IN THE SUPREME COURT OF THE STATE OF NEVADA

LAVONNA WALLACE A/K/A LAVONNA HULL WALLACE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51904

FILED

JUL 19 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING PRIOR ORDER, REINSTATING APPEAL, AFFIRMING IN PART AND REVERSING IN PART

Appellant Lavonna Wallace appeals from a judgment of conviction, pursuant to a jury verdict,[1] of eight counts of burglary, eight counts of conspiracy to use a cheating device, twelve counts of possession of a cheating device and fifteen counts of use of a cheating device. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. After considering and granting the petition for rehearing in the appeal of Wallace's codefendant, see Docket No. 52235 (Order Granting Petition for Rehearing, Reinstating Appeal, and Affirming in Part and Reversing in Part, May 10, 2010), we directed the State to show cause why the dispositional order in this appeal should not be vacated and a new order entered consistent with the dispositional order in Docket No. 52235. We now vacate our prior order, reinstate this appeal, and issue this order in place of our prior order.

[1]The judgment of conviction incorrectly states that Wallace entered a guilty plea to the charges.

Sufficiency of the evidence

Wallace contends that insufficient evidence was adduced at trial to support any of her convictions for use of a cheating device and conspiracy to use a cheating device, and some of her convictions for possession of a cheating device because (1) the State failed to prove that she used a slot cheating device of any sort; (2) the State failed to prove that she possessed any cheating devices on June 6, 2006, as charged in four counts of the indictment; (3) no evidence was adduced to show that she was not a "duly authorized employee" of the casinos; and (4) no legal evidence was adduced to show that she used or possessed a "light optic" cheating device, even though the indictment specifically alleged she used a "light optic" cheating device. We conclude that insufficient evidence supports several of Wallace's convictions for possession of a cheating device, use of a cheating device, and conspiracy to use a cheating device, but the evidence supporting the remaining convictions, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Wallace was charged with aiding and abetting and conspiring with her daughter and codefendant, Stephanie Balsamo. Ray Gentry, the director of security for the Nevada Landing, Gold Strike, and Whiskey Pete's casinos, described an object he saw in Balsamo's hand on May 30, 2006, as "about the size of a standard coat hanger but much shorter in length," and explained that the device observed was similar to other devices that had been used for cheating in the past. Gentry testified that

he observed Balsamo remove the device from her purse, introduce the device into the payout bin, and subsequently replace the device into her purse. While the device was in the machine, Balsamo's mannerisms were indicative of manipulating a device.

Gentry further testified that on April 6, 2006, April 28, 2006, and May 31, 2006, Balsamo exhibited the same movements that he observed on May 30, 2006. Gentry testified that on each of these dates Balsamo's cigarette pack, or another item, was placed over the payout meter of the machines and that her purse was placed on top of the payout chute. On those same dates, Wallace accompanied Balsamo, played a nearby slot machine and also placed her purse on top of the payout chute. Whenever anything unusual happened on Balsamo's machine, Balsamo left the area and Wallace stayed by the machine while a casino employee serviced it. Wallace cashed out Balsamo's winnings and looked around more than a normal player. Wallace and Balsamo stayed in each casino a relatively short period of time and played in multiple casinos on the same day. The jury watched the casino surveillance video depicting Wallace and Balsamo's activities on the dates and at the machines alleged in the indictment.

Pictures of the devices seized from Wallace's residence on June 5, 2006, and the actual devices seized were admitted into evidence. Gaming Control Agent Olin Pierce testified that ten devices were found in Wallace's bedroom, in a drawer filled with women's clothing. The devices were equipped with batteries and either lights or places for lights to attach. Gentry testified that cheating devices usually contain a battery and a light, with a wire connecting the battery and the light.

We conclude that this evidence is insufficient to support seven of Wallace's convictions for possession of a cheating device, fourteen of Wallace's convictions for use of a cheating device, and seven of her convictions for conspiracy to use a cheating device because it does not indicate that any devices were in Balsamo's possession on the dates and at the machines alleged in those counts. Therefore, we reverse Wallace's convictions for counts 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 30, 31, 42, 43 and 45. However, we conclude that a rational juror could have inferred from the evidence that Wallace—as Balsamo's aider and abettor and co-conspirator—possessed a cheating device as alleged in count 38, see NRS 465.080(4), used a cheating device as alleged in count 40, see NRS 465.080(3)(b), conspired to use a cheating device as alleged in count 37, see NRS 465.080(3)(b); NRS 465.088(2), and possessed cheating devices on or about June 6, 2006, see NRS 465.080(4); Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) ("Unless time is an essential element of the offense charged, there is no absolute requirement that the state allege the exact date, and the state may instead give the approximate date on which it believes the crime occurred."), and was not a "duly authorized employee" of the casinos, see NRS 465.080(4). Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573; Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction.").

Finally, we conclude that the State was not obligated to prove that Wallace used, possessed, and conspired to use a "light optic" cheating

device because "light optic" is not an element of the crimes charged.[2] See NRS 465.080; United States v. Jenkins, 785 F.2d 1387, 1392 (9th Cir. 1986). See also Quiriconi v. State, 95 Nev. 195, 196, 591 P.2d 1133, 1134 (1979); U.S. v. Romero-Avila, 210 F.3d 1017, 1020 (9th Cir. 2000).

Prosecutorial misconduct

Wallace asserts that the prosecutor engaged in three instances of misconduct that denied her of a fair trial. First, she contends that the prosecutor committed misconduct by repeatedly asking leading questions, "suggesting his own answers into his witnesses' testimony," and encouraging witnesses to testify in the manner he wanted rather than based on the truth. We agree that the prosecutor improperly led the State's witnesses on direct examination. See NRS 50.115(3)(a). However, we further conclude that this conduct did not substantially affect the jury's verdict or "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). Thus, no relief is warranted on this ground.

Second, Wallace contends that the prosecutor improperly commented that neither she nor her codefendants offered testimony to "rebut the charges, the items recovered, or to explain what actions they were doing." We conclude that the prosecutor improperly implied that the defense was obligated to prove that the devices were not light optic cheating devices, which had the effect of shifting the burden of proof. See

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[2]We note that Wallace does not contend that the variance between the indictment and the evidence adduced at trial constitutes a due process violation.

Rhyne v. State, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002); Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); Lisle v. State, 113 Nev. 540, 553-54, 937 P.2d 473, 481 (1997). Nevertheless, Wallace did not object to the prosecutor's statements, and we conclude that the error did not affect Wallace's substantial rights and thus does not amount to plain error warranting relief. See Valdez, 124 Nev. at ___, 196 P.3d at 477.

To the extent the statements may also be construed as an improper comment on Wallace's failure to testify, see Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989), we conclude that the remarks did not directly comment on Wallace's failure to take the stand, and the prosecutor did not manifestly intend the comments as a reference to Wallace's failure to testify on her own behalf, see Fernandez v. State, 81 Nev. 276, 278-79, 402 P.2d 38, 39 (1965). Thus, no error occurred in this regard.

Third, Wallace contends that, during closing argument, the prosecutor improperly made opinion statements regarding Balsamo and Wallace's actions. To the extent that any statements which were objected to were improper, we conclude that they did not substantially affect the jury's verdict because the district court sustained the objections and the jury was instructed to disregard any evidence to which an objection was sustained. See Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (the jury is presumed to follow its instructions). To the extent Wallace challenges any statements by the prosecutor that were not objected to at trial, Wallace has not alleged that any of those statements were not reasonable deductions or conclusions from the evidence introduced at trial. Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971). Thus, we

conclude that no plain error occurred and no relief is warranted. See Valdez, 124 Nev. at ___, 196 P.3d at 477.

Impermissible lay opinion testimony

Wallace contends that Gentry, surveillance inspector Edward Cashmon, and Agent Pierce each offered impermissible lay opinion testimony.

We conclude that the district court did not abuse its discretion by determining that Gentry's and Cashmon's testimony describing why Balsamo's and Wallace's behavior was suspicious and indicative of cheating was the proper subject of lay witness opinion testimony. See NRS 50.265; Beattie v. Thomas, 99 Nev. 579, 586, 668 P.2d 268, 273 (1983); Paul v. Imperial Palace, Inc., 111 Nev. 1544, 1550, 908 P.2d 226, 230 (1995).

However, the district court abused its discretion by allowing Pierce to identify items discovered during the execution of a search warrant as "slot cheating devices," because that identification required expert testimony. See Beattie, 99 Nev. at 586, 668 P.2d at 273. And the error was further compounded when the district court referred to Pierce as an expert in the presence of the jury. Nevertheless, in light of the substantial other evidence showing that the items possessed were slot cheating devices, we conclude that this error did not substantially affect the jury's verdict. See Valdez, 124 Nev. at ___, 196 P.3d at 476.

Demonstration video and device

Wallace appears to argue that the demonstration video and the demonstration cheating device were impermissibly shown and published to the jury. We conclude that the district court did not abuse its discretion by allowing the demonstration video and cheating device

because the record indicates that the demonstrations were substantially similar to the actual conditions alleged. See Isbell v. State, 97 Nev. 222, 227, 626 P.2d 1274, 1277-78 (1981).

Cumulative error

Wallace contends that even if the above-discussed errors are individually considered harmless, together they violated her right to a fair trial. Balancing the relevant factors, we conclude that the cumulative effect of the errors did not deny Wallace of a fair trial and no relief is warranted. See Valdez, 124 Nev. at ___, 196 P.3d at 481 (three factors are relevant to cumulative error: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000))).

Overbroad indictment

Finally, Wallace contends that the language of the indictment, as contained in each of the counts alleging use of a cheating device, is overbroad for two reasons.

First, she contends that the jury could have found her guilty of use of a cheating device based on her mere presence. We disagree because the words "by her presence" in the indictment simply describe how Wallace and Balsamo supported, counseled, and encouraged each other in the commission of the crime. Further, even if the language could be interpreted to allow a conviction based on mere presence, jury instruction 22 instructed the jury that "[m]ere presence at the scene of the crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a

knowing spectator." The jury is presumed to have followed this instruction. See Lisle, 113 Nev. at 558, 937 P.2d at 484.

Second, Wallace contends that she does not meet the definition of someone who aids and abets in the commission of a crime. However, Wallace incorrectly asserts that the only legal definition of aiding and abetting is found in NRS 195.030 and NRS 175.291. This court has defined a person who aids and abets the commission of a crime as someone who "aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed." Bolden v. State, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 317 (2008); see also NRS 195.020. Based on this, we conclude that Wallace meets the legal definition of a person who aids and abets in the commission of a crime, and that this contention is without merit.

Having considered Wallace's contentions and concluded that relief is warranted only on the twenty-eight identified convictions for possession of a cheating device, use of a cheating device, and conspiracy to use a cheating device, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART.

/Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge
Flangas Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk