IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BERNARDO DOMINGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68974

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of burglary while in possession of a deadly weapon, four counts of conspiracy to commit robbery, one count of robbery with the use of a deadly weapon, three counts of burglary, two counts of robbery, and one count of attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Motion to suppress

Appellant Bernardo Dominguez claims the district court erred by denying his motion to suppress his confession. He claims the State failed to prove by a preponderance of the evidence he understood his constitutional right to remain silent and to have an attorney present. He also claims his confession was not voluntary under the totality of the circumstances. He claims the officers would not let him sleep, he was an admitted methamphetamine user, he was held for four hours before being questioned, and he did not understand English enough to understand the interview and his right to remain silent or to have an attorney present.

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Understanding of rights

"[T]he State must prove by a preponderance of the evidence that the defendant's incriminatory statements are admissible." *Gonzales v. State*, 131 Nev. ___, ___, 354 P.3d 654, 658 (Ct. App. 2015). "When a defendant has been subjected to custodial interrogation, the State must first demonstrate the police administered *Miranda* warnings prior to initiating any questioning."[1] *Id.* (internal quotation marks omitted). "If the warnings were properly given, the State must then prove the defendant voluntarily, knowingly, and intelligently understood his constitutional right to remain silent and/or to have an attorney present during any questioning, and agreed to waive those rights. *Id.*

After holding a hearing on the motion and reviewing the video of the interrogation and a transcript of the interrogation, the district court concluded the *Miranda* rights were given to Dominguez in both English and Spanish and he appeared to understand them and agreed to speak after that occurred. We conclude the district court did not err in concluding the State proved by a preponderance of the evidence Dominguez understood his rights and voluntarily waived them as they were given in both English and Spanish.

Voluntariness of confession

"A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement." *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). Voluntariness is determined by "'the totality of the circumstances.'" *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (quoting *Fikes v. Alabama*, 351 U.S. 191, 197 (1957)). "The

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal." *Chambers v. State*, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

The district court found, while Dominguez did appear sleepy, he understood what was going on in the interview. Dominguez was given the *Miranda* warnings in both English and Spanish, he seemed to understand them, and agreed to speak with detectives. He was asked if he spoke English well enough to talk to detectives, and he said, "yeah I think so." His answers were responsive to the questions. And, while it appeared he may have used drugs recently, it appeared from the interview his answers were freely and voluntarily given. The detective was not being aggressive with Dominguez and did not act inappropriately in the course of the questioning. The questioning lasted approximately 30 minutes. The district court concluded the confession was voluntarily and freely given.

The record demonstrates the district court's findings are supported by substantial evidence. Dominguez was advised of his *Miranda* rights, he agreed to speak with the detectives, he was able to respond to questions in English, and his interview was short. *See Passama*, 103 Nev. at 214, 735 P.2d at 323 (identifying factors for evaluating the voluntariness of a confession). We conclude the district court did not err by denying Dominguez's suppression motion.

Sufficiency

Dominguez claims the State failed to present sufficient evidence that a deadly weapon was used or possessed in counts 1, 3, 10

and 12.[2] Specifically, Dominguez claims that because the State only found a starter pistol, and a starter pistol is not a deadly weapon, the State failed to prove a deadly weapon was used or possessed. We disagree.

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 to count 3, Dominguez's insufficiency argument lacks merit. The charging document alleged that Dominguez used a firearm and/or a knife and he was also charged under aiding and abetting and co-conspirator theories of liability. Testimony was presented that in addition to a gun being used by Dominguez's male codefendant Dominguez's female codefendant also put a knife to the victim's throat and demanded more money. The knife is a deadly weapon under NRS 193.165. Therefore, sufficient evidence was presented of a deadly weapon.

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[2]We note the jury did not find a deadly weapon was possessed in the burglary in count 1. Therefore, we only address the deadly weapon as used in counts 3, 10, and 12.

As to count 10, burglary while in possession of a deadly weapon, and count 12, attempted robbery with the use of a deadly weapon, testimony was presented Dominguez's male codefendant showed the victim a gun. The victim testified the gun was in the waistband of the male codefendant and he testified it was a black revolver that held 6 to 7 bullets.

While the police only recovered a starter pistol which everyone concedes does not constitute a deadly weapon, evidence was presented at trial that at least two guns were used during the crimes. Evidence was also presented that the starter pistol was used by the female codefendant and the male codefendant had a different gun than the starter pistol.

The jury could reasonably infer from the evidence presented that a deadly weapon was possessed in the burglary in count 10 and used in the attempted robbery in count 12. *See* NRS 193.165(1); NRS 205.060(4); *see also Harrison v. State*, 96 Nev. 347, 351, 608 P.2d 1107, 1110 (1980) (holding testimony by the victim describing the gun was sufficient to support the conviction). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Dominguez also contends the evidence presented regarding count 9, robbery, was insufficient to support the jury's finding of guilt. Specifically, he claims fear is an element of robbery, and because the victim did not testify, the State could not show the victim was in fear. We disagree.

"Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence of fear of injury, immediate or future, to his or her person or property." NRS 200.380(1). Actual fear will be presumed if circumstances were likely to create an apprehension of danger and induced the victim to part with the property for the safety of their person. *See Hayden v. State*, 91 Nev. 474, 476, 538 P.2d 583, 584 (1975).

The jury viewed a surveillance video of the robbery. The video showed Dominguez and his two codefendants enter the convenience store. The male codefendant went behind the counter with the convenience store clerk and walked her to the register. The female codefendant was on the customer side of the counter and was holding what looked like a gun. The clerk opened the cash register and allowed Dominguez's codefendants to take money from the register. The clerk then backed up and put her hands up. Based on this video, the jury could find fear or threat because the use of the gun could have induced the victim to part with the money in the register for the safety of her person. Therefore, sufficient evidence was presented that a robbery was committed.

Surveillance video

Dominguez claims the district court abused its discretion by admitting a surveillance video when it was not properly authenticated. Dominguez claims the only person who could authenticate the surveillance video was the victim who did not testify at trial. We review the admission of evidence for an abuse of discretion. *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009).

We conclude the State properly authenticated the surveillance video prior to the district court admitting the video at trial. The State had

the custodian of records for the gas station testify at trial regarding the surveillance equipment and camera angles and he testified the video was of the subject gas station. Further, the State presented testimony through a crime scene analysis that the video tape was consistent with what she saw at the crime scene. This satisfied the requirements of NRS 52.015(1) that the "matter in question was what its proponent claimed." *See also Archanian v. State*, 122 Nev. 1019, 1030, 145 P.3d 1008, 1017 (2006). We conclude the district court did not abuse its discretion by admitting the videotape.

Confrontation

Dominguez claims his Sixth Amendment right to confront his accuser was violated because "[t]he State charged Mr. Dominguez with Counts 7 – 9 based on the accusations of Ms. McDow, who testified at the grand jury only." He further claims that because he "was unable to confront his accuser at trial" his convictions for counts 7 – 9 must be reversed.

The Confrontation Clause "applies to witnesses against the accused—in other words, those who bear testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotation marks omitted). The Confrontation Clause prohibits the admission at trial of testimonial hearsay against a defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 68.

Dominquez has failed to demonstrate his Confrontation Clause rights were violated. Although the victim testified at the grand jury proceedings, the victim's grand jury testimony was not presented at trial. Further, the State was not required to call the victim as a witness at

trial to prove its case against Dominguez and the State's decision not to call the victim as a witness at trial did not violate Dominguez's right to confront his accusers. Therefore, we deny this claim.

Motion for directed verdict

Dominguez claims the district court erred by denying his motion for a directed verdict for counts 7, 8, and 9. This claim lacks merit because Nevada law does not provide for a directed verdict. *State v. Combs*, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000). To the extent Dominguez moved for an advisory instruction to acquit pursuant to NRS 175.381, we conclude the district court did not abuse its discretion by denying the motion because sufficient evidence was presented to support these convictions. *See* NRS 175.381(1); *see also* NRS 205.060; NRS 200.380; NRS 199.480; NRS 193.165.

Cumulative error

Finally, Dominguez claims cumulative error deprived him of a fair trial and warrants reversal of his conviction. We conclude Dominguez is not entitled to relief on this claim. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error.").

Having concluded Dominguez is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk