IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40911

FILED

MAR 0 1 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant to a prison term of 24 to 72 months.

Appellant first contends that the district court erred by refusing to give a proffered jury instruction. Specifically, appellant argues that the jury should have been instructed regarding the crime of theft because theft is a lesser included offense of robbery. We disagree with appellant's contention.

This court has previously held that an offense is a lesser included offense only if "the elements of the lesser offense are an entirely included subset of the elements of the charged offense."[1] In this case, appellant was charged with robbery, which is a taking of personal property from another, "against his will, by means of force or violence or fear of injury".[2] The proffered instruction contained a definition of theft taken from NRS 205.0832(1)(c), which provides that a person commits theft if that person knowingly "[o]btains real, personal or intangible property or the services of another person by a material misrepresentation

[1]Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (citing Schmuck v. United States, 489 U.S. 705, 716 (1989)).

[2]See NRS 200.380(1).

with intent to deprive that person of the property or services." The elements of theft as set forth in the proffered instruction are not an entirely included subset of the elements of robbery, because theft requires a material misrepresentation, which is not an element of robbery. We therefore conclude that the district court did not err by refusing the instruction.

Appellant next contends that the district court erred by allowing a police officer to testify that appellant was belligerent and refused to answer questions when he was arrested. Specifically, appellant argues that the district court should have conducted a Petrocelli hearing.[3] Even assuming that the district court should have conducted a Petrocelli hearing, we conclude that appellant would have been convicted even if the officer had not been allowed to testify as to appellant's behavior when he was arrested.

In particular, we note that the victim testified that appellant approached him while he was waiting at a bus stop. The victim further testified that appellant brandished a rock, made verbal threats, and ripped a necklace from the victim's neck before fleeing. One of the responding police officers testified that a rock and a broken silver chain were recovered from appellant. We therefore conclude that any error is not reversible, as it was harmless beyond a reasonable doubt.[4]

Finally, appellant contends that the district court erred by allowing a reference to appellant's potential gang association. Specifically, appellant argues that the district court should have declared a mistrial when the victim testified that while the appellant was brandishing a rock

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[3]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[4]See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

and taking the victim's necklace, the appellant said he was a member of the Bloods. Because counsel for appellant failed to object, appellant must now show that the error was plain and prejudicial.[5] We conclude that even assuming admission of the testimony was error, it was not prejudicial.

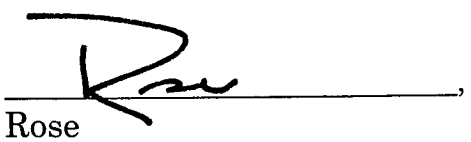
First, there was never any evidence that appellant was actually a member of a gang. It is clear from the context of the testimony that appellant's statement was made to intimidate the victim, and was therefore relevant to prove one of the elements of robbery.

Second, in light of the overwhelming evidence of appellant's guilt, as discussed above, the brief reference to appellant's statement that he was a Blood was harmless beyond a reasonable doubt.[6]

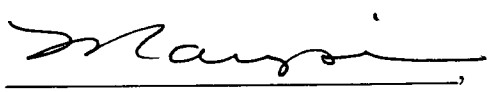
Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Shearing



_____, J.
Rose



_____, J.
Maupin

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[5]Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1130 (2001).

[6]See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (holding that error is prejudicial if the appellant would not have been found guilty in the absence of the error).

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Sciscento & Montgomery
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk