IN THE SUPREME COURT OF THE STATE OF NEVADA

NELSON JUVINI GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58013

FILED

MAY 10 2012

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery, burglary, and possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Sufficiency of the evidence

Appellant Nelson Juvini Garcia contends that insufficient evidence was adduced to support the jury's verdict. We disagree 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. 807, 816, 192 P.3d 721, 727 (2008).

The victim, Dante Blanton, testified that she was sitting in her parked, 2005 Buick Rendezvous, outside the Ellis Island Casino, when Garcia entered the vehicle from the passenger side and repeatedly demanded that she hand over her money, stating, "Give me your money, bitch." The two fought for the keys, which were in the ignition, and Blanton then grabbed her purse, fled from the vehicle, and ran into the casino. When Blanton returned to the scene with a security guard minutes later, her vehicle was gone. Blanton's vehicle was equipped with a tracking device and was found in an apartment complex approximately

one hour later. The investigating officers approached an individual seen near Blanton's vehicle who then directed them to the apartment where Garcia, matching Blanton's description, was eventually found. Two canvass bags belonging to Blanton were found inside the apartment. The keys to Blanton's vehicle were also found inside Garcia's pants pocket.

During an interview with LVMPD Detective Patrick Flynn, Garcia stated, "I am guilty. 100 percent guilty. I don't know why I do that shit today." Garcia told Det. Flynn that he was late and short with the rent money, and when he saw Blanton sitting in her vehicle, "I thought . . . that's money right there to pay the rent." Blanton testified that the Buick had a "ticket price" of $38,000, but with a "GM family discount," she was able to purchase the vehicle for $28,000 in 2005. Blanton stated that the vehicle had not been involved in any accidents or sustained any damages prior to the incident and she believed it was worth more than $2,500.

Circumstantial evidence alone may sustain a conviction. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."). It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 200.380(1); NRS 205.060(1); NRS 205.273(1)(b); former NRS 205.273(4); Stephans v. State, 127 Nev. ___, ___, 262 P.3d 727, 731 (2011) ("An owner of property may testify to its value, at least so long as the owner has personal knowledge, or the ability to provide expert proof, of value.") (internal

citations omitted). Therefore, we conclude that Garcia's contention is without merit.

Double jeopardy/redundancy

Garcia contends that his robbery and possession of a stolen vehicle convictions violate double jeopardy and redundancy principles. We disagree. The convictions do not violate the Double Jeopardy Clause because the two offenses were based upon separate and distinct acts. See U.S. Const. amend. V; Nev. Const. art. 1, § 8; Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Additionally, the convictions were not redundant because "the material or significant part of each charge" was not the same. Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003). Therefore, we conclude that Garcia's contention is without merit.

Evidentiary issues

First, Garcia contends that the district court erred by denying his motion to suppress inculpatory statements made during a custodial interrogation. Garcia claims that his confession was involuntary and obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The district court's factual findings regarding the circumstances surrounding a confession are entitled to deference and reviewed for clear error; we review the court's voluntariness determination de novo. Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). The State bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. Id. at 193, 111 P.3d at 696. Here, the district court conducted a

hearing, heard testimony from Det. Flynn and arguments from counsel, and found that although Garcia was "partially un-Mirandized" when he "blurts out" his confession, the inculpatory statements, nevertheless, were voluntary and not obtained in violation of Miranda. The district court's determination is supported by substantial evidence. Therefore, we conclude that the district court did not err by denying Garcia's motion to suppress.

Second, Garcia contends that the district court violated his right to a fair trial by admitting prior bad act evidence without conducting a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), and abused its discretion by denying his motion for a mistrial on those grounds. Garcia specifically challenges the admission of the unredacted recording of his interview with Det. Flynn where he mentioned a prior DUI arrest and other charges incurred on that same occasion.

The district court admonished the jury to disregard Garcia's reference to his DUI "and other arrests." See generally Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (providing that this court presumes that the jury follows the district court's instructions). While the district court agreed that the recording should have been redacted, it also noted that Garcia should have requested a redaction at an earlier time. There were no further references to Garcia's DUI, and in light of the district court's admonishment and the overwhelming evidence of his guilt, we are confident that any error in admitting the unredacted recording did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)), modified in part by Mclellan v. State, 124 Nev. 263, 182 P.3d 106

(2008). Therefore, we conclude that the district court did not abuse its discretion by denying Garcia's motion for a mistrial. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007).

