

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41985

FILED

MAR 01 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. The district court sentenced appellant Jimmy White to a prison term of 12 to 30 months and then suspended execution of the sentence, placing White on probation for a time period not to exceed 5 years.

White was charged with burglary for attempting to steal the wallet of a hotel patron at the Imperial Palace Hotel and Casino. The victim testified at trial that, while asleep in his hotel room, he was awakened by a noise and observed a man, he later identified as White, tearing the Velcro on his shorts' pocket to get his wallet. White fled, and the victim immediately called hotel security with a description of the perpetrator. Hotel security apprehended White in the lobby area of the hotel and, eventually, the victim positively identified him as the perpetrator of the burglary.

Las Vegas Metropolitan Police Officer Ryan Cook was dispatched to the hotel. At trial, Officer Cook testified that, during the course of a police interview, White gave a voluntary statement, explaining that he was homeless, that he entered the hotel room because the door was ajar, and that he was looking for something of value to take and sell

in order to survive on the streets. A videotape of the police interview, as well as White's signature on a written police statement¹ were admitted into evidence. During Officer Cook's cross-examination, defense counsel asked him if he remembered whether White had a hotel key in his pocket; Officer Cook responded: "I do not remember. I remember that he was prior trespassed [sic] to the hotel." Defense counsel immediately objected, and thereafter, outside of the presence of the jury, requested a mistrial based on Officer Cook's reference to the fact that White had previously trespassed on hotel premises. According to defense counsel, the reference to the prior trespass completely refuted White's defense theory of the case: that he was a first-time visitor in Las Vegas who was misidentified as the perpetrator of the burglary.

The State conceded that the prior trespass incident was not relevant, but noted that the testimony was an unsolicited response from a question posed by defense counsel. The State also noted that it had no intention of introducing evidence of White's prior trespass and suggested that the district court admonish the jury to disregard the statement in its entirety. After further discussion with counsel on the adequacy of that admonishment, the parties agreed to a different admonishment, namely, the district court informed the jury:

[B]ased on the testimony of Officer Cook regarding a trespass action by the Imperial Palace as to the defendant out of an abundance of caution we delved a little further into that outside of your presence. It appears that Mr. White was actually

¹White gave an oral statement to Officer Cook and signed the written statement, but Officer Cook wrote out White's statement because White was illiterate.

given a trespass notification by the Imperial Palace on the date prior to Officer Cook's arrival.

White's sole contention on appeal is that the district court erred in denying his motion for a mistrial based on the admission of Officer Cook's testimony about the trespass.² Specifically, White argues that the district court should have conducted a Petrocelli hearing³ and considered the admissibility of the evidence in light of the three factors set forth in Tinch v. State.⁴ We conclude that the district court did not abuse its discretion in denying White's motion for a mistrial.⁵

In this case, the district court did not err in failing to conduct a Petrocelli hearing or in failing to consider the Tinch factors because the State did not seek to introduce testimony about White's prior trespass and, in fact, conceded that it was irrelevant. Moreover, we note that Officer Cook's testimony about the prior trespass was not solicited by the prosecutor, but instead was an inadvertent remark made on cross-examination. When an appellant challenges a district court's denial of a motion for mistrial based on an inadvertent remark by a witness, the appellant must "prove that the inadvertent statement was so prejudicial

²In agreeing to the modified admonishment, defense counsel preserved the right to appeal the district court's denial of the motion for a mistrial.

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


⁴113 Nev. 1170, 946 P.2d 1061 (1997); see also Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995), overruled on other grounds by State v. District Court, 114 Nev. 739, 964 P.2d 48 (1998).

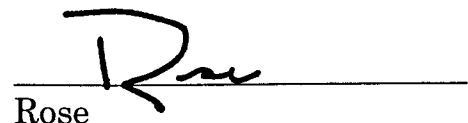
⁵See Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980) (recognizing that the trial court's ruling on a motion for a mistrial "will not be disturbed on appeal in the absence of a clear showing of abuse").


as to be unsusceptible to neutralizing by an admonition to the jury."⁶ Here, the jury was admonished that the "prior trespass" arose when White was detained in the investigation of the burglary at issue. There is no indication that the jury disregarded that admonishment.⁷ Moreover, in light of the overwhelming evidence presented of White's guilt, including the eyewitness identification and White's confession, we conclude that the testimony was not so prejudicial that a mistrial was necessary. Accordingly, reversal of White's conviction is not warranted.

Having considered White's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

⁶Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983).

⁷See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998); see also Owens, 96 Nev. at 883, 620 P.2d at 1238 (holding that any indication of defendant's previous criminal activity based on witness's testimony was cured by trial court's immediate admonition to jury).

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