

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFERY CHARLES MAHAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75773-COA

FILED

MAY 28 2019

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

ORDER OF AFFIRMANCE

Jeffery Charles Mahan appeals from a judgment of conviction, pursuant to a jury verdict, of one count of burglary and two counts of possession of a credit or debit card without consent. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Mahan attempted to use a credit and debit card at a Speedway Market to buy a bottle of Dr. Pepper and a bottle of liquor. The cards did not belong to Mahan but to Taylor Wieland, whose purse and wallet were stolen when her car was burgled. The cards were electronically denied at the Speedway Market because Wieland had remotely locked them. Mahan later returned to the store with cash to make his purchase.¹

Mahan was arraigned on one count of burglary and two counts of possession of a credit card without consent.² Mahan filed a pre-trial

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

²Mahan was originally charged with one count of burglary and two counts of fraudulent use of a credit or debit card. The State later amended the information by dropping the fraudulent use charges. A grand jury returned an indictment against Mahan for two counts of possession of a credit or debit card without consent, however, and the State filed a second amended information consolidating the indictment and the first amended information. Mahan confirmed at the trial readiness hearing that he was ready for trial on the second amended information.

motion to exclude evidence of the vehicle burglary, but the district court allowed the evidence to be admitted under the *res gestae* doctrine and gave oral and written limiting instructions to the jury. During jury selection, the district court excused six prospective jurors without comment or objection from counsel—one prospective juror because she needed to pick up her children at school and apparently had no one to assist her, and five others because of their limited English language competency. The jury convicted Mahan on all three counts in the second amended information.

On appeal, Mahan argues (1) the district court violated his right to a jury of his peers by excusing six prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and without an adequate canvass, violating the Sixth and Fourteenth Amendments, (2) admission of the evidence relating to the car burglary prejudiced his right to a fair trial, violating the Fifth and Fourteenth Amendments, (3) the jury was not properly instructed on the law, violating his right to due process and a fair trial under the Fifth and Fourteenth Amendments, and (4) there was insufficient evidence to sustain the convictions.³ We disagree.

³Mahan also argues that the State abused the grand jury system to correct its legal insufficiency at the initial charging stage of the case, violating his due process rights and the Fifth, Sixth, and Fourteenth Amendments. Mahan makes several arguments relating to the pretrial process that resulted in two amended informations and a grand jury indictment. Mahan did not object below at any time to the alleged defects in the institution of the prosecution as required by NRS 174.105(1) (“Defenses and objections based on defects in the institution of the prosecution . . . may be raised only by motion before trial.”) and NRS 174.105(2) (“Failure to present any such defense or objection as herein provided constitutes a waiver thereof . . .”), nor has he shown any prejudice or miscarriage of justice. Therefore, Mahan’s argument on appeal is waived and this court will not consider it.

Mahan first argues that under *Batson* the district court violated his right to equal protection and due process by purposely discriminating against him as a one-armed, indigent, black man by excusing six prospective jurors without properly canvassing them. Specifically, Mahan contends that the district court's reasons for excusing the prospective jurors were improper.

Because Mahan did not object to the excusal of the six prospective jurors, we review the district court's decision for plain error. See *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Under a plain error standard, the error will warrant reversal only if the defendant shows that the "error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

"The court shall conduct the initial examination of prospective jurors" NRS 175.031. To be qualified to act as a juror, a person must have "sufficient knowledge of the English language." NRS 6.010. "The court may at any time temporarily excuse any juror on account of . . . [u]ndue hardship or extreme inconvenience." NRS 6.030(1)(c).

Mahan's *Batson* challenge is meritless. *Batson* does not apply to the circumstances here because the district court's excusal of the prospective jurors was not in response to a peremptory challenge by the State, nor even a challenge for cause. See generally *Williams v. State*, 134 Nev. ___, ___, 429 P.3d 301, 305-06 (2018) (discussing the *Batson* doctrine's applicability to a prosecutor's peremptory challenges). Notably, NRS 6.010 and NRS 6.030 provide that a court may excuse a potential juror for the very reasons that the district court excused the six prospective jurors—

insufficient knowledge of the English language or hardship. Additionally, the record does not reveal the race of the excused prospective jurors nor the members of the jury panel and is therefore insufficient to show that the district court engaged in purposeful discrimination. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials “are presumed to support the district court’s decision”), *rev’d on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992). Lastly, Mahan has not shown that the excusal of the six prospective jurors caused actual prejudice or a miscarriage of justice, as required for plain error review.

Second, Mahan argues that the district court abused its discretion by allowing Wieland to testify under the *res gestae* doctrine that her car was burgled and that her purse—containing the debit and credit cards—was taken from her car. Further, Mahan argues that the limiting instructions were an inadequate remedy because the jury could still infer that Mahan committed the vehicle burglary.

“The decision to admit or exclude evidence of separate and independent offenses rests within the sound discretion of the trial court, and will not be disturbed unless it is manifestly wrong.” *Daly v. State*, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983).

The *res gestae* doctrine provides that “[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded.” NRS 48.035(3). “[T]he State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime, and such evidence is admissible even if it implicates the accused in

the commission of other crimes for which he has not been charged.” *Brackeen v. State*, 104 Nev. 547, 553, 763 P.2d 59, 63 (1988). The res gestae doctrine is to be construed narrowly and, if invoked, the controlling question as to admissibility is whether the witnesses can describe the crime charged without referring to the related uncharged act. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). When res gestae evidence is admitted, “at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.” NRS 48.035(3).

During the pre-trial motions hearing, the district court decided to admit the evidence, finding that it was relevant and added “to a full and accurate account of the incidents surrounding the case.” At trial, the district court orally warned the jury before Wieland’s testimony that Mahan was not accused of breaking into the car and that the facts of how Wieland lost her credit cards could not be used against Mahan. Additionally, the district court gave a strong limiting instruction reemphasizing that Mahan was not charged with credit card theft or vehicle burglary, and that the evidence of those acts could not be used against him. We presume that the jury followed the court’s instruction. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Because evidence was necessary to satisfy the elements of the offenses that Mahan possessed the cards without consent, we conclude that the district court did not abuse its discretion by allowing Wieland to testify that her car was burgled. Even if, however, the district court improperly applied the res gestae doctrine, the error was harmless because there was other sufficient evidence to support the jury’s verdict. *See Bellon*, 121 Nev. at 445, 117 P.3d at 181 (discussing harmless error review of improperly admitted evidence).

Third, Mahan argues that the presumption jury instruction violated NRS 47.230(3).⁴ Because Mahan did not object to the jury instructions below, we review the district court's decision settling jury instructions for plain error. *See Anderson*, 121 Nev. at 516, 118 P.3d at 187. Whether the instruction was an accurate statement of law is a legal question, which we review de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Mahan was charged with two counts of possessing a credit or debit card without consent under NRS 205.690. NRS 205.690(3) provides:

A person who has in his or her possession or under his or her control two or more credit cards or debit cards issued in the name of another person is presumed to have obtained and to possess the credit cards or debit cards with the knowledge that they have been stolen and with the intent to circulate, use, sell or transfer them with the intent to defraud.

Presumptions are further governed by NRS 47.230(3), which provides in relevant part:

Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall

⁴Mahan also argues that the willfully instructions confused the jury as to the intent required to find him guilty, and thereby reduced the State's burden of proof and deprived him of his "right to have the jury properly instructed." Because Mahan did not provide any relevant authority to support this argument, however, this court need not consider it on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting that an appellate court need not consider issues that are not cogently argued or supported by relevant authority). Additionally, the instructions as a whole show that the jury was properly instructed. *See Harrison v. State*, 96 Nev. 347, 350, 608 P.2d 1107, 1109 (1980) ("[W]hen jury instructions, as a whole, correctly state the law, it will be assumed that the jury was not misled by any isolated portion.").

give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

“[W]hile jury instructions phrased in the form of permissible inferences may satisfy NRS 47.230, those phrased in mandatory language do not.” *Thompson v. State*, 108 Nev. 749, 754, 838 P.2d 452, 456 (1992), *overruled on other grounds by Collman v. State*, 116 Nev. 687, 7 P.3d 426 (2000).

The district court’s instruction on the statutory presumption was permissive and included the specific language that NRS 47.230(3) requires.⁵ Therefore, the district court did not err, plainly or otherwise, in giving the presumption instruction.

Lastly, Mahan argues that none of the evidence that the State produced would lead a rational trier of fact to convict him of the burglary and possession charges. In reviewing a challenge to the sufficiency of the

⁵Jury Instruction No. 17 states:

If facts have been proven by the State beyond a reasonable doubt that a person had in his possession or under his control two or more credit or debit cards issued in the name of another person you may presume Defendant’s knowledge that the credit or debit cards had been stolen and his intent to circulate, use, sell or transfer the credit cards with the intent to defraud.


However, you are not required to adopt the presumption and the existence of the presumed facts must be proven beyond a reasonable doubt before you may presume knowledge and/or intent.

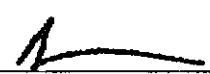
evidence supporting a criminal conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Mahan argues that the facts, as he presented them, could not lead a reasonable jury to find him guilty of the burglary and possession charges. However, "it 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, 438-39 (1975). The jury was able to weigh the evidence including the testimony of the State's witnesses, video surveillance showing Mahan attempting to use the cards, and Mahan's testimony, before reaching its decision. The jury was not required to believe Mahan's testimony. Therefore, we conclude that there was sufficient evidence for a rational jury to convict Mahan on all three charges. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerome M. Polaha, District Judge
Karla K. Butko
Washoe County District Attorney
Washoe District Court Clerk