Third, Garcia contends that the district court erred by overruling his objection to the admission of LVMPD's CAD report generated the night of the incident. On appeal, Garcia claims the report contained inflammatory and prejudicial statements amounting to inadmissible hearsay within hearsay.[1] See NRS 51.067. The district court admitted the report under the business records exception to the hearsay rule. See NRS 51.135.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan, 124 Nev. at 267, 182 P.3d at 109. Here, we conclude that the district court reached the right result, albeit for the wrong reason. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal."). The State sought admission of the report during its direct examination of Officer Christopher Rivera in order to pinpoint the time he arrived at the apartment complex where the victim's vehicle was located. The challenged statements within the report did not amount to hearsay because they were not offered by the State to prove the truth of the matter asserted. See NRS 51.035 (defining "hearsay"). Moreover, the officer was not questioned about the challenged statements contained within the report, nor did the State ever refer to the statements

[1]Garcia's hearsay objection below was vague and failed to address any specific statements contained within the report.

during the course of the trial. Therefore, we conclude that Garcia's contention is without merit.

Jury selection

Garcia contends that the district court erred by denying his challenge for cause of a prospective juror who had "deep-seated prejudices against criminal defendants." We disagree. "Great deference is afforded to the district court in ruling on challenges for cause primarily because such decisions involve factual determinations and the district court may observe a prospective juror's manner." Browning v. State, 124 Nev. 517, 530, 188 P.3d 60, 69-70 (2008). Our review of the record supports the conclusion that the juror would be fair and impartial and the fact that his daughter and son-in-law worked in a correctional facility would not prevent or substantially impair the performance of his duties. See NRS 175.036(1); Nelson v. State, 123 Nev. 534, 543-44, 170 P.3d 517, 524 (2007) ("The test for determining if a veniremember should be removed for cause is whether a veniremember's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.") (quotation omitted). Therefore, we conclude that the district court did not abuse its discretion by denying Garcia's challenge for cause.

Jury instructions

First, Garcia contends that the district court erred by providing the jury with instructions improperly defining "robbery" and denying his motion for a mistrial on those grounds. "This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion." Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). Garcia objected below to jury instruction no.

6, claiming that it was a misstatement of the law. The district court disagreed and overruled the objection, finding that it was an accurate statement of the law. We agree and conclude that the district court did not abuse its discretion. See Hayden v. State, 91 Nev. 474, 476, 538 P.2d 583, 584 (1975) (approving of similar definition of "robbery"). The district court also found that jury instruction no. 5, when read in conjunction with the other instructions on robbery, was also an accurate statement of the law. We agree and conclude that instruction no. 5 did not minimize the State's burden of proof. Therefore, we further conclude that the district court did not abuse its discretion by denying Garcia's motion for a mistrial. See Rose, 123 Nev. at 206-07, 163 P.3d at 417.

On appeal, Garcia contends for the first time that instruction no. 6 contained an impermissible mandatory presumption. An appellant "cannot change [his] theory underlying an assignment of error on appeal." Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); see also Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Nevertheless, we conclude that Garcia fails to demonstrate plain error. See NRS 178.602; State v. Luhano, 31 Nev. 278, 284, 102 P.2d 260, 262 (1909).

Second, Garcia contends that the district court erred by providing the jury with an improper instruction on how to determine the value of the stolen vehicle. Garcia claims that jury instruction no. 17 undermines the presumption of innocence and minimizes the State's burden of proof. We disagree. In order to prove the value of the vehicle, the State offered testimony from the owner who provided information

regarding the purchase price and general condition of the vehicle and her opinion that the value of the vehicle exceeded $2,500. Jury instruction no. 17 mirrors the statutory language and is a correct statement of the law. See NRS 205.273(6) ("the value of a vehicle shall be deemed to be the highest value attributable to the vehicle by any reasonable standard"). We conclude that the district court did not abuse its discretion by providing the jury with instruction no. 17. See Ouanbengboune, 125 Nev. at 774, 220 P.3d at 1129.

Third, Garcia contends that the district court erred by rejecting his proposed adverse inference instruction regarding the State's failure to collect and/or preserve evidence, specifically, the investigating officers' failure to administer a blood alcohol test, because a "high blood alcohol level would have buttressed [his] voluntary intoxication defense." We disagree. Garcia fails to demonstrate that such evidence was exculpatory, material, or that the police "acted out of gross negligence or bad faith in not" administering a blood alcohol test. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001); Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). Therefore, we conclude that the district court did not abuse its discretion by rejecting Garcia's proposed instruction. See Ouanbengboune, 125 Nev. at 774, 220 P.3d at 1129.

Fourth, Garcia contends that the district court erred by rejecting his "two reasonable interpretations" jury instruction. We conclude that the district court did not abuse its discretion because the jury was properly instructed on reasonable doubt. See NRS 175.211(1); Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); see also Ouanbengboune, 125 Nev. at 774, 220 P.3d at 1129.

Fifth, Garcia contends that the district court erred by rejecting his proposed instruction regarding the State's burden to prove intent. "[S]pecific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." Crawford v. State, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005). A "'positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased'" instruction. Id. (quoting Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987)). Here, even assuming the district court erred by not giving Garcia's proposed instruction, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case." Crawford, 121 Nev. at 756, 121 P.3d at 590. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Douglas

Gibbons, J.

Gibbons

Parraguirre, J.

Parraguirre

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