

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE AUSTIN A/K/A  
LAWRENCE LINDSEY AUSTIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43132

**FILED**

SEP 09 2005

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery (count I) and burglary while in possession of a firearm (count II), and two counts of robbery with the use of a deadly weapon (counts IV and VIII). Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Lawrence Austin to serve a prison term of 24-60 months for count I, a concurrent prison term of 35-156 months for count II, a concurrent prison term of 35-156 months for count IV with an equal and consecutive prison term for the deadly weapon enhancement, and two consecutive prison terms of 34-156 months for count VIII. The district court ordered Austin to pay \$1,280.00 in restitution.

First, Austin contends that the photographic lineup presented to the witnesses for identification purposes and the subsequent physical lineup were "unnecessarily suggestive," and therefore, violated his right to due process. We disagree.

A court must consider the totality of the circumstances in determining "whether a photographic identification procedure was 'so

unduly prejudicial as to fatally taint [the defendant's] conviction."<sup>1</sup> Thus, "a photographic identification must be set aside 'only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"<sup>2</sup> Even if the identification procedure is found to be unnecessarily suggestive, however, "the key question is whether the identification was reliable."<sup>3</sup> The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [his] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."<sup>4</sup>

We conclude that Austin has failed to show that the identification procedures were so impermissibly suggestive as to violate his right to due process. The witnesses were instructed prior to viewing the photographic lineup to "pay no attention to whether the photos are in color or black and white, or any other difference in the type or style of the photographs." Three witnesses were also able to independently and positively identify Austin at a physical lineup. The same three witnesses subsequently identified Austin while testifying at his trial. Therefore,

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<sup>1</sup>Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (quoting Simmons v. United States, 390 U.S. 377, 383 (1968)).

<sup>2</sup>Id. (quoting Simmons, 390 U.S. at 384).

<sup>3</sup>Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

<sup>4</sup>Id.; Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

considering the totality of the circumstances, we conclude that the identification procedures were not impermissibly suggestive.

We also conclude that the witnesses' identification of Austin was reliable. Although there are some inconsistencies in the witnesses' pretrial physical descriptions of Austin and his accomplice, this court has repeatedly stated that "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."<sup>5</sup> The witnesses had an opportunity to clearly view Austin, and their trial testimony indicates that they were certain of their respective identifications.

Second, Austin contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. We disagree.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>6</sup> The jury could reasonably infer from the evidence presented that Austin committed the crimes of conspiracy to commit robbery, burglary while in the possession of a firearm, and robbery with the use of a deadly weapon.<sup>7</sup> 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

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<sup>5</sup>McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

<sup>6</sup>See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

<sup>7</sup>See NRS 199.480(1)(a); NRS 200.380(1); NRS 205.060(1), (4); NRS 193.165(1).

appeal where, as here, sufficient evidence supports the verdict.<sup>8</sup> We also note that circumstantial evidence alone may sustain a conviction.<sup>9</sup> Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.<sup>10</sup>

Third, Austin contends that the district court erred by admitting evidence of "another bad act" without conducting a Petrocelli hearing<sup>11</sup> and without giving a limiting instruction to the jury.<sup>12</sup> The district court admitted evidence of a stolen credit card under the res gestae doctrine – the complete story of the crime.<sup>13</sup> We disagree with Austin's contention and conclude that the district court properly admitted the evidence in question, albeit for the wrong reason.

"The decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."<sup>14</sup> Pursuant to NRS 48.045(2), the stolen credit

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<sup>8</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

<sup>9</sup>See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

<sup>10</sup>Without providing any argument in support of his request, Austin asks this court to overrule Robertson v. Sheriff, 93 Nev. 300, 302, 565 P.2d 647, 648 (1977) and Klein v. State, 105 Nev. 880, 885, 784 P.2d 970, 973 (1989). We decline to do so.

<sup>11</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 114 Nev. 321, 955 P.2d 677 (1998).

<sup>12</sup>Tavares v. State, 117 Nev. 725, 733, 30 P.3d. 1128, 1133 (2001).

<sup>13</sup>See NRS 48.035(3).

<sup>14</sup>Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

card evidence was relevant to prove the identity of Austin. Further, it was not reversible error to admit the evidence without conducting a Petrocelli hearing.<sup>15</sup> And finally, because of the substantial evidence of Austin's guilt, we conclude that the district court's failure to give a limiting instruction prior to the admission of the evidence did not have an injurious effect on the jury's verdict, and therefore, amounted to harmless error.<sup>16</sup>

Fourth, Austin contends that the State violated his right to due process based on several instances of prosecutorial misconduct. Austin broadly claims that the prosecutor acted as a witness and "throughout the questioning of the witnesses and during his closing, the prosecutor interjected his own personal observations." Austin has not cited to any specific instances of misconduct where the prosecutor allegedly and improperly "testified."<sup>17</sup> Moreover, Austin does not refer to any objection made by defense counsel to this alleged form of misconduct. This court has repeatedly stated that the failure to object to prosecutorial misconduct generally precludes appellate consideration.<sup>18</sup> Nevertheless, this court may address an alleged error if it was plain and affected the

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<sup>15</sup>See King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000) (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766-67 (1998)).

<sup>16</sup>See Rhymes v. State, 121 Nev. \_\_\_, \_\_\_, 107 P.3d 1278, 1282 (2005) (citing Tavares, 117 Nev. at 732, 30 P.3d at 1132); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

<sup>17</sup>See generally Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

<sup>18</sup>Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993)

appellant's substantial rights.<sup>19</sup> Here, Austin has not presented an argument with any degree of factual specificity in support of his contention, and therefore, we cannot conclude that there was plain error.<sup>20</sup>

Next, Austin contends that the prosecutor committed misconduct by "attack[ing] the defense attorney on several occasions." Once again, we note that Austin did not object to the prosecutor's allegedly improper comments, and therefore, we will only review the argument for plain error.<sup>21</sup> We conclude that Austin was not prejudiced by the prosecutor's comments and therefore no plain error occurred.<sup>22</sup>

Next, Austin contends that the prosecutor committed misconduct by disregarding a district court ruling regarding limitations on the prosecutor's cross-examination of Austin. We conclude that Austin fails to demonstrate that he was prejudiced in any way by the challenged exchange. Austin did not answer the prosecutor's question, and the jury was admonished. This court "presume[s] that the jury followed the district court's orders and instructions."<sup>23</sup> Therefore, we conclude that Austin's contention is without merit.

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<sup>19</sup>See NRS 178.602; Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

<sup>20</sup>See Klein, 105 Nev. at 884, 784 P.2d at 973; see also Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

<sup>21</sup>See NRS 178.602; Parker, 109 Nev. at 391, 849 P.2d at 1067.

<sup>22</sup>See Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002).

<sup>23</sup>Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Fifth, Austin contends that the district court failed to properly instruct the jury to deliberate anew after replacing a dismissed juror with an alternate. Austin claims that the case was never resubmitted to the jury in violation of NRS 175.061(3). We disagree.

NRS 175.061(3) states that "[i]f an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury." In other words, the district court must instruct the jury that "deliberations had to be started anew, not just resumed."<sup>24</sup>

In this case, Austin has failed to demonstrate that the jury did not follow the district court's instruction and deliberate anew prior to reaching the verdict.<sup>25</sup> Therefore, we conclude that the district court did not violate NRS 175.061(3).


Having considered Austin's contentions and concluded that they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Austin was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Austin was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction. Accordingly, we

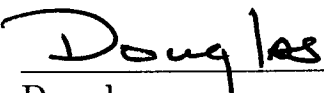
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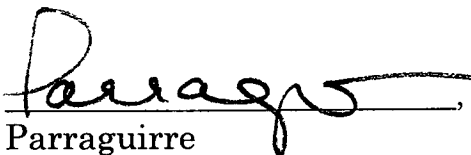
<sup>24</sup>Brake v. State, 113 Nev. 579, 584, 939 P.2d 1029, 1032 (1997).

<sup>25</sup>See Allred, 120 Nev. at 415, 92 P.3d at 1250.

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.<sup>26</sup>

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Honorable Jackie Glass, District Judge  
Clark County Public Defender Philip J. Kohn  
Lawrence Austin  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>26</sup>Because Austin is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Austin unfiled all proper person documents he has submitted to this court in this matter.