

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN ROBERT WHITTINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69422

FILED

JUN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of extortion and coercion with immediate threat of physical force. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

First, appellant John Whittington claims the district court abused its discretion by admitting text messages without them being properly authenticated. Specifically, Whittington claims the State did not show he was the person who sent the text messages because no one witnessed him sending them.

“We review a district court’s decision to admit or exclude evidence for an abuse of discretion.” *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009). The Nevada Supreme Court has held “when there has been an objection to admissibility of a text message, the proponent must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission.” *Rodriguez v. State*, 128 Nev. ___, ___, 273 P.3d 845, 849 (2012) (internal citation omitted). “Thus, some

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additional evidence, 'which tends to corroborate the identity of the sender is required.'" *Id.* (quoting *Commonwealth v. Koch*, 39 A.3d 996, 1005 (Pa. Super. Ct. 2011)). This evidence could be "the context or content of the messages themselves." *Id.*

The State offered the text messages to prove Whittington threatened and demanded money from the victim. Thus, the text messages were relevant to the extent the State could authenticate them as being authored by Whittington.

We conclude the State presented sufficient evidence to authenticate that the text messages were sent by Whittington. Testimony at trial established the victim received several text messages which originated from a phone number registered to Sales Pro JRW, LLC. Further testimony established the corporation was owned by Whittington and Whittington had previously sent the victim text messages from this phone number. The victim testified the messages at issue were similar in writing style and contained similar grammatical and spelling errors that were present in other texts he had received from Whittington. The victim's attorney testified he spoke with Whittington on the phone and Whittington admitted sending the text messages at issue. The victim's attorney later received text messages that were similar to the ones sent to the victim. Whittington also admitted to a police detective he wrote the text messages and expressed remorse to the detective. He also placed a jailhouse phone call to the victim's attorney and again expressed remorse and asked the attorney to tell the victim he was sorry. We conclude the text messages were properly authenticated and the district court did not abuse its discretion by admitting the text messages.

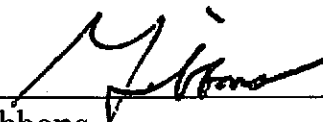
Next, Whittington claims there was insufficient evidence to convict him of extortion and coercion. Specifically, Whittington claims the State did not prove he was the person who sent the text messages; therefore, the evidence of his guilt was insufficient.

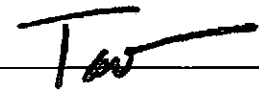
When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). 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). As stated above, the State provided sufficient evidence for a rational trier of fact to determine Whittington sent the text messages.


Finally, Whittington claims the district court abused its discretion by denying a motion for mistrial when the victim testified regarding Whittington being incarcerated. “A defendant’s request for mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial.” *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). “The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion.” *Id.* at 142, 86 P.3d at 586.

The victim's comment in this case was inadvertent and the State clarified for the jury the incarceration was for the instant charges. We conclude the district court did not abuse its discretion in denying the motion. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk