IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONY ALLEN PRESSLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84794-COA

FILED

JUN 28 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Tony Allen Pressler appeals from a judgment of conviction, pursuant to a jury verdict, of principal to robbery, principal to burglary, principal to grand larceny, and conspiracy to commit robbery. Fourth Judicial District Court, Elko County; Steve L. Dobrescu, Judge.

On March 2, 2018, at approximately 7:00 a.m., a Dotty's casino in Elko was robbed. Surveillance video cameras captured the event. The robbery occurred during a "drop" where a two-person team swapped out cash-filled canisters in gaming machines for empty ones. In the middle of the drop, two men came into Dotty's, sprayed the drop team with a chemical spray (likely pepper spray) to disable them, and took the cart holding the cash-filled canisters. Pressler was the only patron inside Dotty's at the time of the robbery. The loss was estimated to be at least $10,000 and as high as $57,000.

Earlier that same morning, Pressler was seen on surveillance video observing a drop at a different Dotty's location. Pressler walked in with James Squires and Kenneth Cook, and the three began conversing. After Squires and Cook left, Pressler stayed behind and was seen using his cell phone during the drop, which was completed without incident. A few hours later, at approximately 6:25 a.m., Pressler walked alone into the subject Dotty's. He did not play any gaming machines and was observed using his cell phone on surveillance video and by witnesses. When the

robbery occurred, Pressler did not move from the table where he was seated, and he continued using his phone. After the robbery, Pressler was picked up nearby in a silver Chevy Traverse and rode away as a passenger.

A few minutes after the robbery, law enforcement received a call about a vehicle on fire about a quarter mile away from the Dotty's that was robbed. Although the vehicle was significantly burned, officers from the Elko Police Department were able to read the license plate and determined it was registered to Kerri Dooley. When questioned by police, Dooley said that her vehicle had been stolen and that Squires had access to it. While police were talking to Dooley, Squires pulled up to Dooley's residence driving a silver Chevy Traverse, believed to be the same vehicle that picked up Pressler. At that point, Squires was arrested, and police seized his cell phone.

In the meantime, Elko detectives suspected that Pressler was also involved in the robbery based on their review of the surveillance video that showed him at both of the Dotty's locations during the drops. Pressler was subsequently arrested, and his phone was also seized. Pressler's booking sheet revealed that he provided a home phone number of 1-775-340-3451.

In the course of their investigation, detectives sought to extract data from Pressler's and Squires' respective cell phones. Pressler's phone extraction showed no recoverable data, and the phone had an activation time of 8:07 a.m., about an hour after the robbery. However, the extraction of Squires' cell phone revealed a lengthy text conversation between Squires and a contact labeled "Uncle Tony." Uncle Tony had a phone number of 1-775-340-3451, which matched the number Pressler provided at booking.

The text conversation between Squires and Uncle Tony was active the morning of the robbery from 3:03 a.m. to 3:27 a.m. (encompassing

the time of the earlier drop at the first Dotty's) and again from 6:05 a.m. to 7:16 a.m. (encompassing the time of the robbery at the subject Dotty's). The text messages that began at 6:05 a.m. showed Squires and Uncle Tony orchestrating the robbery, with Uncle Tony providing live updates as to the drop team's progress. In one message, Squires asked how many people were inside, and Uncle Tony responded, "Just me," at a time when Pressler was the only customer inside Dotty's. Uncle Tony texted Squires that "Nine are done" (referring to the number of full canisters on the cart) just before the robbery occurred. The text exchange had a nine-minute gap, during which the robbery took place. The next text message from Squires to Uncle Tony was "Erase your phone." In the same exchange, Uncle Tony texted Squires, asking Squires to pick him up. Squires responded, "I'm here," around the same time that Pressler left Dotty's and was picked up in the silver Chevy Traverse.

The matter proceeded to a six-day jury trial. During jury selection, Pressler moved to excuse two prospective jurors for cause, and the district court denied both requests. Both of those jurors were excused through Pressler's peremptory challenges. Pressler thereafter passed the remaining panel for cause.

The jury found Pressler guilty on all charges. He was sentenced to serve an aggregate prison term of 124-312 months (10.3-26 years). On appeal, Pressler raises five issues. He contends that the district court abused its discretion when it (1) refused to grant his challenges for cause, thereby forcing Pressler to use his peremptory challenges which caused a biased juror to remain on the jury; (2) admitted hearsay text messages without proper authentication; and (3) denied his requested jury instructions. Pressler also argues (4) there was insufficient evidence to

support his conspiracy and grand larceny convictions, and (5) cumulative error warrants reversal. We disagree, and therefore affirm.

Pressler first argues the district court erroneously denied his request to dismiss two prospective jurors for cause, thereby forcing him to use his peremptory challenges which resulted in a third allegedly biased prospective juror, Juror Koch, being empaneled. Pressler contends Juror Koch was biased because he had a favorable opinion of Squires, a State witness, and therefore could not look at the evidence "with a blank slate." As to the first two jurors, we need not decide whether the district court should have stricken them for cause because they were excused through Pressler's peremptory challenges.

> The United States Supreme Court has definitively held that the erroneous denial of a challenge for cause of a prospective juror, followed by a party's use of a peremptory challenge to remove that juror, does not deprive the party 'of any rule-based or constitutional right' so long as the jury that sits is impartial.

Jitnan v. Oliver, 127 Nev. 424, 434, 254 P.3d 623, 630 (2011) (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000)). Rather, Pressler must show that a juror who was empaneled on the jury was unfair or impartial. *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). Pressler attempts to do this by pointing to Juror Koch.

Express or actual juror bias exists when a "prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Weber v. State*, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (internal quotation marks omitted), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2018); *see also State v. Squaires*, 2 Nev. 226, 230-31 (1866) (defining actual bias). If a juror's answers suggest actual bias, the trial court

must "sufficiently question[ ]" the juror to determine if the juror "was unbiased and could be impartial." *Sayedzada v. State*, 134 Nev. 283, 289, 419 P.3d 184, 191 (Ct. App. 2018) (citing *United States v. Maloney*, 699 F.3d 1130, 1137-38 (9th Cir. 2012) (discussing cases where the jurors in question had experiences similar to the facts of the cases and the district courts' questioning of those jurors was sufficient to show their impartiality), *overruled on other grounds by United States v. Maloney*, 755 F.3d 1044 (9th Cir. 2014)). Although the "district court has broad discretion in ruling on challenges for cause," a "prospective juror who is anything less than unequivocal about his or her impartiality should be excused for cause." *Preciado v. State*, 130 Nev. 40, 42-44, 318 P.3d 176, 177-78 (2014).

However, in *Sayedzada*, this court held the following:

> [A] defendant may waive subsequent challenges to the seating of a juror where the record demonstrates the defendant was aware of the particular facts [that established bias] below; the defendant consciously elected not to pursue, or abandoned, a challenge for cause based on these facts; and the defendant accepted the juror's presence on the jury.

134 Nev. at 286, 419 P.3d at 189. As we explained, "[p]arties should not be able to strategically place questionable jurors on the jury as a means of cultivating grounds for reversal should the verdict be unfavorable." *Id.* at 287, 419 P.3d at 190.

Under these facts, we conclude that Pressler waived his claim that he was denied his constitutional right to an impartial jury because Juror Koch was empaneled. After Juror Koch revealed that he personally knew Squires, Pressler asked Juror Koch numerous follow-up questions to determine whether he could be impartial. During that questioning, Juror Koch indicated that he had a favorable opinion of Squires. Despite Juror Koch's failure to unequivocally affirm his impartiality, Pressler never moved

to challenge him for cause (unlike the prior two prospective jurors, both of whom Pressler moved to strike immediately after follow-up questioning). The district court also asked if Pressler passed the panel for cause, and Pressler responded in the affirmative. Given that Pressler was aware of Juror Koch's potential bias based on his own follow-up questions, chose not to strike him for cause, and subsequently passed the entire panel for cause, Pressler "accepted the juror's presence on the jury" and waived his challenge on appeal. *Id.* at 286, 419 P.3d at 189.

Second, Pressler argues the text messages were not properly authenticated to establish his authorship and, as a result, were also inadmissible hearsay. A district court's decision on the admission of text messages is reviewed for an abuse of discretion. *Rodriguez v. State*, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012). In *Rodriguez*, the Nevada Supreme Court directly addressed the issue of text message authentication and authorship. "[T]ext messages are subject to the same authentication requirements under NRS 52.015(1) as other documents, including proof of authorship." *Id.* at 156-57, 273 P.3d at 846.

> [W]hen there has been an objection to admissibility of a text message, *see* NRS 47.040(1)(a), the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission, *see* NRS 52.015(1) . . . .

Id. at 162, 273 P.3d at 849. Evidence of authorship can include the content of the text messages themselves. *Id.* at 161, 273 P.3d at 849 (citing *Commonwealth v. Koch*, 39 A.3d 996, 1004-05 (Pa. Super. Ct. 2011).

Here, the district court did not abuse its discretion in finding that the text messages were sufficiently authenticated. The district court

undertook a thorough analysis of *Rodriguez* and determined that the State provided sufficient evidence of authorship based on the following: witness testimony that Pressler was on his phone, the surveillance video from both Dotty's locations showing Pressler on his phone at or near the time the text messages were sent, the content of the texts themselves (such as when Squires asked how many people were inside and Uncle Tony's response was, "Just me," at a time when Pressler was the only customer inside), and the pause in text messages during the robbery with the messages resuming after the robbery. Further, the contact names match ("Uncle Tony" with "Tony Pressler"), the phone number from Uncle Tony's phone matched the number Pressler himself gave at his booking, and several text messages correlated with Pressler's conduct, such as Squires texting Pressler to meet him outside before Pressler exited Dotty's. Therefore, we conclude that the district court did not abuse its discretion in finding the texts were properly authenticated and therefore admissible as nonhearsay under both NRS 51.035(3)(a) ("party's own statement") and NRS 51.035(3)(e) ("statement by a coconspirator . . . during the course of and in furtherance of the conspiracy").

Third, Pressler argues the district court erroneously denied his proposed "adverse inference" jury instruction as a remedy for law enforcement's alleged failure to gather additional video surveillance.[1]

---

[1]Pressler also argues the district court erroneously denied his proposed "multiple conspiracies" jury instruction. However, Pressler failed to include this proposed instruction as part of the record on appeal. NRAP 30(b)(2)(D) ("In addition to the transcripts required by Rule 30(b)(1), the joint appendix shall contain: . . . (D) All jury instructions given to which exceptions were taken, and excluded when offered . . . ."). Further, although Pressler's proposed "adverse inference" instruction was read in its entirety in the trial record, his proposed "multiple conspiracies" instruction was not. In his opening brief, Pressler fails to include any reference to the record

Pressler claims that he was entitled to the instruction because it supported his theory of defense.

"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). In *Daniels v. State*, the Nevada Supreme Court adopted a two-part test to determine if sanctions were warranted for the State's failure to gather evidence. 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). First, the defense must "show that the evidence was material, meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." *Id.* (internal quotation marks omitted). Materiality cannot be based on "mere speculation." *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). If the evidence was material, then the next step is to determine if the failure to gather evidence was mere negligence, gross negligence, or bad faith. *Daniels*, 114 Nev. at 267, 956 P.2d at 115. "When gross negligence is involved, the defense is entitled to a presumption that the evidence would have been unfavorable to the State." *Id.*

Here, Pressler merely speculated that the additional surveillance video would have been favorable to his case. Pressler argues that the earlier surveillance would "either prove *or* disprove the fact that he

---

containing the substance of the proposed instruction. NRAP 28(e)(1) (stating that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found"). Because Pressler failed to include the "multiple conspiracies" instruction in the appendix on appeal, his claim is waived. *Turpen v. State*, 94 Nev. 576, 577-78, 583 P.2d 1083, 1083 (1978) (concluding that the appellant's failure to include a proposed instruction in the record on appeal precludes appellate review).

was sending text messages," thereby acknowledging that the video may have been inculpatory. (Emphasis added.) Further, Pressler never argued that had the earlier surveillance video been available to him, the result of the proceedings would have been different. *Id.* Therefore, because Pressler failed to establish that the additional surveillance was material, or that the district court incorrectly found no bad faith or gross negligence, we conclude that the district court did not abuse its discretion in rejecting his proposed "adverse inference" instruction.

Fourth, Pressler claims there was insufficient evidence to support his convictions for conspiracy to commit robbery and principal to grand larceny. He asserts there was insufficient evidence that he intended to conspire and that damages were not properly established for the grand larceny conviction because witness testimony regarding the amount of damages ranged widely from $10,000 to $57,524.

In reviewing the sufficiency of the evidence, this court views the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Circumstantial evidence alone is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

A conspiracy is generally defined as "an agreement between two or more persons for an unlawful purpose." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004); *see also* NRS 199.480, 200.380. "A person

who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator . . . ." *Id.* "Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction." *Garner v. State*, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), *overruled in part by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002).

In this case, there was sufficient evidence that Pressler was a member of the conspiracy. On the day of the robbery, Pressler, Squires, and Cook were seen entering the first Dotty's location together and conversing. Although Squires and Cook left, Pressler stayed and observed the drop while texting updates to Squires. At the second Dotty's, Pressler was again observing the drop team while texting updates to Squires. The text messages contained updates on the drop team's progress, with Squires and Cook coming inside to commit the robbery when Pressler texted that nine full canisters were on the cart. Viewing the evidence in the light most favorable to the prosecution, we conclude that the presence of Pressler, Squires, and Cook together at the first Dotty's, in conjunction with the text messages and subsequent robbery at the second Dotty's, provided sufficient evidence for the jury to find Pressler guilty of conspiracy to commit robbery.

Additionally, Pressler does not cogently argue why there was insufficient evidence for the grand larceny conviction. Pressler claims there is a wide discrepancy in testimony about the damages amount, but the minimum damages assessment ($10,000) was well above the $3,500 threshold required for grand larceny in 2018. *See* NRS 205.222(3) (2011); 2011 Nev. Stat., ch. 41, § 14, at 164.[2] Pressler does not provide any

[2]NRS 205.222(3) was subsequently amended and renumbered in 2020, and now with NRS 205.222(2)(b), the threshold was increased from $3,500

authorities or legal argument that a discrepancy in damages estimates alone precludes a conviction, particularly when all testimony indicated that the damages exceeded the minimum amount required for the conviction. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Therefore, we reject Pressler's insufficiency of the evidence claim as it relates to his grand larceny conviction.

Lastly, Pressler argues that cumulative error warrants reversal. However, Pressler fails to identify any errors that would entitle him to relief, and therefore there are no errors to cumulate. *Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) ("Because we have rejected Chaparro's assignments of error, we conclude that his allegation of cumulative error lacks merit."). As a result, Pressler's cumulative error argument fails.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.[3]

_____, C.J.
Gibbons

_____, J.
Westbrook

_____, Sr.J.
Silver

---

to its current $5,000 minimum to classify as a category C felony. NRS 205.222(2)(c) provides for punishment as a category B felony when the value of the property involved in the grand larceny is between $25,000 and $100,000. *See* 2019 Nev. Stat., ch. 633, § 62 at 4430.

[3]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.

cc: Hon. Steve L. Dobrescu, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk