facts except as necessary to our disposition.

[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

[3]Olivera fails to cite case law to support his contention that a change to the correct date in the information deprives the district court of jurisdiction. Accordingly, we decline to address this issue. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (this court need not consider arguments that are not supported by relevant authority). However, we note that Olivera waived his right to object to the alleged defect in the

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In reviewing *Batson* challenges, we give great deference to the district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent, *Diomampo v. State,* 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008), and do not disturb that determination "unless clearly erroneous." *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004). Olivera contends the district court abused its discretion by denying his challenge to the prosecution's peremptory strikes against prospective jurors 222 and 240, under *Batson v. Kentucky,* 476 U.S. 79 (1986), because the prosecutor's reasons for striking the prospective jurors were a pretext for racial discrimination. The prosecution explained it struck prospective juror 222 because she was a paralegal for a local criminal defense attorney and prospective juror 240 because she had a pending DUI charge against her, which may have biased her against the State. Olivera failed to show these reasons are a pretext for discrimination.[4] *See e.g., McCarty v. State,* 132 Nev. ___, ___, ___ P.3d ___ (2016) (after the State provides a race-neutral explanation, the defense's burden to demonstrate pretextual discrimination is a heavy one). We conclude, therefore, the record supports the district court's determination that the prosecution proffered race-neutral reasons for striking the two prospective jurors and that there was no evidence of

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information by failing to raise the objection by motion prior to trial. NRS 174.105(2).

[4]If the proponent of the strike tenders a race-neutral explanation for the strike, the district court must then determine whether the opponent of the strike nevertheless proved the strike amounted to purposeful discrimination. *See Purkett v. Elem,* 514 U.S. 765, 767 (1995) (summarizing the three-step *Batson* analysis).

discrimination. Accordingly, the district court did not abuse its discretion by denying Olivera's *Batson* challenges.

We next turn to Olivera's argument that prosecutorial misconduct in closing arguments mandated a mistrial. We give great deference to a district court's decisions regarding motions for mistrial, and we will not reverse the district court's determination absent a clear showing of abuse. *Rose v. State*, 123 Nev. 194, 206-207, 163 P.3d 408, 417 (2007). We apply a two-step test when considering claims of prosecutorial misconduct. First, we consider whether the conduct in question was improper. *Valdez v. State,* 124 Nev. 1172, 1188, 196 P.3d 465, 476. Second, if the conduct was improper, we then consider whether the conduct merits reversal. *Id.* We will not reverse the conviction if the error is harmless. *Id.* However, harmless-error review does not apply when the defendant fails to object at trial. *Id.* at 1190, 196 P.3d at 477. If the defendant fails to object, we review for plain error, which requires the defendant demonstrate "'actual prejudice or a miscarriage of justice.'" *Id.* (quoting *Green v. State,* 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Here, the State's comments on the reasonable doubt standard during closing arguments echoed the language used in NRS 175.211.[5] Because the State used the statutory definition of reasonable doubt, the State's comments on reasonable doubt were not misconduct. Moreover,

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[5]During closing arguments, the prosecutor first stated, "I need you to understand that guilty beyond a reasonable doubt doesn't mean all doubt, merely reasonable doubt. For doubt to be reasonable it must be actual. Not based on mere possibility or just simply speculation," and later reemphasized, "Doubt to be reasonable must be actual, not a mere possibility or speculation." Olivera objected to the first statement, but did not object to the second statement.

even an incorrect explanation of reasonable doubt is harmless so long as a jury instruction correctly defines reasonable doubt, as was the case here. *See Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). We therefore conclude Olivera failed to demonstrate prosecutorial misconduct, and, accordingly, the district court did not abuse its discretion in denying Olivera's motion for a mistrial.[6]

We next turn to Olivera's claim that several given and refused proposed jury instructions warrant reversal. In reviewing jury instructions, we accord the district court broad discretion and review the district court's decision for abuse of discretion or judicial error. *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Olivera first claims the district court erred by giving the jury instruction on the inference of burglarious intent because it shifted the burden of proof to the defendant. The supreme court has previously upheld inference of burglarious intent instructions based on NRS 205.065, *Redeford v. State*, 93 Nev. 649, 653-54, 572 P.2d 219, 221 (1977), and clarified such instructions may be proper when phrased in permissive rather than mandatory language. *See Hollis v. State,* 96 Nev. 207, 209, 606 P.2d 534, 536 (1980), *modified on other grounds by Thompson v. State,* 108 Nev. 749, 838 P.2d 452 (1993), *overruled by Collman v. State,* 116 Nev. 687, 722, 7 P.3d 426, 449 (2000).

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[6]Olivera also contends the prosecution committed misconduct by commenting on Olivera's decision not to testify. A careful review of the record indicates the prosecutor did not comment on Olivera's decision not to testify, nor were the statements such that a juror would understand them as commenting on Olivera's failure to testify. *See Barron v. State,* 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Accordingly, we conclude this claim is without merit.

Here, the disputed instruction on the inference of burglarious intent essentially quotes NRS 205.065 and uses permissive rather than mandatory language. Additionally, the instruction did not relieve the State of its burden to prove each element of burglary. The jury was instructed both that the State must prove each element beyond a reasonable doubt and specifically that the State must prove beyond a reasonable doubt that Olivera intended to commit larceny upon entering the victims' home. Thus, we conclude the district court did not abuse its discretion by giving the jury instruction on burglarious intent.[7]

Next, Olivera contends the district court abused its discretion by giving the instruction on the entry element of burglary because he admitted to entering the victims' home. The district court must instruct the jury on the necessary elements of the crime charged, and failure to do so constitutes reversible error. *Rossana v. State*, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997). Here, the State charged Olivera with burglary,

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[7]We have also considered Olivera's contention that *State v. Deal*, 911 P.2d 996 (Wash. 1996) supports his position that the jury instruction on the inference of burglarious intent unconstitutionally shifts the burden of proof to the defendant. We conclude this argument is unpersuasive. *Deal* is not binding authority and we are constrained to follow Nevada case law, which has upheld the constitutionality of NRS 205.065. *See e.g.*, *Redeford*, 93 Nev. 649, 572 P.2d 219 (1977), and *Arnold v. State*, 94 Nev. 742, 587 P.2d 423 (1978). Moreover, the jury instruction in *Deal* is distinguishable because the Washington Supreme Court interpreted it as *requiring* the jury to find the defendant possessed the requisite criminal intent unless the defendant produced evidence that the inference should not be drawn, 911 P.2d at 1001; whereas in the instant case, the jury instruction merely *allows* the jury to draw the inference of burglarious intent, and the *unless* language, did not mandate that the defendant present any evidence; it simply allowed the permissive inference to be rebutted if there was such evidence.

and entry is an essential element of burglary. NRS 205.060; *Sheriff, Clark County v. Hicks*, 89 Nev. 78, 83, 506 P.2d 766, 769 (1973) ("One of the essential elements of burglary is the entry of a building"). Therefore, we conclude it was not error for the district court to instruct the jury on the entry element of burglary.

Olivera also contends the district court erred by rejecting his proposed instructions on circumstantial evidence and evidence susceptible to two reasonable interpretations. The supreme court has repeatedly held that when the jury is properly instructed on reasonable doubt, it is not error for the district court to refuse to give an instruction on circumstantial evidence or evidence susceptible to two reasonable interpretations. *See Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); *see also Bails v. State,* 92 Nev. 95, 96–98, 545 P.2d 1155, 1155–56 (1976). Additionally, NRS 175.211 defines reasonable doubt and instructs that "[n]o other definition of reasonable doubt may be given by the court to juries in criminal actions in this State." NRS 175.211(2)

Here, Olivera's proposed instructions on circumstantial evidence and evidence susceptible to two reasonable interpretations were substantially the same as instructions the supreme court previously deemed properly rejected. *See Deveroux v. State*, 96 Nev. 388, 391-92, 610 P.2d 722, 724 (1980). Further, the jury was properly instructed regarding reasonable doubt as the reasonable doubt instruction directly quoted the language in NRS 175.211. Thus, no other instruction on reasonable doubt was necessary. We therefore conclude the district court did not abuse its discretion by rejecting Olivera's proposed instructions.[8]

We next consider whether the district court erred by responding to a note from the jury containing a legal question without first notifying or conferring with counsel. "[T]he court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury." *Manning v. State*, 131 Nev. ___, ___, 348 P.3d 1015, 1019 (2015).[9] Nevertheless, this court will not reverse if the error is harmless beyond a reasonable doubt. *Id.* To determine whether the error was harmless, we look to three factors: "'(1) the probable effect of the message actually sent'; (2) 'the likelihood that the court would have sent a different message had it consulted with appellants beforehand'; and (3) 'whether any changes in the message that appellants might have obtained would have affected the verdict in any way.'" *Id.* (quoting *United States v. Barragan–Devis,* 133 F.3d 1287, 1289 (9th Cir. 1998); *United States v. Frazin,* 780 F.2d 1461, 1470 (9th Cir. 1986)) (internal quotations omitted).

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[8]Olivera further argues the district court erred by rejecting his proposed supplemental instruction to the jury instruction on the inference of burglarious intent. But, as Olivera failed to cogently argue this claim, we decline to address it. *See Maresca,* 103 Nev. at 673, 748 P.2d at 6 (this court need not consider arguments that are not cogently argued).

[9]We note *Manning* was published after Olivera's trial ended. While Nevada case law on this topic did not exist at trial, Ninth Circuit cases would have been persuasive authority. *See United States v. Barragan–Devis,* 133 F.3d 1287, 1289 (9th Cir. 1998) and *United States v. Frazin,* 780 F.2d 1461, 1470 (9th Cir. 1986).

Here, the jury sent the district court a note during deliberations that read, "Who pressed the charges against the defendant? The family? (The Maganas?)" The district court instructed its bailiff to respond "The State of Nevada." The district court, however, failed to inform the parties of the note until after the jury delivered the verdict. This procedure constitutes error pursuant to *Manning*. But, the instruction was simple, accurate and did not contain any legal instructions, much like the message in *Manning*. While the court should have reconvened the proceedings and conferred with counsel to develop a response on the record, it is unlikely the result would have been different had it done so. Under these circumstances, we conclude the district court's error was harmless and does not warrant reversal.

Finally, Olivera contends that cumulative error warrants reversal. We will not reverse the district court based on cumulative error absent a showing that the cumulative effect of errors violated a defendant's right to a fair trial. *Rose*, 123 Nev. at 211, 163 P.3d at 419. As we conclude the district court only erred in one regard, the doctrine of cumulative error does not apply. *See United States v. Sager*, 227 F.3d 1138, 1149 (2000) ("One error is not cumulative error."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________________, C.J.
Gibbons

_______________________, J.
Tao

Silver, J.

cc: Hon. Jessie Elizabeth Walsh, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk