

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. ACOSTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55584

FILED

FEB 09 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Confrontation Clause violation

Appellant Michael A. Acosta contends that the district court erred by admitting hearsay evidence in violation of his right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004). Whether a defendant's right to confrontation was violated is a question of law subject to de novo review. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). Here, the district court allowed Detective Samuel Smith to imply during his trial testimony that one of Acosta's accomplices, Raul Salazar, implicated him in the robbery. Acosta's right to confrontation was violated because the content of Salazar's interview with Detective Smith was testimonial and he did not testify at either the preliminary hearing or trial. See Crawford, 541 U.S. at 68. We conclude, however, that the district court's error was harmless beyond a reasonable doubt because Detective Smith's testimony was cumulative and corroborated at trial by multiple witnesses, and the State presented overwhelming

evidence of Acosta's guilt. See Chapman v. California, 386 U.S. 18, 24 (1967) (constitutional error is harmless when "the error complained of did not contribute to the verdict obtained"); Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 476-77 (2006).

To the extent that Acosta claims that his conviction should be reversed, or that the district court erred by denying his motion for a mistrial, because references to the information provided by Salazar in the State's closing argument amounted to prosecutorial misconduct, we disagree and conclude that the prosecutor's comments were harmless due to the overwhelming evidence of Acosta's guilt. See Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003) (reversal of conviction is not warranted when the comments are harmless); King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) ("[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."); see also McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998) ("Denial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion.").

Voice identification

Acosta contends that the district court erred by allowing the victim the opportunity to identify him by his voice during the State's redirect examination. We disagree. The United States Supreme Court stated that a compelled voice exemplar used solely for identification purposes does not violate the Fifth Amendment because it is not testimonial. United States v. Dionisio, 410 U.S. 1, 5-7 (1973); United States v. Domina, 784 F.2d 1361, 1371 (9th Cir. 1986) (compelling utterance of perpetrator's words before jury for identification purposes

does not violate privilege against self-incrimination). Further, the victim replied that Acosta's voice in the courtroom merely "sounds similar" to that of her assailant and she was then available for cross-examination. Therefore, we conclude that the voice identification was not unduly prejudicial and the district court did not abuse its discretion by allowing its admission. See Domina, 784 F.2d at 1371-72; see also Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion.").

Investigation summary

Acosta contends that the district court erred by allowing Detective Smith "to essentially outline the entire case against [him]" because the testimony was irrelevant and highly prejudicial. Acosta failed to object to this line of questioning, and we conclude that he has failed to satisfy his burden and demonstrate that he was prejudiced in any way amounting to reversible plain error. See NRS 178.602; Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Motion to suppress identification

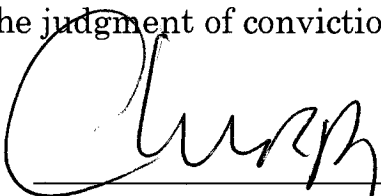
Acosta contends that the district court erred by denying his motion to suppress Officer David Sims' identification of him as the perpetrator because the officer's opportunity to view him was brief and stressed and he misidentified his race. We review the district court's factual findings regarding suppression issues for clear error and review the legal consequences of those findings de novo. Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). Here, Acosta does not allege that the identification procedure was unnecessarily suggestive, see Odoms v. State, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986), and after conducting a hearing on the motion, the district court found that there was not a

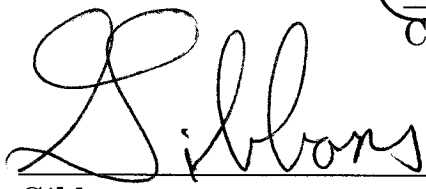
likelihood of misidentification. We agree and conclude that the district court did not err by denying Acosta's motion to suppress. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Gehrke v. State, 96 Nev. 581, 583-84, 613 P.2d 1028, 1029 (1980) (addressing factors relevant to reliability of identification).

Cumulative error

Acosta contends that cumulative error deprived him of a fair trial and requires the reversal of his conviction. Balancing the relevant factors, we conclude that Acosta's contention is without merit. See Valdez, 124 Nev. at 1195, 196 P.3d at 481.

Having concluded that Acosta is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk