IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYFORD CARLOS WILLIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47587

FILED

MAY 30 2007

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 of robbery. Eighth Judicial District Court, Clark County; David Wall, Judge. The district court sentenced appellant Rayford Carlos Willis to serve a prison term of 28 to 96 months.

First, Willis contends that his right to due process was violated because the information failed to allege sufficient facts constituting robbery.[1] The information provided that, on January 1, 2006, Willis and his codefendant took money from an identified victim without his consent by use of force or fear in the following manner:

> Defendants acting in concert with one another and the Defendants directly committing the acts constituting the offense and/or the Defendants aiding or abetting each other and/or the Defendants directly or indirectly counseling, encouraging, hiring, commanding, inducing or otherwise procuring each other to commit the acts constituting the offense, as evidenced by the conduct of the Defendants before, during and after the offense.

[1]Willis also challenges the jury instruction restating the information.

Citing to Ikie v. State,[2] Willis argues the information was inadequate because it contains no facts "outlining each of three different theories that the State proceeded under, [and] no fact outlining the acts Willis did as opposed to his codefendant." While acknowledging that he failed to object at trial to the information, Willis argues that the State's failure to allege essential facts is a structural error warranting reversal of his conviction. We disagree.

If a charging document alleges a theory of aiding and abetting, it "should specifically allege the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense."[3] This court has recognized that where a challenge to the sufficiency of the information is raised after the verdict, the verdict cures any technical defects unless the defendant has been prejudiced by the defective charging document.[4]

In this case, Willis has failed to show that he was prejudiced by any deficiency in the information. The information contained the elements of the charged robbery offense and provided Willis with adequate notice of the State's theory of the case to allow him to prepare a defense.[5]

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[2]107 Nev. 916, 823 P.2d 258 (1991).

[3]Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983).

[4]Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669-70 (1970).

[5]See NRS 173.075(1); Sanders v. Sheriff, 85 Nev. 179, 182, 451 P.2d 718, 720 (1969) (holding that a charging document "may simply be drawn in the words of the statute so long as the essential elements of the crime are stated"); see also Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985) (recognizing that the purpose of NRS 173.075 is to put the

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Second, Willis contends that the district court erred by denying in part his motion to suppress evidence of the victim's pretrial identification of Willis as one of the perpetrators of the robbery. Specifically, Willis argues that the show-up identification was unreliable because "the opportunity for the witness to view the suspect was a few seconds, he was nervous, he was in an unfamiliar area, his descriptions of the suspects changed, he was allowed to see Willis and his codefendant twice the night of the incident, and he did not identify Willis in the proper clothing." We conclude that Willis's contention lacks merit.

In considering whether an out-of-court identification violates a defendant's due process rights, our inquiry is two-part: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.[6] 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."[7]

Even assuming that the identification was suggestive, the district court did not err in concluding that the identification was reliable.

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defendant on notice of the charges he is facing and to allow him to prepare a defense).

[6]Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

[7]Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

The identification occurred approximately twenty minutes after the crime occurred, the victim had a good opportunity to view Willis at the time of the crime, and the victim was certain in his identification of Willis. Moreover, we note that, at trial, defense counsel thoroughly cross-examined the victim with respect to the show-up identification, thereby exposing any deficiencies in the procedure and any inconsistencies in the victim's identification testimony to the jurors charged with evaluating the weight and credibility of such testimony.

Third, Willis contends that there is insufficient evidence in support of the robbery conviction. Specifically, Willis argues that the identification evidence was unreliable and there was insufficient evidence of force since "pressing something against the [victim] and asking for his money was not more than a mere distraction while a second person took the [money]." 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.[8]

In particular, the victim testified that two men approached him, pressed a hard object into his back, and demanded his money. The victim identified Willis as one of perpetrators of the robbery. Additionally, Willis was apprehended approximately one block from the robbery shortly after it occurred. Police observed Willis walking with his codefendant Anthony Sherman. Sherman matched the victim's general description of one of the perpetrators of the robbery based on his weight, height, race, and clothing. When Willis and Sherman were spotted by police, they immediately separated and started walking in different directions. The

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[8]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).

jury could reasonably infer from the circumstantial evidence presented that Willis and his codefendant robbed the victim.[9] 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.[10]

Fourth, Willis contends that the district court erred in giving jury instruction number fourteen because it allowed the jurors to find him guilty of robbery even if he was not present at the scene. Willis also argues that the jury instruction inaccurately defined a principal because by using an "or" instead of "and" before the words "whether present or not" it allowed the jurors to find him guilty "even if he was not present and did not know about the crime." We conclude that Willis's contention lacks merit.

As a preliminary matter, we note that Willis failed to object to the jury instruction in the proceedings below. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain or constitutional error.[11] In this case, jury instruction number fourteen provided in relevant part:

> Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

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[9]See NRS 200.380(1).

[10]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).

[11]See Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991); McCall v. State, 91 Nev. 556, 540 P.2d 95 (1975).

> All persons concerned in the commission of a crime who either directly or actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed are equally guilty thereof.

(Emphasis added.)

We conclude that jury instruction number fourteen correctly defined a principal to a crime.[12] And any ambiguity in the jury instruction with respect to presence at the scene was harmless beyond a reasonable doubt. The State never proceeded on a theory that Willis was not present at the scene and, to the contrary, presented convincing evidence of his active participation in the robbery.[13] Accordingly, we conclude that the giving of jury instruction number fourteen did not amount to plain error.

Fifth, Willis contends that the district court erred in dismissing a juror who informed the trial court that she had seen Sherman and Willis together at a charity food line where she had worked during the holidays. Specifically, Willis argues that the juror should not have been dismissed because she never expressed any bias. We conclude that Willis's contention lacks merit.

NRS 16.080 provides that "[a]fter the impaneling of the jury and before verdict, the court may discharge a juror upon a showing of . . . any . . . inability to perform [her] duty." "A juror who will not weigh and

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[12]See NRS 195.020.

[13]See Neder v. United States, 527 U.S. 1, 10 (1999); Chapman v. California, 386 U.S. 18, 24 (1966).

consider all the facts and circumstances shown by the evidence for the purpose of doing equal and exact justice between the State and the accused should not be allowed to decide the case."[14] A district court's ruling with respect to a juror's state of mind involves factual findings "that cannot be easily discerned from an appellate record."[15] The district court's determination that a juror is unable to perform her duty will not be disturbed on appeal if the juror's statements about her objectivity were equivocal or conflicting.[16]

In this case, the juror's statements about whether she could be fair and objective were equivocal and conflicting. In particular, when the trial court asked the juror if she could separate her sympathetic feelings from the facts, the juror responded: "I don't know. I really don't because I think I am a combo thinker, so I do think from my heart, too. So that's where I kind of just thought I should tell you so you could decide." Accordingly, the district court's ruling that the juror was unable to perform her duty is supported by sufficient evidence.

Sixth, Willis contends that the prosecutor engaged in misconduct during closing argument by misrepresenting the evidence. Specifically, Willis argues that the prosecutor's argument that the victim's identification of Willis "never varied" was not true because, at the preliminary hearing, the victim testified that he did not get a good look at Willis's face. As a preliminary matter, we note that Willis failed to contemporaneously object to some of the alleged instances of prosecutorial

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[14]McKenna v. State, 96 Nev. 811, 813, 618 P.2d 348, 349 (1980).

[15]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

[16]Id.

misconduct. The failure to object to prosecutorial misconduct generally precludes appellate review absent plain error.[17] Nonetheless, we have considered the prosecutor's comments in context and conclude that they do not rise to the level of improper argument that would justify overturning Willis's conviction.[18]

Seventh, Willis contends that the district court erred by overruling his objection to the prosecutor's use of a peremptory challenge to strike an African-American venire person in violation of Batson v. Kentucky.[19] More specifically, Willis argues that the district court erred "by requiring the defense to show a pattern" of discrimination. Alternatively, Willis argues that the district court erred by refusing to find a pattern of discrimination because "the prosecutor admitted using 'race' as the deciding factor for keeping a [prospective juror] on the panel, even though he wanted her off." Finally, Willis argues that "the prosecutor's alleged race neutral reasons . . . for using his first strike to remove the only African-American male, made no sense."[20] We conclude that Willis's contention lacks merit.

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[17]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

[18]See Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997) ("[T]he relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[19]476 U.S. 79 (1986).

[20]Willis also argues the prosecutor "used 'racial perspectives' for his last peremptory challenge by striking a juror who expressed concern that minorities may not get a fair shake or may be prejudged because of their skin color." We note that it was actually defense counsel who questioned the potential juror about his views on race. Further, in the proceedings

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Pursuant to Batson and its progeny, there is a three step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the proffered explanation is merely a pretext for purposeful racial discrimination.[21] The ultimate burden of proof regarding racial motivation rests with the opponent of the strike.[22] The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.[23]

Our review of the record on appeal reveals that the district court did not abuse its discretion in overruling Willis's objection to the peremptory challenge of the African-American venire person. The prosecutor offered a race-neutral explanation providing:

> I tend not to like to pick people with ponytails. He had a ponytail. . . His educational background, the fact that he was single, he was wearing this chain

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below, defense counsel failed to challenge the prosecutor's strike of the potential juror.

[21]See id. at 96-98; Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

[22]See Purkett v. Elem, 514 U.S. 765, 768 (1995).

[23]See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

thing, there were things about him that gave me pause.

The district court overruled the objection, noting that the prosecutors did not appear to be challenging venire persons based on race. We conclude that the district court did not err in overruling the Batson objection. The prosecutor's explanation for the peremptory challenge was race-neutral, and Willis failed to present any evidence of intentional discrimination.[24]

Eighth, citing to NRS 178.405, Willis contends that the district court erred by failing to continue the sentencing hearing and request a competency hearing. Willis notes that the district court commented that Willis was "out of his mind" after he commented in his statement of allocution that the jurors were not in the courtroom when the victim testified.[25] We conclude that Willis's contention lacks merit.

NRS 178.405 provides that "if doubt arises as to the competence of the defendant, the court shall suspend . . . the pronouncing of the judgment . . . until the question of competence is determined." "A determination whether doubt [about a defendant's competency] exists rests largely within the discretion of the trial judge."[26]

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[24]See Purkett, 514 U.S. at 768-69 (the fact that prospective juror had a beard and long, unkempt hair was race-neutral reason for peremptory strike, and trial court did not abuse its discretion in finding that prosecutor's justification was genuine); cf. Miller-el v. Cockrell, 537 U.S. 322, 343 (2003) (discussing evidence of discriminatory intent).

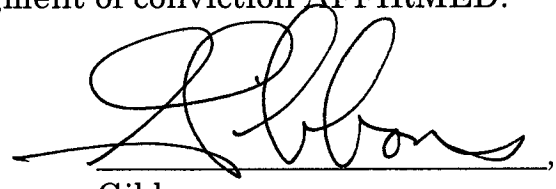
[25]It appears that Willis was referring to the victim's testimony during the hearing on the pretrial motion to suppress, which was conducted outside the presence of the jury.

[26]Williams v. State, 85 Nev. 169, 174, 451 P.2d 848, 852 (1969) (citation omitted).

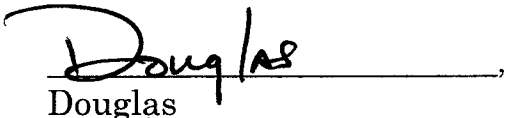
In this case, there was no indication in the record giving rise to a question of competency. Defense counsel never expressed concern about Willis's ability to assist in his defense or understand the proceedings, and Willis does not allege that he has a history of mental illness. Accordingly, the district court did not err by failing to conduct a competency evaluation.

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

ORDER the judgment of conviction AFFIRMED.[27]



_____, J.
Gibbons



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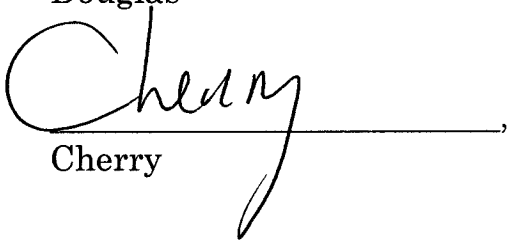

_____, J.
Cherry

cc: Hon. David Wall, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[27]Because Willis 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, this court shall take no action and shall not consider the proper person documents Willis has submitted to this court in this matter.