IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE BALSAMO A/K/A STEPHANIE WALLACE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52235

FILED

FEB 01 2010

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of nine counts of burglary, eight counts of conspiracy to use a cheating device, three counts of possession of a cheating device, sixteen counts of use of a cheating device, and one count of possession or sale of a document of personal identifying information to establish false status or identity.[1] Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Sufficiency of the evidence

Appellant Stephanie Balsamo contends that insufficient evidence supports all 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

[1]The jury also convicted Balsamo of nine additional counts of possession of a cheating device. The district court determined that those possession counts merged with the convictions for use of a cheating device and dismissed them in the judgment of conviction.

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, the date charged in three counts of the indictment; and (3) 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 fifteen of Balsamo's convictions for use of a cheating device, but that 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. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Jackson v. Virginia, 443 U.S. 307, 319 (1979).

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 as 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.

Edward Cashmon, surveillance inspector at Fitzgerald's casino, testified that on April 30, 2006, he observed Balsamo block security's view of her slot machine and "cup something in her hand and place something inside her purse." Balsamo's friend testified that she went with Balsamo to Fitzgerald's casino on that date to cheat, Balsamo instructed her to warn of any approaching casino personnel, Balsamo's hand was inside the slot machine, and money was coming out of the machine although non-winning hands were displayed. Further, the jury watched the casino surveillance video depicting Balsamo's activities on each of the dates and at the machines alleged in the indictment.

Pictures of devices seized from Balsamo's home on June 5, 2006, and the actual devices seized were admitted into evidence. Gaming Control Agent Olin Pierce testified that five devices were found in Balsamo's bedroom. The devices were equipped with either lights or places for lights to attach and batteries. Gentry testified 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 fifteen of Balsamo's convictions for use of a cheating device because it does not indicate that any devices were seen in Balsamo's possession on the dates and at the machines alleged to have been cheated in those counts.[2] Therefore, we reverse Balsamo's convictions for counts 4, 8, 9, 13, 17, 18,

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[2]We also conclude that insufficient evidence supports seven of the convictions for possession of a cheating device that were dismissed in the judgment of conviction. Accordingly, the district court may not reinstate counts 3, 7, 12, 16, 24, 29, or 43.

19, 20, 21, 25, 26, 30, 31, 40, and 45. However, we conclude that a rational juror could have inferred from the evidence that Balsamo possessed and used a cheating device as alleged in counts 34, 35, and 38, NRS 465.080(3)(b), conspired to use a cheating device as alleged in the indictment, NRS 465.080(3)(b), NRS 465.088(2), and possessed cheating devices on or about June 6, 2006, NRS 465.080(4), see 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."). 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) ("circumstantial evidence alone may support a conviction"). Although the judgment of conviction dismissed count 38, a possession conviction, pursuant to the merger doctrine, this dismissal was improper because count 38 did not merge with any of Balsamo's use convictions. Accordingly, we reinstate the conviction for count 38 and we remand this appeal for the district court to enter, after issuance of the remittitur, an amended judgment of conviction that imposes a sentence for that count.

We further conclude that the State was not obligated to prove that Balsamo used, possessed, and conspired to use a "light optic" cheating device because "light optic" is not an element of the crimes charged.[3] NRS 465.080; United States v. Jenkins, 785 F.2d 1387, 1392 (9th Cir. 1986).

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[3]We note that Balsamo does not challenge the variance between the indictment and the evidence adduced at trial based on a due process violation.

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

Balsamo 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, Balsamo 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 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, Balsamo did not object to the prosecutor's statements, and we conclude that the error did not affect Balsamo'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 Balsamo argues that the statements were an improper comment on Balsamo'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 Balsamo's failure to take the stand, and the prosecutor did not manifestly intend the comments as a reference to Balsamo'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, Balsamo contends that, during closing argument, the prosecutor improperly made opinion statements regarding Balsamo and her codefendants' 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 Balsamo challenges any statements by the prosecutor that were not objected to at trial, Balsamo has not alleged that any of those statements were not reasonable deductions or conclusions from the evidence introduced at trial. See 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

Balsamo 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 it discretion by determining that Gentry's and Cashmon's testimony describing why Balsamo'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 the 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

Balsamo 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).

Evidence of prior bad acts

Balsamo contends that the district court erred by allowing a Texas Highway Patrol Trooper to testify about his discovery of several devices in Balsamo's possession in 2005 and by admitting photographs of

the items the Trooper discovered. We conclude that although this testimony and evidence may have been marginally relevant to show knowledge, it was not relevant to demonstrate proof of motive, opportunity, intent, preparation, plan, identity, or absence of mistake or accident, and the risk of unfair prejudice outweighed its probative value. See NRS 48.045(2); Diomampo v. State, 124 Nev.___, ___, 185 P.3d 1031, 1041 (2008). Therefore, we conclude that the district court abused its discretion in admitting this evidence. See Somee v. State, 124 Nev.___, ___, 187 P.3d 152, 160 (2008); Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). Nevertheless, in light of the significant evidence adduced at trial, we conclude that this error did not substantially affect the jury's verdict and was therefore harmless. See Phillips v. State, 121 Nev. 591, 602, 119 P.3d 711, 719 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. ___, ___ n.52, 195 P.3d 315, 324 n.52 (2008).

Balsamo also challenges the introduction of a casino security video depicting Balsamo "cheating machines she was not charged with." The record reveals that the video was relevant to prove count 38, which charged Balsamo with possession of a cheating device at the Nevada Landing casino on May 30, 2006. Therefore, we conclude that the district court did not abuse its discretion by admitting the video. See Somee, 124 Nev. at ___, 187 P.3d at 160; Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

Cumulative error

Finally, Balsamo contends that even if the above-discussed errors are individually considered harmless, together they violate her right to a fair trial. Balancing the relevant factors, we conclude that the cumulative effect of the errors did not deny Balsamo of a fair trial and no

relief is warranted. 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))).

Having considered Balsamo's contentions and concluded that relief is warranted only on the fifteen identified convictions for use of a cheating device, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk