IN THE SUPREME COURT OF THE STATE OF NEVADA

RASHON KALANIKAI KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44738

FILED

SEP 28 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon and first-degree kidnapping. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Rashon Kalanikai King to serve two consecutive prison terms of 35-156 months for the robbery and two consecutive prison terms of 5-15 years for the kidnapping. King was ordered to pay restitution in the amount of $1,500.00 jointly and severally with his codefendant, Robert Benson, and extradition costs amounting to $2,665.78.

First, King contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. King argues that no physical evidence of the crime was found either in his apartment or in the victim's vehicle; the only evidence presented by the State, he claims, were statements made by the victim. Alternatively, King contends that he is entitled to a new trial based on conflicting evidence. King, however, did not file a motion for a new trial in

the district court, as required by NRS 176.515.[1] Furthermore, we disagree with King's contentions.

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.[2] In particular, we note that the victim, Tony Berliner, positively identified King as one of the two perpetrators of the robbery and kidnapping. Berliner testified at trial that he had been introduced to King by a friend, Aimee Moser, that very day. Berliner also stated that he had previously seen both King and Benson, "[i]n passing" around the apartment complex, and "going up to Aimee's."

After being formally introduced to King and Benson by Moser, Berliner agreed to give the two men a ride to several locations in Reno. Eventually, King and Benson, known to Berliner as "Mack," asked to be dropped off. Benson offered Berliner five dollars for the ride, and Berliner pulled over. Berliner testified that when he stopped the vehicle, Benson then "grabbed a handful of hair and shoved a gun in my head. And [King] leaned over with a knife and asked me where my money was." King proceeded to take Berliner's wallet and the car stereo. King repeatedly told Benson to "[p]op him," which Berliner understood to mean that King wanted Benson to shoot him. According to Berliner, when Benson refused,

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[1]NRS 176.515(4) provides that "[a] motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period." See also Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

[2]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

King said, "I'll just cut his throat." King and Benson saw a woman walking in their direction, and they ordered Berliner to start the car and drive away. King mentioned going to an ATM and asked Berliner for his PIN. When Berliner stated that he did not remember his PIN, Benson hit him in the head with the gun. Berliner feared for his life and believed that King and Benson were going to kill him. Finally, the two men had Berliner stop the car and they got out. King took Berliner's wallet while Benson held him at gunpoint. They also took Berliner's cell phone. According to Berliner, King told him, "We know where you live. You go to the cops, we'll kill you. . . . Don't go back to Aimee's. We'll kill you." Within hours after the crimes were committed and while Berliner was in the hospital, his cell phone was used to make several calls to Hawai'i where King was later discovered and taken into custody.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that King committed the crimes of robbery with the use of a deadly weapon and first-degree kidnapping.[3] 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, sufficient evidence supports the verdict.[4] We also note that circumstantial evidence alone may sustain a conviction.[5]

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[3]See NRS 200.380(1); NRS 193.165(1); NRS 200.310(1).

[4]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).

[5]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); see also Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (holding that "[i]ntent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence").

Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, King contends that the pretrial identification procedure was unduly suggestive. The extent of King's argument is that Berliner was never shown a photographic lineup and that Moser was only shown one photograph. Moser testified that she had known King and Benson for several months prior to the crimes. King and his wife and son lived above Moser in the apartment complex, and Moser knew Benson as a friend of King's; she often saw them together. Moser was shown photographs of both King and Benson by a detective and was asked to identify them. Moser provided the detective with the names of the individuals in the photographs. Berliner, as well, knew both King and Benson and positively identified them at trial as the perpetrators. King has failed to demonstrate, let alone articulate, how the so-called identification procedures described herein were unduly suggestive, unreliable, or a violation of his right to due process.[6] Therefore, we conclude that King's contention is without merit.

Third, King contends that incriminating statements he made to Reno police detectives after being taken into custody in Hawai'i, and then later in San Francisco while in transit, were improperly admitted at trial. Specifically, King claims there was "no independent proof," other than the trial testimony of the detectives, that he waived his Miranda rights.[7] King, however, failed to file a pretrial motion to suppress those

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[6]See Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796-97 (1998) (citing Stovall v. Denno, 388 U.S. 293, 301-02 (1967)), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

[7]Miranda v. Arizona, 384 U.S. 436 (1966).

statements, and at no point during the detectives' trial testimony pertaining to King's admissions did defense counsel object. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[8] This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.[9] "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record."[10] King has not provided this court with any cogent argument in support of his contention, and he has failed to challenge, with the requisite factual specificity, the uncontroverted testimony of the detectives and demonstrated that his waiver of Miranda rights was not, in fact, knowing and voluntary. Therefore, we conclude there was no plain error.

Fourth, King contends that the State violated Brady v. Maryland[11] by not providing the defense with information related to the identity of a secret witness caller and a secret witness report. The secret witness implicated Benson, King's codefendant, as one of the perpetrators of the robbery and kidnapping. Reno Police Detective Jim Duncan, during his cross-examination by the defense, testified that Benson's sister told

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[8]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[9]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[10]Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

[11]373 U.S. 83 (1963).

him that she was the secret witness caller. Outside the presence of the jury, the district court heard arguments from counsel and allowed counsel to voir dire Detective Duncan about the contents of the secret witness report and how it was used in the police investigation. We conclude that King's contention is without merit.

Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense.[12] A claim that the State committed a Brady violation must show that: (1) the evidence at issue is favorable to the accused; (2) the State failed to disclose the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.[13] If a specific request is made for information, materiality may be established upon a showing that a different result would have been reasonably possible if the evidence had been disclosed.[14]

We conclude that the State did not violate Brady or commit a discovery violation.[15] King has failed to demonstrate, let alone allege with

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[12]See Strickler v. Greene, 527 U.S. 263, 280 (1999).

[13]Id. at 281-82.

[14]See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

[15]NRS 174.295(2) provides that:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295 [disclosure of evidence statutes], inclusive, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence

continued on next page . . .

any cogent argument or degree of specificity, that the evidence at issue was favorable to his defense. Further, as described above, there was overwhelming evidence of King's guilt, and therefore, he cannot demonstrate that he was prejudiced by not knowing the identity of the secret witness caller. Additionally, all of the information provided by the secret witness was included in reports prepared by Detective Duncan. And most importantly, the secret witness actually testified during the defense's case-in-chief and denied that she provided any information as a secret witness, completely contradicting the testimony of Detective Duncan. Therefore, we conclude that there was not a reasonable possibility of a different verdict had the identity of the secret witness been revealed prior to trial.[16]

Fifth, King contends that the district court improperly instructed the jury "regarding the State's burden of proof." King challenges the following instruction:

> It is not necessary for the prosecution to prove each and every factual statement contained in the Indictment. So long as the State proves all of the essential elements of the particular crime charged, then the evidence is sufficient to convict

. . . *continued*

> the material not disclosed, or it may enter such other order as it deems just under the circumstances.

[16]Alternatively, and without any application of the facts of the case to the cited case law, King contends that his Sixth Amendment right to confrontation was somehow violated by the State. See U.S. Const. amend VI. As noted above, the defense called the secret witness to testify in their case-in-chief. Therefore, King's contention is belied by the record.

> regardless of whether every statement in the Indictment is proved.

(Emphasis added.) King concedes that he did not object to the instruction,[17] but argues that the instruction runs afoul of In re Winship[18] and therefore amounts to plain error. We disagree with King's contention.

Initially, we note that King only challenges the first sentence in the instruction above. King does not address or even acknowledge the second sentence in the instruction. Further, the instruction is not an incorrect statement of law and King's reliance on Winship is misplaced. The United States Supreme Court in Winship held that due process requires that the prosecution prove every element of a crime beyond a reasonable doubt.[19] The instruction above complies with this mandate, and therefore, we conclude that the district court did not commit plain error.

Finally, King contends that the district court erred in instructing the jury on conspiracy. King claims that "no evidence of conspiracy was presented at trial," and that the erroneous conspiracy instructions unfairly prejudiced him by attributing his codefendant's actions to him. We disagree.

In both counts of the criminal indictment, King and Benson were charged "individually and/or in joint participation as co-conspirators." (Emphasis added.) This court has stated that the

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[17]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (holding that the failure to object to jury instructions precludes appellate review).

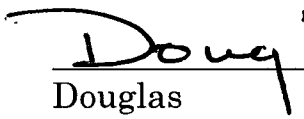
[18]397 U.S. 358 (1970).

[19]Id. at 364.

prosecution "may proceed on alternate theories of liability as long as there is evidence in support of those theories. . . . [I]t is not necessary to plead a conspiracy in the charging document if the evidence actually shows its existence."[20] In other words, the existence of a conspiratorial agreement can be inferred from the facts of a case.[21] Based on all of the above, we conclude that there were sufficient facts supporting "conspiracy" as a theory of liability. Accordingly, the district court did not abuse its discretion.[22]

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

ORDER the judgment of conviction AFFIRMED.



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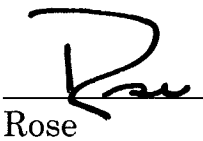
Douglas



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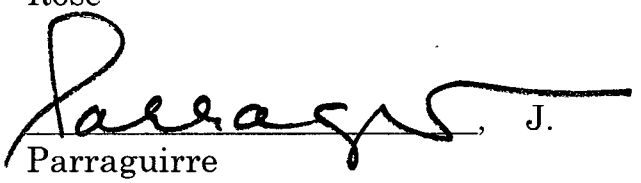

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Parraguirre

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[20]Walker v. State, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000) (citation omitted).

[21]See Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998).

[22]See Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (holding that a district court has broad discretion in settling jury instructions).

cc: Hon. Steven R. Kosach, District Judge
Jenny Hubach
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk