

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAWN MARIE BERTINELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53175

FILED

MAR 11 2010

THACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and possession or sale of a document or personal identifying information to establish a false status or identity. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Jury instructions

Appellant Dawn Marie Bertinelli claims that the district court erred by instructing the jury on flight. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We conclude the district court did not err because the State presented evidence from which the jury could reasonably infer that Bertinelli's departure immediately after the crime signified "something more than a mere going away." Weber v. State, 121 Nev. 554, 582, 119 P.2d 107, 126 (2005) (internal quotation marks omitted); see also Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

Bertinelli also claims that the district court erred by instructing the jury that an entry without consent is sufficient to prove the

entry element of burglary and that neither force nor breaking is required because the instruction did not inform the jury of the intent necessary for the crime of burglary. Because Bertinelli failed to object to the instruction below, we review for plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We conclude that the district court did not err because this instruction was a correct statement of Nevada law and, when read in conjunction with the other instructions relating to the burglary charge, properly instructed the jury on the intent necessary for the crime of burglary. NRS 193.0145 (defining “enter”); Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1113 (2002) (“forcible entry is not an element of burglary”); State v. Arellano, 68 Nev. 134, 149, 227 P.2d 963, 970 (1951) (explaining that all instructions relating to a charge must be considered as a whole when deciding if one instruction is erroneous).

Comment on pre-arrest silence

Bertinelli claims the admission of evidence that she initially refused to speak with the detective during a telephone conversation prior to her arrest violated her constitutional right to remain silent. We review Bertinelli’s claim for plain error because she failed to object to the introduction of this evidence at trial. See NRS 178.602; Gaxiola v. State, 121 Nev. 638, 653-54, 119 P.3d 1225, 1236-37 (2005). We conclude that no error occurred because a prosecutor is permitted to comment on a defendant’s pre-arrest silence. See Gaxiola, 121 Nev. at 655-56, 119 P.3d at 1236-37. We decline Bertinelli’s invitation to depart from our precedents on this issue by limiting the admissibility of such comments to instances where the defendant testifies at trial.

Sufficiency of the evidence

Bertinelli claims that the State presented insufficient evidence to support her conviction for burglary because the State failed to prove

that she entered the home with the intent to commit a crime. This claim lacks merit because the evidence, 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. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 727 (2008). Bertinelli argues on appeal that she entered the home to retrieve some of her personal belongings with the mistaken belief that it was the home of a friend of hers. However, Bertinelli's car already contained several of the homeowner's items when the homeowner confronted Bertinelli coming out of his front door with another armload of his wife's designer purses and jewelry. Based on this evidence, we conclude that a rational juror could find that Bertinelli entered the home with the intent to commit larceny. See NRS 205.060(1). 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. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Having considered Bertinelli's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk