IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY SHERMAN, AKA TONY CONRAD SHERMAN, AND AKA TONY C. SHERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47665

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 Anthony Sherman to serve a prison term of 28 to 96 months.

First, Sherman contends that the district court erred in denying in part his motion to suppress identification testimony arising from a suggestive and unreliable show-up. Sherman argues that the district court erred in allowing testimony that the victim "identified" Sherman by his clothing at a one-on-one police show-up conducted shortly after the robbery. Preliminarily, we note that the victim did not identify Sherman as one of the perpetrators of the robbery at trial, but only stated that he wore similar clothing to one of the robbers. Nonetheless, even assuming the victim's statement could be considered an identification, we

conclude that the district court did not err in admitting the evidence because the victim's identification of the clothing was reliable.[1]

Second, Sherman contends that the district court erred in denying his motion to sever the trial. Sherman argues that he was prejudiced by the joint trial because the jurors heard highly inflammatory evidence involving the show-up identification of his codefendant, Rayford Willis, that would not have been admissible if Sherman was tried separately. We conclude that Sherman's contention lacks merit.

Multiple defendants may be charged in the same "information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[2] If it appears that a defendant is prejudiced by a joint trial, the court may grant a severance or other relief.[3] The decision to sever is within the discretion of the district court, and defendants that have been jointly charged should be tried together "absent compelling reasons to the contrary."[4]

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[1]See Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980) (recognizing the factors to be weighed in determining whether an identification is reliable are "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") (citing Neil v. Biggers, 409 U.S. 188 (1972)).

[2]NRS 173.135.

[3]NRS 174.165(1).

[4]Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995).

In this case, the district court did not abuse its discretion in denying Sherman's motion to sever. Sherman does not allege that he and Willis had inconsistent defenses.[5] Moreover, the evidence that Sherman alleges was prejudicial--the identification testimony of Willis at the show-up--was relevant evidence that would have been admissible had Sherman been tried separately.[6] The fact that Willis was identified by the victim as one of the robbers was relevant circumstantial evidence of Sherman's guilt because Sherman was apprehended with Willis in the vicinity of the robbery shortly after it occurred and matched the general physical description of Willis's accomplice.[7] Accordingly, Sherman failed to show any undue prejudice from the denial of his motion to sever.

Third, Sherman contends that the evidence was insufficient to support the conviction. Citing to Walker v. State,[8] Sherman argues that the mere fact that he was wearing similar clothing as one of the robbers was insufficient to support the conviction. Sherman also argues that the evidence was insufficient because the victim's account of the robbery was

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[5]See id. at 854, 899 P.2d at 547 (noting that inconsistent defenses may support a motion for severance).

[6]See generally Amen v. State, 106 Nev. 749, 755, 801 P.2d 1354, 1358 (1990) (discussing factors for when severance is appropriate).

[7]See NRS 48.015; NRS 48.025.

[8]111 Nev. 497, 893 P.2d 366 (1995) (identification of suspect's clothing insufficient to sustain his conviction where he had several alibi witnesses and similar clothing was worn by other gang members in the area).

inconsistent, and no key items of evidence, such as the $50.00 dollar bill stolen or the "hard object" used in the robbery, were ever found. 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.[9]

In particular, Sherman matched the victim's general description of one of perpetrators of the robbery based on his weight, height, race, and clothing. Additionally, Sherman was apprehended approximately one block from the robbery shortly after it occurred. Police observed Sherman walking with his codefendant Willis, who the victim positively identified as one of the perpetrators of the robbery. When Sherman and Willis were spotted by police, they immediately separated and started walking different directions. The jury could reasonably infer from the circumstantial evidence presented that Sherman and his codefendant robbed the victim.[10] 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.[11]

Fourth, Sherman contends that the district court erred by refusing his proposed jury instruction advising acquittal pursuant to NRS 175.381(1). Sherman argues that the only evidence linking him to the

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[9]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).

[10]See NRS 200.380(1).

[11]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).

crime was inadmissible identification evidence arising from an inherently suggestive and unreliable show-up and, therefore, the trial court abused its discretion in failing to advise the jurors to acquit him of the robbery. We disagree.

The decision to give an advisory instruction to acquit pursuant to NRS 175.381 rests within the district court's sound discretion.[12] Given our conclusion that there was sufficient evidence to sustain the conviction, the district court did not abuse its discretion by refusing to give an advisory instruction to acquit.

Fifth, Sherman contends that the district court erred in refusing his proposed instruction on the burden of proof[13] and in giving the

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[12]See Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995).

[13]In addition to the statutory language set forth in NRS 175.211(1), the reasonable doubt instruction given at trial provided that:

> Each Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that each Defendant is the person who committed the offense.

Sherman requested the following instruction:

> This is a criminal case, and there are two basic rules that you must keep in mind. First, the defendants are presumed innocent unless proved guilty beyond a reasonable doubt. The defendants are not required to present any evidence or prove their innocence. The law never imposes upon a defendant in a criminal case the burden of calling any witness or introducing any evidence. Second,

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reasonable doubt instruction mandated by NRS 175.211. Sherman argues that the reasonable doubt instruction is unconstitutional because it impermissibly diminishes the State's burden of proof. Sherman also argues that the error involving the reasonable doubt standard was compounded by the prosecutor's closing argument. In closing argument, the prosecutor commented: "If we have to prove every detail of every single crime, not just the elements, but every detail of every crime that occurred and find every little piece of evidence that may or may not be there, nobody would ever be convicted of anything." We conclude that Sherman's contentions lack merit.

As Sherman acknowledges, this court has repeatedly upheld the statutory reasonable doubt instruction against similar constitutional challenges.[14] We decline his invitation to revisit the issue. We also conclude that the district court did not err in rejecting Sherman's instruction on the burden of proof and the presumption of innocence because it was adequately covered by other jury instructions.[15] And the prosecutor's comment in closing argument did not impermissibly diminish

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> the State is required to prove beyond a reasonable doubt that a crime was committed and that the defendant committed the crime.

[14]See, e.g., Garcia v. State, 121 Nev. 327, 339-41, 113 P.3d 836, 844 (2005), modified in part on other grounds by Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006); Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton, 111 Nev. at 1492, 908 P.2d at 687.

[15]See Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

the burden of proof.[16] Alternatively, we conclude that any error involving the instruction or argument on reasonable doubt was harmless beyond a reasonable doubt.[17]

Sixth, Sherman contends that the prosecutor engaged in misconduct during closing argument by misrepresenting the evidence. Specifically, the prosecutor commented that the victim was credible because his identifications were consistent in that he had consistently identified Willis by face and had never identified Sherman. Sherman argues that the victim's identifications were not consistent because, in a police statement and at the preliminary hearing, the victim identified Sherman, and the victim previously stated, at the preliminary hearing, that he did not see Willis's face.

As a preliminary matter, we note that Sherman failed to contemporaneously object to some of the alleged instances of prosecutorial misconduct. The failure to object to prosecutorial misconduct generally precludes appellate review absent plain error.[18] 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 Sherman's conviction.[19]

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[16]Cf. McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983).

[17]Wesley v. State, 112 Nev. 503, 514, 916 P.2d 793, 801 (1996).

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

[19]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

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Seventh, Sherman contends that the district court erred in dismissing a juror who informed the trial court that she had seen Willis and Sherman together at a charity food line where she had worked during the holidays. Specifically, Sherman argues that the juror should not have been dismissed because she said she could be fair and impartial. We conclude that Sherman'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 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."[20] 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."[21] 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.[22]

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process."), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

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

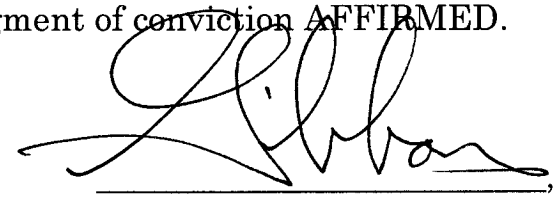
[21]Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997).

[22]Id.

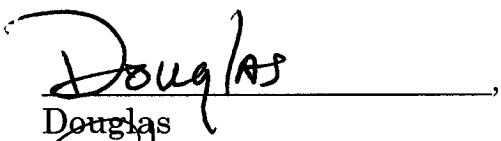
In this case, the juror's statements about whether she could be fair and objective were equivocal and conflicting. In particular, when the trial court asked the juror if she could separate her sympathetic feelings from the facts, the juror responded: "I don't know. I really don't because I think I am 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, we conclude that the district court's ruling that the juror was unable to perform her duty is supported by sufficient evidence.

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



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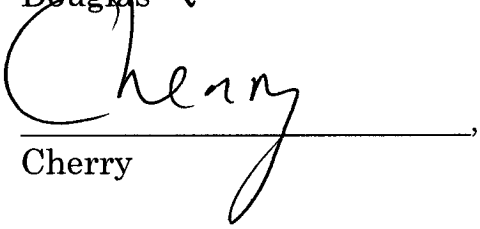
Douglas



_____, J.
Cherry

cc: Hon. David Wall, District Judge
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Eighth District Court Clerk