IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTONIO HUSTON AK/A ANTONIO HOUSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87991-COA

ORDER OF AFFIRMANCE

Antonio Huston appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, robbery, robbery with the use of a deadly weapon, attempted robbery, two counts of burglary of a business, burglary of a business while in possession of a deadly weapon, and attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Between November 25 and December 3, 2022, a group of up to five individuals burglarized three separate pawn stores and robbed or attempted to rob the people inside.[1] The incidents started on Black Friday when five people ran into the Super Pawn on South Decatur in Las Vegas wearing masks, hoodies, and gloves and started smashing the jewelry display cases. They stole all the jewelry inside and were seen leaving the store in two getaway cars: a white Chevy SUV and a gold Lincoln sedan. Both cars had drivers waiting during the robbery.

Three days later, three people wearing masks, hoodies, and gloves entered the EZ Pawn on West Sunset Road in Las Vegas and tried

[1]We recount the facts only as necessary for our disposition.

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breaking the jewelry display cases. But they were unsuccessful and left the store shortly afterwards in a white SUV and a gold Lincoln sedan. The next day, a police traffic patrol officer pulled over Huston in a gold Lincoln MKZ in a standard traffic stop. During the stop, the officer's bodycam recorded footage of Huston using his cell phone. The officer asked Huston for his phone number, and Huston complied. The officer then released Huston.

On December 3, three assailants entered the EZ Pawn on South Valley View in Las Vegas wearing masks, hoodies, gloves, and this time, two were holding guns: a pistol-grip shotgun and a revolver. They told the employees to get on the ground, and then told one employee to open the jewelry case. One robber then shoveled the jewelry into his backpack.

A man and a woman walked in during the robbery, and one of the armed robbers ordered them to get on the ground next to the employees. When they complied, the robber tried to take the woman's purse, but she resisted and he was ultimately unsuccessful. Concurrently, the other armed robber pointed his firearm at all the employees and customers on the floor making sure they did not move, and the third robber intermittently told everyone to get and stay on the ground. The robbers left on foot shortly afterwards, but not before shoveling as much of the jewelry into the backpack as possible. The manager locked the door and called the police after they left.

The police consolidated the three robberies into one investigation, and they found a palm print of Armani Doss on one of the loot bags left behind during the first robbery. Their investigation of him led to Huston and his social media account entitled "TruStory." After the police investigated the ownership of the account and found multiple pictures of Huston on it, they matched the IP address of the account with the phone

number recorded by the traffic patrol officer and concluded that the account belonged to Huston.

The police subsequentiy executed a search warrant permitting them to obtain information from Huston's social media accounts and his phone data. They found multiple messages between him and others planning the various robberies. The police also found that Huston's cell phone was in the vicinity of the pawn stores during the times of all three robberies according to cell phone tower pings. That data allowed the police to obtain another warrant to search Huston's apartment, where they found a pistol-grip shotgun within a closet.

The State charged Huston with eight counts: (1) conspiracy to commit robbery, (2) burglary of a business, (3) robbery, (4) burglary of a business, (5) attempted robbery, (6) burglary of a business while in possession of a deadly weapon, (7) robbery with the use of a deadly weapon, and (8) attempted robbery with the use of a deadly weapon. The State alleged that Huston was criminally liable by directly committing the charged acts, by aiding or abetting others, or by participating in a conspiracy.

This matter proceeded to a jury trial. During the trial, the State presented a still-shot of a video Huston posted on his social media, depicting the revolver apparently used in the robbery. Both parties agreed the video would not be offered and instead would use a still-shot of the video at a specific time. However, the photo also included a depiction of multiple firearms and a hand that was not Huston's. Both parties agreed that those items were not relevant to the case, and the State offered to sanitize the photo leaving only the revolver, and Huston agreed. However, on direct examination, the State asked the detective presenting the photo if "the item that the hand is holding, while not relevant to this investigation, is a

possessory item that is later found at Mr. Huston's home?" It did so to connect the photograph with Huston because an unrelated gun that was sanitized in the photo was found in Huston's apartment. The anticipated affirmative answer to the question would establish a connection between Huston and the picture, and thus, between Huston and the revolver.

The witness responded, "yes," and Huston immediately asked for a bench conference, arguing that the question de-sanitized the photo and essentially asking that the line of questioning be stopped. The court agreed and ordered the State to stop the line of inquiry. Huston asked for a mistrial the following morning, arguing that the State's question unduly prejudiced him in front of the jury. Huston never directly objected to the question and answer and the district court did not expressly determine if the question and the answer were unfairly prejudicial. Rather, it simply denied the motion for mistrial, and the photo was admitted into evidence.

Near the end of the trial, the district court and the parties discussed jury instructions that included the reasonable doubt instruction mandated by NRS 175.211[2] and another instruction that is now found in the Nevada Pattern Criminal Jury Instructions.[3] Huston confirmed to the court that he did not have any comments or objections to the instructions nor did he offer any alternative instructions.

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[2]Those instructions included the language that "[reasonable doubt] is not mere possible doubt but is such doubt as would govern or control a person in the more weighty affairs of life." Nevada Pattern Jury Instructions: Criminal § 1.06 (State Bar of Nevada 2023).

[3]This instruction included the language that the jury "will bear in mind it is your duty to be governed in your deliberation . . . with the sole, fixed and steadfast purpose of doing equal and exact justice . . . ." *See* Nevada Pattern Jury Instructions: Criminal § 4.03 (State Bar of Nevada 2023).

The jury found Huston guilty of all eight counts, and Huston pled guilty to a ninth count for ownership or possession of a firearm by a prohibited person that had been severed. The district court adjudicated Huston as a habitual felon because he had multiple prior convictions for robbery. *See* NRS 207.012(1)(b)(2). Per that statute, the court sentenced Huston to concurrent terms totaling life in prison with the possibility of parole after 10 years. This appeal followed.

Huston challenges the sufficiency of the evidence supporting his conviction, arguing that the State failed to prove he participated in the commission of the crimes beyond a reasonable doubt. He also argues that the district court abused its discretion when it denied his motion for a mistrial after the State questioned the witness about the sanitized part of the video still-shot depicting a hand and a revolver. He also challenges the constitutionality of the two aforementioned jury instructions. Finally, he argues his conviction should be reversed based on cumulative error. We address each issue in turn.

Huston first argues there was insufficient evidence to support his conviction because the State failed to prove he was actually involved in the commission of the crimes. Specifically, he argues that: (1) the State never showed that he operated the TruStory account, (2) the State never showed he was the owner of the phone that was used to communicate with the other perpetrators, (3) the State never proved the shotgun was his and not someone else's who placed it in his apartment, and (4) there was no forensic evidence linking him to the crime scenes. The State counters that there was strong circumstantial evidence sufficient for a conviction.

In reviewing the sufficiency of the evidence supporting a conviction, we consider whether the jury, acting reasonably, "could have been convinced of the defendant's guilt beyond a reasonable doubt." *Doyle*

v. State, 112 Nev. 879, 891, 921 P.2d 901, 910 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). "The question for the reviewing court is '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.'" *Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). To that end, it is the jury's function, and not the reviewing court's, "to assess the weight of the evidence and determine the credibility of witnesses." *Doyle*, 112 Nev. at 891-92, 921 P.2d at 910. This court will not disturb the jury's verdict on appeal where substantial evidence supports the verdict. *Mason*, 118 Nev. at 559, 51 P.3d at 524. Circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

"Nevada Law does not distinguish between an aider or abettor to a crime and the actual perpetrator of a crime . . . both are equally culpable." *State v. Plunkett*, 134 Nev. 728, 730, 429 P.3d 936, 938 (2018) (internal citation omitted); *see* NRS 195.020. Every person involved in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission is guilty as a principal. NRS 195.020. "[I]n order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

"A conspiracy is an agreement between two or more persons for an unlawful purpose." *Doyle*, 112 Nev. at 894, 921 P.2d at 911. To be convicted of conspiracy to commit robbery, a person must only enter into an agreement to commit robbery. *Burnside v. State*, 131 Nev. 371, 397, 352

P.3d 627, 645 (2015) (citing NRS 199.490). But "[a] person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator." *Doyle*, 112 Nev. at 894, 921 P.2d at 911. Even though "mere association is insufficient to support a charge of conspiracy," *Sanders v. State*, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994), "proof of even a single overt act may be sufficient to corroborate a defendant's statement and support a conspiracy conviction," *Doyle*, 112 Nev. at 894, 921 P.2d at 911. Further, overt acts need not be proven to establish conspiracy to commit robbery. *See* NRS 200.380; NRS 199.490; *see also Burnside*, 131 Nev. at 397, 352 P.3d at 645.

"[C]onspiracy is usually established by inference from the conduct of the parties." *Rowland v. State*, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002). And a jury may infer a conspiracy from that conduct. *Washington*, 132 Nev. at 664, 376 P.3d at 809. Circumstantial evidence can also be used to prove a conspiracy. *Sena v. State*, 138 Nev. 310, 328, 510 P.3d 731, 749 (2022). And a "coordinated series of acts, in furtherance of the underlying offense, [is] sufficient to infer the existence of an agreement [for a conspiracy conviction]." *Id.* at 327, 510 P.3d at 749 (internal quotation marks omitted).

Here, there was sufficient evidence for a rational jury to find Huston participated in all three criminal events, and thus was guilty of counts one through seven.[4] There was ample circumstantial evidence from which a rational jury could infer that Huston was a member of a conspiracy. First, Huston was recorded driving a gold Lincoln MKZ, which matched the description of the getaway car for the first two robberies. Second, Huston, through his TruStory account, messaged multiple co-conspirators to plan and recruit for the robberies. The lead detective in the case testified that

[4]Huston presents a second argument about count eight and intent that we will address next.

he examined thousands of pictures from the TruStory account and found multiple photos of Huston from different stages of his life, concluding that the account belonged to Huston. Third, after Huston's phone data was ascertained by a traffic patrol officer, the phone's historical location data placed Huston's phone at or near the scene of each of the three robberies at the time of the robberies. Fourth, a pistol-grip shotgun, which matched the description of the one used in the third robbery, was found in Huston's apartment, and the other gun, a revolver, was depicted in a social media video he shared. Lastly, Huston posted a picture of some stolen rings from the robberies on the TruStory account.

Huston challenges the legal significance of this evidence, arguing that the State did not prove beyond a reasonable doubt that he was involved in the crimes. But this court's job is not to reweigh the evidence or make credibility findings. *Doyle*, 112 Nev. at 891-92, 921 P.2d at 910. Rather, it is the jury's function to assess the weight of the evidence when determining guilt, *id.*, and "[t]he jury is at liberty to reject the defendant's version of events," *Cunningham v. State*, 113 Nev. 897, 909, 944 P.2d 261, 268 (1997) (quoting *Porter v. State*, 94 Nev. 142, 146, 576 P.2d 275, 278 (1978)).

Here, when looking at the first seven counts, the State presented sufficient evidence for a rational jury to find that Huston participated in all three criminal events. The evidence in the record places Huston at all three locations, either directly taking part in the robberies or acting as a getaway driver, and through circumstantial evidence, shows that he participated in a conspiracy to commit robbery. Thus, there was sufficient evidence for a rational jury to find Huston guilty of counts one through seven.

In addition, Huston specifically challenges count eight, which was the attempted robbery of a customer during the December 3 robbery. He argues that attempted robbery is a specific intent crime, and to secure a conviction on a theory of co-conspirator liability, the State must show the defendant had the specific intent to commit that specific crime. Huston asserts that the State failed to prove he had the specific intent to rob the woman specifically, and thus, failed to prove every element of the crime beyond a reasonable doubt.

Attempted robbery is a specific intent crime. *See Curry v. State*, 106 Nev. 317, 319, 792 P.2d 396, 397 (1990). To prove a specific intent crime with co-conspirator liability, the State must show that the defendant actually possessed the requisite statutory intent of the crime. *Bolden v. State*, 121 Nev. 908, 922, 124 P.3d 191, 200-01 (2005). A natural and probable consequence of the object of the conspiracy is insufficient. *Id.* at 922, 124 P.3d at 200. But co-conspirator liability for specific intent crimes can be proven by circumstantial evidence. *See Washington*, 132 Nev. at 661, 376 P.3d at 807; *see also Gaitor v. State*, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990), *overruled on other grounds by Barone v. State*, 109 Nev. 1168, 1171, 866 P.2d 291, 292 (1993). Further, a "jury [can] infer that an agreement was formed" between defendants during a robbery if they acted in concert. *Thomas v. State*, 114 Nev. 1127, 1143-44, 967 P.2d 1111, 1122 (1998).

Here, as mentioned above, there is sufficient evidence to place Huston at the scene of the December 3 robbery. Further, there is circumstantial evidence placing him inside the pawn store as one of the three robbers. First, this robbery was different from the two prior robberies because the first two were "smash-and-grabs" without any interaction with the people inside the stores. Second, this robbery included the co-

conspirators ordering the people inside to open the jewelry cases and everyone else to get on the floor. Third, no getaway cars were observed as the three robbers apparently left on foot. Additionally, the shotgun that matched the one used in the robbery was found in a closet in Huston's apartment; and the video he shared included the apparent revolver used in the attempted robbery of the female customer. Thus, a reasonable jury could find that Huston was one of the individuals actively participating in the robbery inside of the EZ Pawn.

Regarding the attempted robbery, there is additional evidence from which a rational jury could infer, once it was established that Huston was one of the robbers in the pawn store, that he had the specific intent to commit attempted robbery. Initially, when the woman entered the store during the robbery, one of the armed robbers holding a revolver directed her to get on the floor and tried to take her purse. At the same time, the other armed robber was pointing the shotgun at everyone on the floor making sure they did not move. And the third robber repeatedly yelled at everyone to get on or stay on the ground. Thus, a rational jury could infer that Huston either aided and abetted or conspired with the other two robbers to attempt to rob the woman, showing his specific intent to satisfy count eight. Thus, there was sufficient evidence to find Huston guilty of count eight, and his sufficiency-of-the-evidence challenge fails.

Next, Huston argues that the district court abused its discretion by denying his motion for mistrial after the State asked a question about the content of a photograph that had previously been sanitized by the State. The State responds that its question never prejudiced Huston, and thus the court did not abuse its discretion when it denied Huston's motion for a mistrial. In the alternative, the State argues that if the court erred, then that error was harmless because it did not prejudice Huston.

The trial court has sound discretion to deny a motion for mistrial, and "[t]he trial court's determination will not be disturbed on appeal [absent] a clear showing of abuse." *Smith v. State*, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994). A defendant's motion for a mistrial must demonstrate prejudice that prevents the defendant from receiving a fair trial. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). When a district court denies a motion for a mistrial based on an unfairly prejudicial statement, "the appellant must 'prove that the inadvertent statement was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury.'" *Parker v. State*, 109 Nev. 383, 388, 849 P.2d 1062, 1065 (1993) (quoting *Allen v. State*, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983)).

"The trial court is justified in denying a motion for a mistrial when a witness inadvertently makes reference to other unrelated criminal activity as long as the testimony is not clearly and enduringly prejudicial and has not been solicited by the prosecution." *Allen v. State*, 99 Nev. 485, 490-91, 665 P.2d 238, 242 (1983). However, when "a prosecutor solicits the prejudicial testimony, denial of a defendant's motion for a mistrial will be deemed harmless error where the prejudicial effect of the statement is not strong and where there is otherwise strong evidence of [the] defendant's guilt." *Parker*, 109 Nev. at 389, 849 P.2d at 1066; *see also Dickey v. State*, 140 Nev., Adv. Op. 2, 540 P.3d 442, 450 (2024) (stating that a "district court's error in admitting [testimony] to prove identity was harmless given the quantity of evidence supporting the state's case").

Huston does not show how the State's question or the witness's answer prejudiced him. The reason why the photo was sanitized was to obscure the guns unrelated to the robbery. The State did not reference that the items in the photo were guns when it asked the question. In fact, Huston and the State elicited testimony that the hand was not Huston's.

The question only established that undescribed items in the picture were found at Huston's home, and the State did so to tie him to the picture, which contained the revolver apparently used in the third robbery. And it is unclear how the question prejudiced Huston because no testimony regarding another crime or act was elicited from that question. Thus, if there was any prejudicial effect, it was minimal, and the district court did not abuse its discretion when it denied Huston's motion for a mistrial. *See generally* NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice.").

But even if the denial was error, Huston has not shown that the question and answer were unfairly prejudicial such that a mistrial was necessary. *See Parker*, 109 Nev. at 389, 849 P.2d at 1066; *cf.* NRS 47.040(1) (providing that an error may not be predicated upon a ruling admitting evidence unless a substantial right of the party is affected and a timely objection or motion to strike is made). To reiterate, the prejudicial nature of the question was minimal because it did not imply that Huston committed any other crimes, nor did it reveal the photo's sanitized content. And, as detailed, there was overwhelming evidence of Huston's guilt, even absent the photograph. *See Dickey*, 140 Nev., Adv. Op. 2, 540 P.3d at 450. Therefore, if there was any error, it was harmless, and Huston's challenge fails. *See Mclellan v. State*, 124 Nev. 263, 270, 182 P.3d 106, 111 (2008) (holding that an error is harmless unless it "had [a] substantial and injurious effect or influence in determining the jury's verdict" (internal quotation marks omitted)); NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Next, Huston argues that the jury instructions provided by the court amounted to plain error. He specifically points to the "more weighty

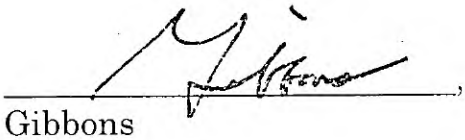
affairs of life" jury instruction and the "equal and exact justice" jury instruction, arguing that they lessened the burden on the State to prove a crime beyond a reasonable doubt. Huston did not object to the instructions, and thus, he is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, an appellant must show there was an error, the error was plain or clear under current law, and the error affected the appellant's substantial rights. *Id.* at 50, 412 P.3d at 48.

However, this is a settled issue. Nevada law mandates this exact reasonable doubt jury instruction, and "[n]o other definition of reasonable doubt may be given." NRS 175.211. Further, the Nevada Supreme Court has regularly held that the instruction is constitutional. *See, e.g., Jeremias*, 134 Nev. at 55-56, 412 P.3d at 52; *Garcia v. State*, 121 Nev. 327, 331, 113 P.3d 836, 838 (2005). And the United States Court of Appeals for the Ninth Circuit has held that the reasonable doubt jury instruction does not violate constitutional standards. *Ramirez v. Hatcher*, 136 F.3d 1209, 1211-13 (9th Cir. 1998). Likewise, although not mandated by statute, the supreme court has upheld the "equal and exact justice" language as constitutional. *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998). In light of the foregoing, Huston fails to demonstrate the instructions amounted to plain error.

Lastly, Huston argues that his conviction should be reversed because of cumulative error. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)). Here, even assuming there was error stemming from the questioning concerning the photograph, "one error cannot cumulate."

Carroll v. State, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016). Thus, we deny Huston's cumulative error challenge. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[5]



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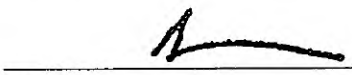

_____, J.
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_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Marchese Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[5]Insofar as Huston has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.