IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ANTHONY BENSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44739

FILED

OCT 0 4 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 Robert Anthony Benson 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. Benson was ordered to pay restitution in the amount of $1,500.00 jointly and severally with his codefendant, Rashon Kalanikai King.

First, Benson contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Benson argues that no physical evidence of the crime was found linking him and his codefendant, King, to the crimes; the only evidence presented by the State, he claims, were statements made by the victim. Alternatively, Benson contends that he is entitled to a new trial

based on conflicting evidence. Benson, 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 Benson'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 Benson as one of the two perpetrators of the robbery and kidnapping. Berliner testified at trial that he had been introduced to Benson 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

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[1]NRS 176.515(4) provides that "[a] motion for a new trial based on any other grounds [than newly discovered evidence] 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)).

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 disengage 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, 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." The mother of Benson's two children, Ebony Young, testified at trial that several days later she was visiting Benson's mother when he telephoned. Young testified that Benson "basically said he wanted me to say that I was with him" at the time of the robbery and kidnapping, "And I wasn't."

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Benson 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] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Benson contends that the pretrial identification procedure was unduly suggestive. The extent of Benson'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

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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").

Benson and positively identified them at trial as the perpetrators. Benson 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 Benson's contention is without merit.

Third, Benson contends that the State violated Brady v. Maryland[7] 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 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 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 Benson's contention is without merit.

Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the

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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]373 U.S. 83 (1963).

defense.[8] 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.[9] 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.[10]

We conclude that the State did not violate Brady or commit a discovery violation.[11] Benson has failed to demonstrate, let alone allege with any cogent argument or degree of specificity, that the evidence at issue was favorable to his defense. Further, as described above, there was

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

[9]Id. at 281-82.

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

[11]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 the material not disclosed, or it may enter such

continued on next page . . .

overwhelming evidence of Benson'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.[12]

Fourth, Benson contends that the district court improperly instructed the jury "regarding the State's burden of proof." Benson 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

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. . . continued

> other order as it deems just under the circumstances.

[12]Alternatively, and without any application of the facts of the case to the cited case law, Benson 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, Benson's contention is belied by the record.

> essential elements of the particular crime charged, then the evidence is sufficient to convict regardless of whether every statement in the Indictment is proved.

(Emphasis added.) Benson concedes that he did not object to the instruction,[13] but argues that the instruction runs afoul of In re Winship[14] and therefore amounts to plain error. We disagree with Benson's contention.

Initially, we note that Benson only challenges the first sentence in the instruction above. Benson does not address or even acknowledge the second sentence in the instruction. Further, the instruction is not an incorrect statement of law and Benson'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.[15] The instruction above complies with this mandate, and therefore, we conclude that the district court did not commit plain error.

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[13]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).

[14]397 U.S. 358 (1970).

[15]Id. at 364.

Fifth, Benson contends that the district court erred in instructing the jury on conspiracy. Benson 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 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."[16] In other words, the existence of a conspiratorial agreement can be inferred from the facts of a case.[17] Based on all of the above, we conclude that there were sufficient facts supporting "conspiracy" as a theory of liability, and therefore, the district court did not err in so instructing the jury.

Finally, Benson contends that the district court erred in rejecting his proffered jury instruction on circumstantial evidence. Citing

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

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

to Buchanan v. State[18] for support, Benson requested the following instruction: "Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a reasonable certainty every hypothesis but the single one of guilt." We conclude that Benson's contention is without merit.

The district court's broad discretion in settling jury instructions will not be disturbed absent an abuse of discretion or judicial error.[19] The district court may refuse to give a proposed jury instruction if the content is substantially covered by other jury instructions.[20] Although Benson's proposed instruction is a correct statement of law, we conclude that the instruction was substantially covered by other jury instructions, specifically, those explaining the presumption of innocence, the prosecution's burden to prove both act and intent beyond a reasonable doubt, and the State's proffered instruction on direct and circumstantial evidence. Accordingly, we conclude that the district court did not abuse its discretion.

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[18]119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

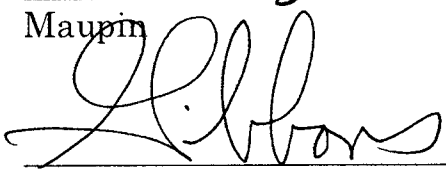
[19]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[20]See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

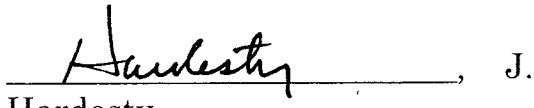
Having considered Benson's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[21]

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Steven R. Kosach, District Judge
John P. Calvert
Robert Anthony Benson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[21]Because Benson 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 Benson unfiled all proper person documents he has submitted to this court in this matter.