

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN NUNLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70309

FILED

JAN 06 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

A jury convicted John Nunley of burglary and grand larceny.¹ On appeal, Nunley asserts the State failed to gather² material evidence due to gross negligence or bad faith, the district court improperly admitted prejudicial and irrelevant evidence, the district court erred by restricting Nunley's voir dire during jury selection, the State failed to prove with sufficient evidence that Nunley committed the crimes, the district court erred by rejecting Nunley's proposed jury instructions, and the State committed prosecutorial misconduct warranting a new trial. We disagree.

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

²We need not consider Nunley's assertion the State also violated *Brady v. Maryland*, 373 U.S. 83 (1963), as in this case the State never obtained the evidence. See *Johnson v. State*, 117 Nev. 153, 167, 17 P.3d 1008, 1017 (2001) (stating when the State never had possession or control of the evidence, it is more appropriate to use the failure-to-gather test than a failure-to-preserve test).

When a defendant alleges the State failed to collect evidence, the court must determine whether the evidence is material and whether the failure to collect the evidence was the result of gross negligence or bad faith. *Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). If the failure was the result of mere negligence, no sanctions are imposed against the State. *Id.* We agree with the district court that in this case Smith's surveillance video was not material as multiple people witnessed Nunley's actions and there is not a reasonable probability that, had the evidence been available, the result of the trial would have been different. Moreover, the failure by the police to obtain the video was not the result of gross negligence or bad faith under the circumstances of this case. Furthermore, Smith's videotaping system later crashed, which prevented the State from gathering surveillance of the incident after Nunley's arrest. Because Nunley failed to show that the potential evidence was material, and that the State acted in bad faith or was grossly negligent in failing to gather it, the district court did not abuse its discretion when it denied the motion to dismiss and rejected the adverse inference jury instruction.

Next, we consider Nunley's argument that the district court improperly admitted evidence that Smith's loss prevention officers recognized Nunley. "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). We conclude the district court acted within its discretion by ruling that Nunley opened the door to this evidence by asserting during his opening statement to the jury, that the loss prevention officers rushed to judgment. *See Cordova v. State*, 116 Nev. 664, 670, 6 P.3d 481, 485 (2000) (explaining that a defendant may open the door, permitting the State to introduce evidence that it could not

otherwise offer). Even if this evidence was improper, its admission was, at most, harmless error in light of the evidence presented at trial. See *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (stating improperly admitted evidence is harmless if it does not have a substantial influence in determining the jury's verdict.). Significantly, multiple witnesses testified to Nunley's act of concealing merchandise within the store and his attempt to leave the store without paying for the items. Moreover, the loss-prevention officers did not testify to witnessing Nunley's past thefts or other experiences with Nunley.

Nunley also argues that the district court erred in restricting his voir dire. However, the manner of conducting voir dire is within the sound discretion of the trial court. *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937-38 (1978). After reviewing the record, we conclude the district court did not abuse its discretion in limiting Nunley's questions regarding reasonable doubt and video surveillance because the district court only limited questions that were irrelevant and prejudicial.

Next, we consider Nunley's argument that the State failed to prove Nunley committed the crimes beyond a reasonable doubt. Evidence is sufficient to support a verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted)). Here, a reasonable jury could find Nunley guilty of burglary and grand larceny based on the overwhelming eyewitness testimony presented at trial. Multiple witnesses testified Nunley removed items from Smith's shelves, concealed them in a bag in his cart, and attempted to leave the store without paying. Whether Nunley's cart actually exited

Smith's is not a determinative factor here. Larceny may be accomplished by a slight movement, and there is no requirement that the property leave the premises. *See Walker v. Sheriff, Clark Cty.*, 93 Nev. 298, 300, 565 P.2d 326, 326-27 (1977) (addressing the asportation requirement). Furthermore, the jury heard the evidence about the alleged inconsistencies and deficiencies in the State's case before rendering its verdict.

Nunley further argues that the district court erred by rejecting Nunley's proposed jury instructions. We review a district court's decision to give or refuse a jury instruction for abuse of discretion. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We review de novo whether the jury was provided with a complete and correct statement of the law. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). After reviewing the record, we conclude that the reasonable doubt and grand larceny instructions properly stated the law. Here, the district court gave the standard reasonable doubt instruction contained within NRS 175.211. Further, the instructions regarding larceny mirrored Nevada law. *See Walker*, 93 Nev. at 300, 565 P.2d at 326-27 (discussing the asportation element of larceny).

Finally, we consider Nunley's argument that the State committed prosecutorial misconduct in its closing argument by trivializing its burden of proof. In evaluating allegations of prosecutorial misconduct, we must determine whether the prosecutor's conduct was improper and whether the improper conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We also consider the weight of the evidence against the defendant to determine whether the error was harmless. *See Smith v. State*, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004).

In reviewing the record before us, we conclude the State did not trivialize or misstate the burden of proof and, therefore, did not engage in misconduct. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.
Silver

Tao, J.
Tao

Gibbons, J.
Gibbons

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