IN THE SUPREME COURT OF THE STATE OF NEVADA

GIOVANNI NIEVES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40094

FILED

SEP 0 4 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted burglary and one count of possession of burglary tools. The district court sentenced appellant to a prison term of 12 to 30 months for attempted burglary, and to a concurrent term of one year in the Clark County Detention Center for possession of burglary tools.

Appellant first contends that the district court erred by refusing to instruct the jury that trespass is a lesser-included offense of burglary, and by not including trespass on the verdict form. This court has specifically held, however, that "the 'entry onto land' form of trespass is not a lesser included offense of burglary."[1] We therefore conclude that the district court did not err.

Moreover, in the instant case, the district court did provide the jury with a definition of trespass, and defense counsel argued, during closing arguments that the evidence presented against appellant

[1]Block v. State, 95 Nev. 933, 937, 604 P.2d 338, 341 (1979).

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amounted to a trespass and was not attempted burglary. The defense was therefore able to present its theory of the case, and the jury was appropriately instructed.

Appellant next contends that his right to due process was violated because Count II of the information was impermissibly vague. Count II charged appellant with possession of burglary tools. Appellant argues that the information was vague because it did not state what crime appellant intended to commit with the burglary tools.

NRS 205.080(1) defines the crime of possession of burglary tools as having possession of any tool "designed or commonly used for the commission of burglary, invasion of the home, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime."

Due process requires that an information be: "a plain, concise and definite written statement of the essential facts constituting the offense charged."[2] In the instant case, the information alleged that appellant possessed gloves, pieces of a spark plug, and a pry bar under circumstances evincing an intent to use the items in the commission of a crime. We conclude that the information is sufficient, and that it was not necessary for the State to specifically allege what crime appellant intended to commit, in light of the fact that appellant was also charged with attempted burglary.

Appellant next contends that his right to a speedy trial was violated. NRS 178.556(1) provides, in part: "If a defendant whose trial

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[2]NRS 173.075(1).

has not been postponed upon his application is not brought to trial within 60 days after the arraignment on the . . . information, the district court may dismiss the . . . information." Appellant initially invoked the 60-day rule at his arraignment on December 17, 2001. Trial finally commenced on May 21, 2001.

In determining whether a defendant's speedy trial rights have been violated, this court must consider four factors: "(1) [l]ength of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right [to speedy trial]; and (4) prejudice to the defendant."[3] Considering these factors in the instant case, we first note that the trial was held 165 days after appellant was arraigned, and the delay was therefore not particularly long.[4] Second, none of the continuances was attributable to the State, but rather were the result of either court congestion or the actions of appellant. Third, although appellant initially invoked the 60-day rule, he subsequently indicated that he wished to waive the rule. Finally, appellant does not allege prejudice with any particularity other than a general statement that the memories of witnesses might be diminished, witnesses might be more difficult to find, or that it might be more difficult to contradict the State's allegation that appellant made incriminating statements. We therefore conclude that the district court

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[3]Barker v. Wingo, 407 U.S. 514, 530 (1972).

[4]Cf. Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (holding that a delay of two and a half years did not deprive defendant to his right to a speedy trial); Furbay v. State, 116 Nev. 481, 998 P.2d 553 (2000) (holding that a delay of five and a half years did not violate defendant's speedy-trial right).

was not required to dismiss the information because of the delay, and that appellant's speedy trial right was not violated.

Appellant also contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[5]

In particular, we note that appellant was discovered in the victim's backyard minutes after the victim called 911. Appellant falsely identified himself to police, was in possession of burglary tools, and initially admitted entering the yard with the intent of breaking into the victim's home.

The jury could reasonably infer from the evidence presented that appellant was guilty of attempted burglary. 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.[6]

Appellant next contends that the district court erred by not giving a limiting instruction regarding evidence of appellant's drug use. The failure to give the instruction is subject to a harmless error analysis.[7] In light of the evidence against appellant, we conclude that the failure to

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[5]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[7]Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1130-31 (2001).

give a limiting instruction did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[8]

Appellant also argues that the prosecutor misstated the law during closing argument and that the jury was improperly instructed. As to the allegation of prosecutorial misconduct, we note that appellant objected to only one comment made by the prosecutor. Appellant objected when the prosecutor informed the jury that appellant could be convicted of attempted burglary if the jury found that appellant entered the backyard with the intent to commit burglary. Although this is not entirely accurate, in light of the fact that the jury was properly instructed regarding the elements of attempted burglary, we conclude that the prosecutor's statement was harmless error.[9] The remainder of the comments were not objected to, and we conclude that they do not constitute plain error.[10]

Similarly, we note that appellant did not object to the jury instructions now challenged on appeal. The failure to object to jury instructions precludes appellate review.[11] Moreover, even if we were to consider the instructions on appeal, we conclude that the jury was properly instructed.

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[8]Id. at 732, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[9]See Quillen v. State, 112 Nev. 1369, 1382-83, 929 P.2d 893, 901-02 (1996) (holding that proper jury instruction rendered comments by prosecutor harmless).

[10]See Leonard v. State, 117 Nev. 53, 82, 17 P.3d 397, 415 (2001).

[11]McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975).

Finally, appellant contends that cumulative error warrants reversal. We have concluded, however, that there was no reversible error at trial, and this argument is therefore without merit.

Having considered all of appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Nancy M. Saitta, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk