IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD A. LESNICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84577

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of commission of a fraudulent act in a gaming establishment, one count of grand larceny, and one count of theft. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.[1]

The verdict does not violate Lesnick's double jeopardy protections

Appellant Ronald A. Lesnick's convictions stem from an incident in which Lesnick took a ticket, belonging to another gaming patron, from a gambling machine and presented it to the main cage clerk at the Wynn Hotel & Casino (the Wynn). Lesnick purported to be the ticket's owner and collected a cash payout from the Wynn. Lesnick first argues that the convictions violated his double jeopardy protections because they stem from the same conduct. *See* U.S. Const. amend. V (no person shall "be subject for the same offence to be twice put in jeopardy of life or limb"); *see also* Nev. Const. art. 1, § 8 ("[n]o person shall be subject to be twice put in jeopardy for the same offense"). "Whether conduct that violates more than one criminal statute can produce multiple convictions in a single trial is essentially a question of statutory construction" that this court reviews de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012).

[1]Judge Ronald J. Israel presided over the jury trial.

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We conclude that Lesnick's convictions do not violate the Double Jeopardy Clause. Indeed, Lesnick's convictions did not stem from the "same offense": his act of taking Brad Winters' (Winters) ticket is a separate action from his act of presenting the ticket as the purported winner and obtaining money from Wynn. *See id.* at 604-05, 291 P.3d at 1277-78 (explaining that the Double Jeopardy Clause protects against "multiple punishments for the same offense"). Furthermore, there are two separate victims: Winters is the victim for Lesnick's grand larceny conviction, whereas the Wynn is the victim for Lesnick's theft and commission of a fraudulent act in a gaming establishment convictions. Although each of Lesnick's actions are related, there were nonetheless separate acts and victims, justifying separate punishments for each act. *Cf. Ashford v. Edwards*, 780 F.2d 405 (4th Cir. 1985) (holding that a defendant's conviction of two counts of attempted armed robbery arising from an incident involving two victims does not violate the Double Jeopardy Clause); *see also Jones v. State*, 95 Nev. 613, 619-29, 600 P.2d 247, 251-52 (1979) (holding similarly for a defendant's conviction of two counts of burglary and two counts of robbery for an incident involving two victims).

We further conclude that the convictions do not violate the Double Jeopardy Clause because commission of a fraudulent act in a gaming establishment, theft, and grand larceny are unique and separate charges requiring proof of different elements. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (explaining that, to determine whether a defendant is punished for the same offense twice, the court looks at "whether each provision requires proof of a fact which the other does not"); *see also Jackson*, 128 Nev. at 604-05, 291 P.3d at 1278 (citing the *Blockburger* test approvingly); *compare* NRS 465.070(3) (listing the

elements of a fraudulent act in a gaming establishment), *with* NRS 205.0832(1)(c) (defining theft) *and* NRS 205.220(1)(a) (providing the elements of grand larceny). Thus, Lesnick's convictions do not violate the Double Jeopardy Clause.

A rational trier of fact could find sufficient evidence supports the verdict

Lesnick next argues that insufficient evidence supports his convictions because a reasonable juror could not find that he had an intent to defraud or steal. To determine the sufficiency of evidence, this court considers "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). We conclude that sufficient evidence supports Lesnick's convictions.

As to his convictions for commission of a fraudulent act in a gaming establishment and theft, we conclude that a reasonable juror could find that Lesnick intended to defraud Wynn and that he had the specific intent to deprive the victim of his ticket. *See* NRS 465.070(3) (requiring an intent to defraud); *see also* NRS 205.0832(1) (requiring a specific intent to deprive the victim of his property). The State presented evidence, including video evidence, that Winters turned away from the machine in question after it "locked up" due to his jackpot win. Winters turned to another machine he was playing as he awaited an attendant. Within minutes of Winters turning away, Lesnick approached the machine in question, did not place a wager in the gambling machine, but he inserted two tickets that were rejected, and then ultimately pressed the "cash-out" button. Lesnick does not refute the video evidence and instead relies solely on the fact that

his defense of abandonment raises reasonable doubt. However, with Lesnick's repeated statements to the arresting gaming agent that he knew the ticket did not belong to him, a reasonable juror could find that he knew he was not entitled to the money on the gambling machine yet pressed the cash-out button to obtain the leftover winnings on it. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("[I]t is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses."); *see also Desai v. State*, 133 Nev. 339, 345, 398 P.3d 889, 894 (2017) (explaining that intent is a question for the jury). Likewise, a reasonable juror could determine that Lesnick intentionally took something of value knowing that it was owned by another when he pressed "cash-out" on the machine without first placing a wager. Because Lesnick knew the $3,000 ticket did not belong to him and made no attempts to return it to anyone, a reasonable juror could determine Lesnick did not truly believe the property was abandoned and therefore had the requisite specific intent to deprive the victim of his property. *See* NRS 193.200 ("Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.").

We also conclude that sufficient evidence supports Lesnick's grand larceny conviction. A reasonable juror could find that Lesnick made a material misrepresentation when he presented the ticket to the main cage, even though he did not win it, and presented his identification card to claim it as his own. *See* NRS 205.0832(1)(c) (requiring a material misrepresentation). All of the circumstantial evidence indicates that Lesnick presented himself as someone who was the rightful owner of the $3,000 ticket when in fact, he was not; there is no requirement that Lesnick

affirmatively state that he won the ticket to support a finding that he made a material misrepresentation. *See* NRS 205.0832(1)(c) (defining "material misrepresentation"); *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (explaining that "circumstantial evidence alone may sustain a conviction").

The district court did not violate Lesnick's Confrontation Clause rights by allowing Winters to testify by video

Lesnick next argues that the district court violated his Sixth Amendment confrontation rights by permitting Winters to testify at trial remotely. *See* U.S. Const. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *see also Chavez v. State*, 125 Nev. 328, 342, 213 P.3d 476, 486 (2009) (explaining that the Confrontation Clause also "guarantees the opportunity to cross-examine" witnesses). Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. *Chavez*, 125 Nev. at 339, 213 P.3d at 484.

The State originally filed a motion to permit video testimony at a trial setting, explaining that Winters was 64 years old, lived in Missouri, had not traveled since January 2020, had concerns about COVID, and was beyond its subpoena power. The district court deferred ruling on the motion due to the trial being continued. At the time of the calendar call for the January 2022 trial, the State renewed its motion, indicating that despite its efforts to have Winters present for trial, he was again unwilling to travel for the same reasons as well as the recent COVID omicron variant surge. The court questioned the State about Winters' availability on the first day of trial and learned that his status remained the same. The court noted that the omicron surge had led to a very high level of COVID infections and

that there were no foreseeable changes likely in Winters' availability and therefore, allowed him to testify by video. We conclude that the district court made sufficient findings to justify permitting Winters to testify via live two-way video. *See Brown v. State*, 138 Nev., Adv. Op. 44, 512 P.3d 269, 278 (2022) (explaining that the district court must make findings as to "whether the denial of an in-person cross-examination [i]s necessary to further an important public policy"). Furthermore, Winters testified under oath, was subject to cross-examination, and the jury had the opportunity to observe his behavior and assess his credibility. *See Lipsitz v. State*, 135 Nev. 131, 138, 442 P.3d 138, 144 (2019) (approving of the use of two-way video testimony and concluding that the reliability of such testimony is assured when it "allows the witness to swear under oath, the defendant can cross-examine the witness, and the court and jury have the ability to observe the witness's demeanor and judge her credibility").

Lesnick also fails to identify any alleged prejudice from allowing Winters to testify remotely, including how such video testimony hindered his ability to cross-examine him. *See Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."). Aside from Lesnick's contention that the trial transcript noted that Winters made certain "indiscernible" comments, there is no indication in the record that those present in the courtroom could not hear Winters. Thus, the record demonstrates that a reasonable juror could understand the testimony as a whole, there was no indication of the testimony being unreliable, and Lesnick's right to confrontation was not violated.

The district court did not abuse its discretion in admitting the preliminary hearing testimony for an unavailable witness

Lesnick also argues that the district court improperly admitted the preliminary hearing testimony of another witness, Jay Kim, at trial. This court generally reviews a district court's decision to admit evidence for an abuse of discretion. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). However, when the district court's admission of evidence implicates constitutional rights, that decision presents a mixed question of law and fact subject to de novo review. *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008), *abrogated on other grounds by State v. Eighth Judicial Dist. Court (Baker)*, 134 Nev. 104, 412 P.3d 18 (2018). Preliminary hearing testimony is admissible where (1) "the defendant was represented by counsel or affirmatively waived his . . . right to counsel" at the preliminary hearing, NRS 171.198(7)(b); (2) the defendant or counsel had the opportunity to cross-examine the witness; and (3) the witness is unavailable for the trial. *Drummond v. State*, 86 Nev. 4, 6-7, 462 P.2d 1012, 1013-14 (1970) (discussing the requirements for such testimony to be admitted in a criminal trial).

At the time of the preliminary hearing, Lesnick was representing himself and while the appendix does not include records of the relevant justice court proceedings, Lesnick does not dispute that he was allowed to represent himself and had the opportunity to cross-examine Kim at that time. *See Baker*, 134 Nev. at 108, 412 P.3d at 22 (concluding that the Confrontation Clause did not prohibit the admission of testimony from a preliminary hearing where the defendant declined the opportunity to cross-examine the witness). And when the State sought to admit Kim's preliminary hearing transcript at trial, Lesnick did not dispute that he affirmatively waived his right to counsel at the preliminary hearing. *See*

generally Faretta v. California, 422 U.S. 806 (1975) (holding that defendants generally have a constitutional right to represent themselves); *cf. People v. Pulley*, 195 N.W.2d 283, 285 (Mich. Ct. App. 1972) (observing that a defendant's choice to waive his right to counsel at the preliminary hearing should not be used to "preclude later use of preliminary examination testimony"). Accordingly, it appears to this court that Lesnick affirmatively waived his right to counsel at the preliminary hearing and had an opportunity to cross-examine Kim.

We also conclude that the district court did not abuse its discretion in finding that the State made reasonable efforts to procure Kim's attendance and that Kim was unavailable. *See* NRS 51.055(1)(d) (providing that a declarant is unavailable if he is "[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the [State] has exercised reasonable diligence but has been unable to procure the declarant's attendance"). Here, although the State intended the witness to testify in person, it learned shortly before trial that Kim was sick with COVID and would not be available within the time frame set for trial. The State demonstrated that it attempted to arrange for the witness to testify via two-way video testimony, as it did with Winters, but that it was unable to do so. *See Hernandez*, 124 Nev. at 650, 188 P.3d at 1135 (explaining that whether the State used "reasonable diligence" to procure a witness is determined under the totality of circumstances). And although Lesnick suggests additional questions the State could have asked to delve further into the witness's diagnosis it is unlikely that the witness would have been available, especially given that the trial was only to last three days. *See id.* at 651, 188 P.3d at 1135 ("This court . . . has stated that a prosecutor's efforts were reasonable where 'it [was] unlikely that the additional efforts

suggested by [the defendant] would have led to the witnesses' production at trial.'") (alterations in original) (quoting *Quillen v. State*, 112 Nev. 1369, 1376, 929 P.2d 893, 898 (1996)). Accordingly, we conclude that because the State made more than minimal efforts to procure Kim's attendance, the district court did not abuse its discretion in determining that the witness was unavailable and admitting the preliminary hearing transcript.

The district court did not abuse its discretion in issuing jury instructions on abandonment and ignorance of the law and the erroneous instruction regarding the persons liable for crimes was harmless

Lesnick next argues that the district court abused its discretion in issuing certain jury instructions. *See Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) (explaining that this court generally reviews the district court's jury instructions for an abuse of discretion but whether an instruction correctly states the law presents a legal question that is reviewed de novo). Specifically, Lesnick challenges the district court's jury instructions regarding abandonment, ignorance of the law, and persons liable for crimes.

We first conclude that the district court did not err in providing the abandonment and ignorance of the law instructions because they correctly state the law. The record reflects that, while the district court issued the State's proposed abandonment instruction, it also incorporated Lesnick's proposed additional language concerning timing, reasoning that it was more appropriate to give as complete of a definition as possible. Although Lesnick contends that court's instruction did not "encapsulate the theory of defense," he fails to identify how the instruction inaccurately defines abandonment. *See Goldfield Consol. Milling & Transp. Co. v. Old Sandstrom Annex Gold Mining Co.*, 38 Nev. 426, 440-41, 150 P. 313, 317 (1915) (defining abandonment). Despite initial objections to the ignorance

of the law instruction, Lesnick ultimately agreed to its inclusion with the full abandonment definition.

We also conclude, however, that the district court abused its discretion by providing the persons liable for crime instruction, as Lesnick did not raise a defense that he was not subject to Nevada laws as an Arizona resident. While the district court has a "duty to refrain from [giving jury instructions] which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury," *Gonzalez v. State*, 131 Nev. 991, 997, 366 P.3d 680, 684 (2015), the error was harmless because the instruction was nonetheless an accurate statement of law and it is clear beyond a reasonable doubt that a rational jury would have found Lesnick guilty absent the error. *See Wegner v. State*, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *see also* NRS 178.598 (defining harmless error).

The single error on jury instructions does not warrant reversal

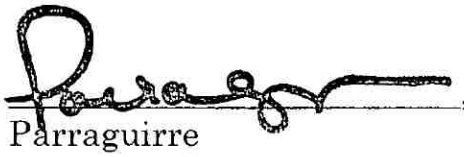
Finally, Lesnick argues that cumulative error warrants relief. *See Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002) ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."); *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating that the court considers three factors to determine whether the cumulative effect of errors violated a defendant's right to a fair trial: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged"). Because the district court only erred in giving the persons liable for crimes jury instruction, but that the error was harmless, we

conclude that there is also no cumulative error warranting reversal.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

cc: Hon. Tierra Danielle Jones, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]In light of our conclusions, we need not address the parties' other arguments.