

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN RANKIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45697

FILED

NOV 13 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF 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 two counts of attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court adjudicated appellant Alvin Rankin, Jr., as a habitual criminal and sentenced him to serve four prison terms of life with parole eligibility in 10 years. The district ordered two of the life prison terms to run consecutively and two of the life prison terms to run concurrently.

First, Rankin contends that the district court erred by denying his motion to exclude the in-court identification testimony of State's witnesses, Jesus Lara and Mario Sangines. Specifically, Rankin notes that neither witness was given an opportunity to identify him in a photographic or in-person line-up, and the courtroom setting identifications were highly suggestive because Rankin was the only African-American male in the room and seated next to Caucasian defense

counsel. Citing to Neil v. Biggers,¹ Rankin argues that the witness identifications were unreliable because the robbery was brief, occurred in a dark parking lot, and the witnesses's descriptions of the robbers were inconsistent. Also, Rankin notes that Sangines previously told police that he was uncertain whether he could identify the robbers and did not identify Rankin until trial, approximately two years after the commission of the crime. We conclude that Rankin's contention lacks merit.

As a preliminary matter, we note that Biggers is inapposite because it only applies to identification testimony that has been tainted by an impermissibly suggestive, out-of-court pretrial identification.² The analysis in Biggers does not extend to identifications occurring for the first time at trial because the presence of the judge and defense counsel and the availability of cross-examination provide adequate safeguards against suggestiveness.³ At trial, Rankin cross-examined both Lara and Sangines about any inconsistencies or weaknesses in their identifications, and the determination of the weight and credibility of their testimony was within

¹409 U.S. 188 (1972) (setting forth facts to determine whether pretrial identification is reliable, including witness's opportunity to view the crime, length of time between crime and identification, and accuracy of witness's prior description).

²See People v. Monroe, 925 P.2d 767, 775 (Colo. 1996) ("The exclusionary rule has not been extended to in-court identifications alleged to be suggestive simply because of the typical trial setting.").

³See Steese v. State, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998); see also State v. Lewis, 609 S.E.2d 515 (S.C. 2005) (citing cases from numerous jurisdictions concluding that Biggers does not apply to first time in-court identifications).

the sole province of the jury.⁴ Further, the record indicates that Lara and Sangines were unavailable for a show-up identification after the crime because both victims were receiving emergency medical treatment for their injuries sustained in the robbery. Finally, according to the prosecutor, defense counsel made no pretrial request for a physical or photographic line-up. Accordingly, we conclude that the district court did not abuse its discretion by refusing to exclude the testimony.

Second, Rankin contends that the district court abused its discretion by limiting defense counsel's cross-examination of the crime scene investigators. Citing to United States v. Hoffman⁵ and United States v. Pointdexter,⁶ Rankin argues that the district court erred by limiting his cross-examination because the lack of physical evidence in the case, such as gun powder residue and blood spatter, supported his defense that he was misidentified as the man in close proximity to the shooter. We agree.

A criminal defendant has a right to cross-examine witnesses against him,⁷ which includes presenting "any relevant evidence and testimony at trial that someone other than the defendant committed the

⁴See Steese, 114 Nev. at 498, 960 P.2d at 333; McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁵964 F.2d 21 (D.C. Cir. 1992).

⁶942 F.2d 354 (6th Cir. 1991).

⁷See U.S. Const. amend VI.

offense."⁸ However, district courts also have the discretion to limit the scope of cross-examination.⁹

In this case, the trial court did not allow defense counsel to question the crime scene analyst about the nonperformance of paraffin or blood spatter evidence because it found that the line of questioning was not relevant to the case and posed a "very distinct possibility of misleading the jury." We conclude that the district court abused its discretion by limiting the cross-examination of the crime scene analyst because testimony about the lack of physical evidence and whether police procedures were followed supported Rankin's misidentification defense.¹⁰ We further conclude, however, that any error was harmless beyond a reasonable doubt. The prejudicial nature of the error was minimal because the cross-examination of the crime scene analyst would not have revealed any exculpatory evidence. Additionally, the State's evidence against Rankin was convincing. We note that Rankin was identified as a participant in the robbery by three different eyewitnesses. Further,

⁸See Garcia v. State, 121 Nev. ___, ___, 113 P.3d 836, 845 (2005), modified in part on other grounds by Mendoza v. State, 122 Nev. ___, ___, 130 P.3d 176, 180-81 (2006).

⁹See Crawford v. State, 121 Nev. 327, 341, 121 P.3d 582, 591 (2005).

¹⁰See generally Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1106 (1990) (defendant is entitled to present defense theory of the case); see also Commonwealth v. Miles, 648 N.E.2d 719, 724 (Mass. 1995) ("It is well-settled that a defendant has a right to expose inadequacies of police investigation, and the trial court should not preclude cross-examination on whether police procedures were followed.").

Rankin was found in the vicinity of the robbery immediately after it occurred; police described him as sweating profusely, dirty, and having what appeared to be new lacerations or scratches on his neck and hand. Although the charged crimes were serious, we conclude beyond a reasonable doubt that the error in limiting cross-examination did not undermine the reliability of the jury's verdict.¹¹

Third, Rankin contends that the district court improperly limited the direct examination of defense witness, Dr. Robert Shomer, by precluding him from explaining the basis for his opinion that the pretrial identification of Rankin as one of the robbers was the product of a suggestive and unreliable show-up. Specifically, the district court prohibited Dr. Shomer from (1) describing the United States Department of Justice guidelines for law enforcement on minimizing suggestive field identification procedures; and (2) comparing those guidelines to the practices used by the Las Vegas Metropolitan Police Department. Rankin argues that the testimony should have been admitted because it would have assisted the jury in evaluating the strength of the State's identification evidence. We disagree.

The admissibility of expert testimony is within the sound discretion of the district court.¹² And, even admissible expert testimony may be excluded if it does not "withstand the challenge to all relevant evidence, i.e., whether probative value exceeds prejudicial effect."¹³

¹¹See Chapman v. California, 386 U.S. 18, 24 (1967).

¹²Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

¹³Townsend v. State, 103 Nev. 113, 117-18, 734 P.2d 705, 708 (1987).

In this case, the district court ruled that the evidence was not admissible because it was "not productive." We conclude that the district court did not manifestly abuse its discretion by excluding the evidence because its probative value was negligible. Moreover, our review of the direct examination of Dr. Shomer indicates that he testified extensively about the basis for his opinion. Specifically, he testified that he reviewed the police reports, the preliminary hearing transcript, and witness statements in the case. Dr. Shomer summarized the scientific research supporting his conclusion that one-on-one show-up identifications are unreliable, and even described possible solutions for the deficiencies in the identification procedure based on one of the United States Department of Justice Guidelines. Accordingly, we conclude that the district court did not improperly limit the expert testimony of Dr. Shomer.

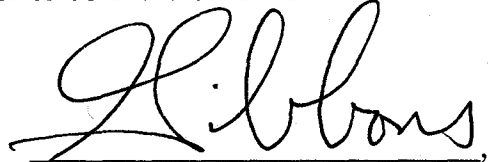
Finally, Rankin argues that the district court abused its discretion by adjudicating him as a habitual criminal because (1) only one of his prior convictions involved a crime of violence and that conviction was stale, occurring eleven years ago; (2) the act of possessing marijuana, the basis for two of his prior convictions for possession of a controlled substance, is no longer a felony under Nevada law; (3) the Division of Parole and Probation did not recommend habitual criminal treatment; and (4) his three prior convictions for possession of a controlled substance are thirteen months part and are indicative of an individual who has a serious drug problem, not a career criminal who poses a serious threat to society. We conclude that Rankin's contention lacks merit.

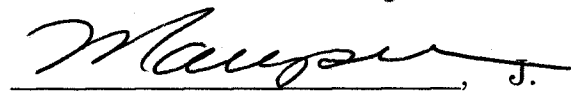
We have recognized that the habitual criminal statute "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the

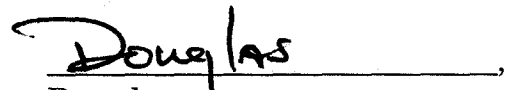
district court."¹⁴ Further, we have held that "as long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law."¹⁵ Here, we conclude that the district court did not abuse its discretion by relying on Rankin's four prior felony convictions in adjudicating him as a habitual criminal. The transcript of the sentencing hearing indicates that the district court properly exercised its discretion in determining that such an adjudication was warranted.

Having considered Rankin's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


Gibbons, J.


Maupin, J.


Douglas, J.

¹⁴Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

¹⁵Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

cc: Hon. Donald M. Mosley, District Judge
Brent D. Percival
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk