IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY HUMPHREY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69080

ORDER OF AFFIRMANCE

This is an appeal from a jury verdict finding appellant guilty of burglary while in possession of a firearm, robbery with the use of a deadly weapon, and carrying a concealed firearm or other deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant Anthony Humphrey was tried and convicted by a jury following a robbery at a Papa John's Pizza.[1] On appeal, he argues the district court abused its discretion by denying his motion for a mistrial, refusing to allow him to place Anthony Toliver[2] before the jury as a demonstrative exhibit, admitting evidence of a jail phone call, and admitting expert testimony. Humphrey also argues the State improperly qualified the reasonable doubt standard to the jury, and that cumulative error warrants reversal.

After careful consideration, we conclude the majority of Humphrey's arguments are without merit. First, the district court correctly denied Humphrey's motion for a mistrial—which Humphrey based largely upon uncertainty regarding the amount stolen—as the

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

[2]Toliver was apprehended with Humphrey shortly after the robbery. At trial, Humphrey argued that Toliver committed the robbery.

amount stolen is immaterial to the crimes charged. *See* NRS 205.060 (defining burglary); NRS 200.380 (defining robbery); NRS 202.350 (defining carrying a concealed firearm or other deadly weapon); *Gordon v. State*, 121 Nev. 504, 510, 117 P.3d 214, 218-19 (2005) (holding that where the missing evidence was irrelevant to the issue at trial, the defendant was not prejudiced); *Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008) (evidence erroneously admitted merits a new trial only if without this evidence the jury could have reasonably been expected to reach a different result).

Further, the detective's testimony as to the cashier's statement of the amount taken was not inadmissible hearsay where shortly after the robbery the cashier told the detective that $309 had been stolen but at trial the cashier testified she could not recall the amount stolen. *See* NRS 51.035(2)(a) (prior statements inconsistent with those given at trial are not hearsay where the declarant testifies at trial and is subject to cross-examination); *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (a witness's failure to recall a previous statement makes it a prior inconsistent statement under NRS 51.035(2)(a)).

Neither did the district court abuse its discretion by refusing to allow Humphrey to present Toliver to the jury where Toliver indicated he would invoke his Fifth Amendment right if called to testify, and did in fact invoke that right outside the presence of the jury. *See Ducksworth v. State*, 113 Nev. 780, 790-91, 942 P.2d 157, 164 (1997) (if a witness indicates he will invoke his Fifth Amendment right on the witness stand, the district court may refuse to allow the defendant to call the witness where the defense is attempting "to persuade the jury to make negative inferences" about the witness); *Palmer v. State*, 112 Nev. 763, 766, 920 P.2d 112, 113 (1996) (if a witness validly asserts his Fifth Amendment right, that right overrides the defendant's Sixth Amendment right).

We need not consider Humphrey's arguments regarding the jail call as Humphrey has not presented Nevada law establishing that the phone call was inadmissible. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (we need not consider arguments not supported by relevant authority). Nevertheless, we note that the prohibition against wiretapping set forth in NRS 200.620 does not extend to recordings of phone conversations taken from phones installed in prisons, and prisoners generally do not have a reasonable expectation of privacy in their phone calls. NRS 200.620(4); *United States v. Van Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996).

Further, our review of the record compels our conclusion that the prosecution did not, as Humphrey argues, impermissibly qualify the reasonable doubt standard. To the contrary, the prosecution gave a correct statement of law.[3] Additionally, the district court properly instructed the jury on the burden of proof and also instructed the jury that the prosecutor's arguments did not constitute evidence. We presume the jury followed these instructions. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

We agree, however, that the district court abused its discretion by allowing a criminalist to testify regarding a palm print exemplar.[4] NRS 52.015(1) states that "as a condition precedent to

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[3]Even if the prosecutor's statements were incorrect, we note the Nevada Supreme Court has consistently held that where the jury instruction correctly defines reasonable doubt, a party's incorrect explanation of reasonable doubt is harmless error. *See Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

[4]Humphrey also asserts this evidence was produced late and without adequate notice. But, as he does not support this conclusion with argument, rule, or relevant case law, we do not consider it. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. However, even assuming, *arguendo*, the

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admissibility" there must be "evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Our review of the record reveals that the district court abused its discretion by admitting the palm print exemplar into evidence and by allowing the expert to opine that the latent palm print recovered from the crime scene matched the palm print exemplar because the State failed to lay an adequate foundation for its admission pursuant to NRS 50.025.[5]

Nonetheless, we conclude this error does not warrant a new trial as it was harmless beyond a reasonable doubt. NRS 178.598 requires that any error "which does not affect substantial rights shall be disregarded." Here, removing the criminalist's testimony, substantial other identity evidence supported the conviction: Four witnesses testified they saw Humphrey commit the crime, and two of those saw his face before he covered it with the bandana. Humphrey even turned and half-smiled at the two witnesses in the van. Officers discovered the bandana on Humphrey when they apprehended him a short distance from the Papa John's. A gun and magazine clip were both found discarded near Humphrey. And, Humphrey and another man who was with him were in possession of the exact amount stolen.

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district court erred, that error was harmless for the reasons set forth in this order.

[5]We note NRS 52.125 provides that copies of fingerprint classification cards are presumed authentic if certified as correct by the custodian of the records or another person authorized to certify the records as authentic. However, that statute does not apply here because the expert did not testify she was the custodian or a person authorized to certify the records as authentic.

As an aside, Humphrey's great-aunt testified in Humphrey's case-in-chief that she lived near the Papa John's and that Humphrey visited her the afternoon of the robbery. The defense intimated that Humphrey's palm print was actually on the door because Humphrey may have purchased a pizza at the Papa John's that day. Thus, the jury heard evidence and later argument by Humphrey's counsel downplaying the admission of the evidence, supporting the State's contention that any error by the district court is nonetheless harmless. In light of the substantial evidence of Humphrey's guilt, we conclude the error was harmless.[6] *See Dalby v. State*, 81 Nev. 517, 520-21, 406 P.2d 916, 918 (1965) (holding the erroneous admission of an unauthenticated exemplar was not reversible error where three witnesses testified the defendant was the robber).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[6]We also reject Humphrey's argument that cumulative error warrants reversal, as only one error is apparent from the record. *See United States v. Sager*, 227 F.3d 1138, 1149 (2000) ("One error is not cumulative error.").