

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE REFUGIO MONTOYA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44134

**FILED**

OCT 21 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of robbery with the use of a deadly weapon, and one count of possession of burglary tools. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant: for conspiracy, to a prison term of 12 to 48 months; for robbery, to a prison term of 24 to 72 months with an equal and consecutive term for the use of a deadly weapon; and for possession of burglary, to time served. The district court ordered the sentences for conspiracy and robbery to run concurrently.

Appellant first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt on the counts of conspiracy and robbery. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>1</sup>

In particular, we note that appellant stood behind the victim while another individual brandished an ice pick or screwdriver and

---

<sup>1</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

demanded money. After the individual with the weapon took the victim's money and ran away, appellant warned the victim not to turn around and told him to go in an aggressive tone of voice. Appellant then ran off in the same direction as the other individual.

A short time later, when the victim was talking with police, appellant walked by and was recognized by the victim. When police called out to appellant, he immediately began to run. After he was apprehended, appellant led police to an apartment where the victim identified an occupant of the apartment named Felix Padilla as the individual who had brandished the screwdriver or ice pick.

The jury could reasonably infer from the evidence presented that appellant conspired with Padilla to rob the victim and then aided and abetted Padilla in robbing the victim. 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.<sup>2</sup>

Appellant next contends that that the district court erred by denying his motion to suppress evidence of his identification by the victim prior to his arrest. Specifically, appellant argues that the show-up procedure used by the police, whereby appellant was identified by the victim while he was in handcuffs in front of a police vehicle, was impermissibly suggestive. The test is whether, upon review of the totality of the circumstances, "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that

---

<sup>2</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[appellant] was denied due process of law."<sup>3</sup> We conclude that although the show-up procedure in the instant case was suggestive, the identification was still reliable. In particular, we note that appellant was initially identified by the victim when appellant walked by the victim as the victim was giving a statement to the police. Further, the victim had ample opportunity to view appellant and based his identification on appellant's face, clothing, and a tattoo on appellant's forearm. Accordingly, we conclude that the district court did not err.<sup>4</sup>

Appellant also contends that the district court erred by denying his motion to suppress statements made to police after he was informed of Miranda rights.<sup>5</sup> Specifically, appellant argues that although he was informed of the rights enumerated in Miranda, he did not understand them. "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal."<sup>6</sup> Moreover, in determining whether a confession is voluntary, the court looks at the totality of the circumstances.<sup>7</sup>

---

<sup>3</sup>Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (quoting Stovall v. Denno, 388 U.S. 293, 301-302 (1967)).

<sup>4</sup>See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (concluding that "reliability is the linchpin in determining the admissibility of identification testimony" and listing relevant factors).

<sup>5</sup>See Miranda v. Arizona, 384 U.S. 436 (1966).

<sup>6</sup>Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

<sup>7</sup>Id.

In the instant case, the district court found that appellant was informed of his Miranda rights, that appellant spoke and understood English, and that his claim that he did not understand his rights was not credible. We conclude that the district court's determination that appellant's confession was voluntary and admissible is supported by substantial evidence. Appellant's contention is therefore without merit.

Appellant also contends that the district court erred by refusing to sever the charge of possession of burglary tools from the other charges. In reviewing the district court's denial of a motion to sever, reversal is warranted only if joinder is manifestly prejudicial and renders the trial fundamentally unfair.<sup>8</sup> Additionally, the denial of a motion to sever is subject to harmless error analysis.<sup>9</sup> We conclude that appellant has not demonstrated that the joinder of the charges violated his right to due process. Moreover, in light of the evidence adduced supporting all of the charges, any error in refusing to sever the charges was harmless beyond a reasonable doubt.

Finally appellant contends that the district court erred by giving a flight instruction. An instruction may be given on flight where evidence would support a finding that the defendant fled because of consciousness of guilt and fear of arrest.<sup>10</sup> Here, we note that appellant, upon seeing a police patrol car at the scene of the robbery initially ducked into some bushes. When he emerged and continued walking, a police officer called for him to stop, whereupon appellant began running away.

---

<sup>8</sup>Honeycutt v. State, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002).

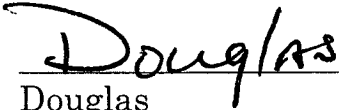
<sup>9</sup>Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342-43 (1989).


<sup>10</sup>See Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992).

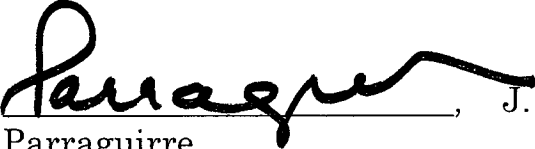
We conclude that the evidence presented supports a finding that appellant fled because of consciousness of guilt and a fear of being arrested. We therefore conclude that the district court did not err by giving the flight instruction.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

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

 \_\_\_\_\_, J.  
Rose

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

cc: Hon. Stewart L. Bell, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk