IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIUS DESHAWN MABRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51585

FILED

MAY 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Darius Mabry was originally charged with one count each of conspiracy to commit robbery, robbery with the use of a deadly weapon, and possession of stolen property. After a two-day jury trial, Mabry was found guilty of one count each of conspiracy to commit robbery and robbery with the use of a deadly weapon. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Identification

Mabry argues that the victim's identification of him shortly after the robbery was improperly suggestive. Mabry contends that the identification was improperly suggestive because the police told the victim he was going to make an identification of a suspect who was in custody.

The State contends that this issue should be reviewed for plain error because Mabry failed to file a motion to suppress the identification or to object to the identification at trial. We agree that this

issue should be reviewed for plain error since Mabry failed to object to or file a motion to suppress the identification.

The failure to object on the record generally precludes appellate review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). We may, at our discretion, address an unobjected to error if it was plain and affected the defendant's substantial rights. Id.

To address a pretrial identification challenge, we consider the totality of the circumstances to determine if the identification was so unnecessarily suggestive that the defendant was denied due process of the law. Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990). However, even if an at-the-scene identification was unnecessarily suggestive, the resulting testimony need not be excluded if it is determined to be reliable. Banks v. State, 94 Nev. 90, 96, 575 P.2d 592, 596 (1978). To determine if an identification was reliable, we weigh the corrupting effect of the identification against five factors: (1) the opportunity of the witness to view the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the defendant, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the time between the crime and the identification. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

We conclude that the identification of Mabry by the victim was reliable because the factors of reliability are not outweighed by the corrupting effect of the police telling the victim that they had a suspect in custody and that he was being taken to identify him. Specifically, we note that the victim was able to identify Mabry's distinctive hairstyle and clothing during the preliminary hearing and again at trial, and the witness had two separate opportunities to view Mabry's hairstyle and

clothing the night of the robbery. As such, we conclude that the victim's identification of Mabry was reliable and that Mabry has failed to show that plain error existed that would warrant a reversal of his convictions on this issue.

Sufficiency of the evidence

Mabry also argues that there was insufficient evidence presented at trial to support his convictions for robbery and conspiracy to commit robbery.

We will not reverse a jury's verdict on appeal if that verdict is supported by sufficient evidence. Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

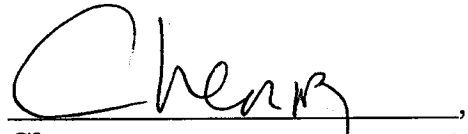
We conclude that there was sufficient evidence presented for the jury to find Mabry guilty of robbery because the victim identified Mabry as the man who held him up and took his money by force in the Gold Coast parking lot. See NRS 200.380(1).

However, we further conclude that the jury was not presented with sufficient evidence to find Mabry guilty of the conspiracy-to-commit-robbery charge. The only evidence presented by the State of the involvement of any other person in this robbery besides Mabry was that Mabry came back to meet the victim accompanied by two friends and that Mabry may have left in a vehicle occupied by his two friends. Without more, there was not sufficient evidence presented to the jury to show that

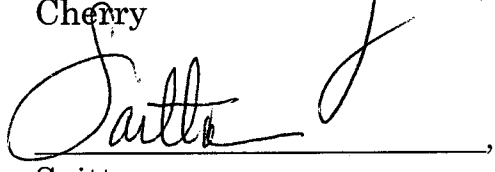
Mabry entered into an unlawful agreement to commit robbery. See Nunnery v. Dist. Ct., 124 Nev. ___, ___, 186 P.3d 886, 888 (2008).[1]

In light of the foregoing discussion, we

ORDER the judgment of conviction for robbery AFFIRMED and the judgment of conviction for conspiracy to commit robbery REVERSED.



_____, J.
Cherry



_____, J.
Saitta

cc: Eighth Judicial District Court Dept. 7, District Judge
Thomas A. Ericsson, Chtd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

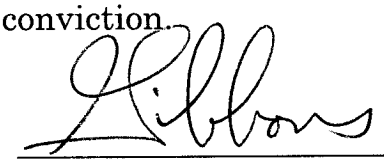
---

[1]We note that the dissent believes that there was sufficient evidence to sustain Mabry's conviction for conspiracy to commit robbery. We believe that the dissent has filled in many holes that are present in the facts presented by the State at trial. Further, based on the dissent's theory, it would follow that anytime there is more than one person present when a crime occurs that a conspiracy has taken place.

GIBBONS, J., concurring in part and dissenting in part:

I concur with the majority that there was sufficient evidence presented at trial for the jury to conclude beyond a reasonable doubt that Mabry was guilty of robbery. I also conclude that there was sufficient evidence presented at trial for the jury to conclude beyond a reasonable doubt that Mabry was guilty of conspiracy to commit robbery.

The victim testified that he met Mabry inside Bill's Gambling Hall in order to purchase marijuana. After meeting with Mabry, the victim, Mabry, and two other individuals got into an elevator leading to the parking garage. Upon arriving at the second floor, the two men accompanying Mabry ran from the scene after the victim was robbed at gunpoint. The two other men prepared the get-away car and fled with Mabry. The victim's testimony was corroborated by the assistant shift manager for security at Bill's Gambling Hall. Therefore, I would affirm the conspiracy to commit robbery conviction.



_____, J.
Gibbons