

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD BERNARD CLAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42271

FILED

MAY 11 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 each of robbery and burglary. The district court adjudicated appellant Edward Bernard Clay a habitual criminal and sentenced him to serve two concurrent prison terms of 10 to 25 years.

Clay first contends that there was insufficient evidence presented at trial to support the jury's finding that he committed robbery. Specifically, Clay argues that there was no evidence presented that he used force or fear to retain possession of the property because he did not threaten or struggle with the clerk. In support of his contention, Clay relies on Barkley v. State.¹ 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.²

In particular, a convenience store clerk testified that Clay grabbed a bag of cigarettes on the counter without paying for them and

¹114 Nev. 635, 637, 958 P.2d 1218, 1219 (1998) (holding that sufficient evidence of robbery existed where defendant used force to retain possession of unlawfully taken property).

²See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

refused the clerk's request to give the bag back. The clerk described how she reached over the counter and grabbed Clay's shirt in an attempt to grab the bag, then Clay and the clerk "struggled for a minute," and Clay "snatched" or "jerked" away from the clerk's grasp and walked out of the store. Although Clay did not strike the clerk like the defendant in Barkley, the jury could reasonably infer from the evidence presented that Clay used force to retain the unlawfully taken property by struggling with the clerk to retain possession of the cigarettes.³ 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.⁴

In a related argument, Clay contends that there was insufficient evidence presented at trial to support the jury's finding that he committed burglary. Specifically, Clay argues that there was no evidence presented that he had the intent to steal at the time he entered the convenience store because: (1) he had enough money in his wallet to purchase the cigarettes and waited at the counter to purchase them while the clerk was in the back of the store; and (2) he flirted with the clerk in an attempt to obtain a discount on the cigarettes prior to taking them. Our review of the record on appeal, however, reveals sufficient evidence to

³See NRS 200.380(1)(c).

⁴See 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).

establish guilt beyond a reasonable doubt as determined by a rational trier of fact.⁵

In particular, Las Vegas Metropolitan Police Officer Matthew Vorce testified that, after he arrested and Mirandized Clay, Clay agreed to discuss the robbery with him. Clay told Officer Vorce that, when he drove into the convenience store parking lot, Clay observed that there was only one female clerk working and decided that he would steal a few cartons of cigarettes in order to repay a debt owed to a friend. The jury could reasonably infer from Officer Vorce's testimony that Clay entered the store with the intent to commit a larceny, specifically, taking the cigarettes without paying for them.⁶ Again, 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.

Finally, citing to Green v. State,⁷ Clay contends that reversal of his conviction is warranted because the district court gave improper "acquittal first" jury instructions. While acknowledging that he failed to object to the improper instructions, Clay argues that giving the erroneous transition instructions in his case amounted to plain error in light of the fact that the evidence was close and that "at least one of the jurors did not want to convict [Clay] of at least Robbery." After considering the record on

⁵See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

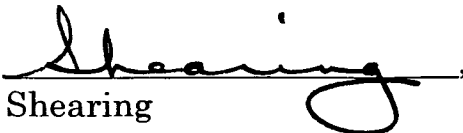
⁶NRS 205.060(1).

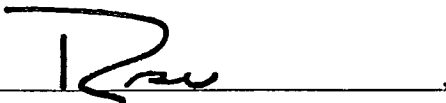
⁷119 Nev. ___, 80 P.3d 93 (2003) (adopting the "unable to agree" transitional jury instruction, and holding that that the district court did not commit plain error by giving the "acquittal first" instruction).

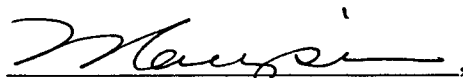
appeal, we conclude that error alleged was not plain, and therefore Clay is not entitled to relief.

Having considered Clay's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

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