IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PIERRE TAVON RAYMOND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70483

FILED

MAY 24 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

Pierre Tavon Raymond appeals from a judgment of conviction, pursuant to a jury verdict, for burglary while in possession of a firearm, robbery with the use of a deadly weapon, carrying a concealed firearm or other deadly weapon, and possession of burglary tools. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

A jury convicted Raymond of multiple counts relating to an incident in which he shoplifted items from a store into a thermally-insulated bag and, when pursued by store security, relinquished the items, but reentered the store and drew a firearm, demanding the items back.[1] On appeal, Raymond first asserts that the trial judge erred by asking questions that led a police detective to provide testimony that incriminated Raymond, and thereby improperly became an "advocate" for the State. In the portion of the record cited by Raymond, the judge asked two un-objected to questions: "Is there any significance with regards to the inside of this bag?" and, when the witness gave an affirmative answer, "What is it?" In response, the detective testified that foil-lined thermal bags of the type used by Raymond are sometimes used to shoplift because the foil lining defeats many types of store security devices.

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

17-901099

A trial judge has the right to examine witnesses to clarify testimony, but must not do so in a way that makes him an advocate for either party. *See* NRS 50.145(2); *Azbill v. State*, 88 Nev. 240, 249, 495 P.2d 1064, 1070 (1972). Here, because Raymond did not object to the judge's questions, our review is limited to whether the questions constitute "plain error," meaning error "so unmistakable that it is apparent from a casual inspection of the record" and which affects the defendant's substantial rights by causing "actual prejudice or a miscarriage of justice." *See Vega v. State*, 126 Nev. 336, 338, 236 P.3d 637. 636-637 (2010); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Here, the motive for the judge's questions is not clear from the record, but they had the unfortunate effect of producing highly incriminatory testimony from the witness that the prosecutor had not elicited. Had the defendant lodged a timely objection to them, we might be presented with a close call regarding whether the judge's questioning was inappropriate and prejudicial; judges should avoid asking questions that help one side or the other fill in the elements of their case. But since no objection was made, our review is limited and we cannot conclude that "plain error" occurred. *See Azbill* 88 Nev. at 249, 495 P.2d at 1070; *Kirksey v. State*, 112 Nev. 980, 1006, 923 P.2d 1102, 1119 (1996); *Hernandez v. State*, 87 Nev. 553, 557-58, 490 P.2d 1245, 1247 (1971).

Raymond next contends that, although he admitted to possessing a firearm while committing the burglary, he cannot be convicted of the enhanced crime of "burglary while in possession of a firearm or other deadly weapon" under NRS 205.060 because he never used the firearm in any way during the burglary as it remained in his pocket until after he left the store. However, "use" of the weapon is not an element of the crime with which Raymond was convicted; under the plain language of the statute, a

defendant is guilty if he merely possesses, or comes into possession of, a firearm at any time during the commission of the burglary whether or not he "uses" the firearm to facilitate the burglary. *See* NRS 205.060.[2] Moreover, while Raymond is correct that he did not "use" the firearm during his first entry into the store, he brandished it toward a store employee during his second entry. Thus even if "use" of the firearm were an element of the crime, a jury could have concluded that the facts of this case met that element.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J.

---

[2]Raymond also argues the trial court erred in issuing contradictory jury instructions—one that instructed the jury to determine whether a deadly weapon was "used" during the burglary and another that instructed the jury that "possession" was adequate for the enhanced burglary charge. Assuming *arguendo* that these instructions could confuse jurors, Raymond fails to demonstrate he suffered prejudice from these instructions, and we can infer none because Raymond was not convicted of burglary with *use* of a deadly weapon. Thus, we fail to find error and decline to reverse on this basis. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that appellants must present relevant authority and cogent argument).

Further, we decline to consider Raymond's double jeopardy argument because he raises it for the first time in his reply brief. *See* NRAP 28(c) (stating that reply briefs "must be limited to answering any new matter set forth in the opposing brief").

cc: Hon. William D. Kephart, District Judge
Kenneth G. Frizzell, III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk