

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVIN ANDREW JIM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58223

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery, battery with the intent to commit robbery, and principal to the crime of robbery with the use of a deadly weapon against a victim 60 years of age or older. Tenth Judicial District Court, Churchill County; David A. Huff, Judge.

Appellant Devin Andrew Jim contends that the district court erred by denying his motion to suppress the victim's identification of him as the perpetrator because the circumstances surrounding the show-up were unnecessarily suggestive and the identification was not reliable. The district court conducted a hearing, heard testimony from the victim and three of the investigating officers, and denied Jim's motion after finding that the on-the-scene identification procedure was not unduly suggestive and, even if it was, the victim's positive identification was sufficiently reliable. See Bias v. State, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989); Gehrke v. State, 96 Nev. 581, 583-84, 613 P.2d 1028, 1029 (1980). We agree and conclude that the district court did not err by denying Jim's motion to suppress. See Lamb v. State, 127 Nev. ___, ___, 251 P.3d 700,

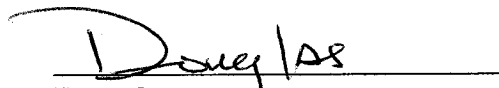
703 (2011) (“[W]e review the district court’s legal conclusions de novo and its factual findings for clear error.”).

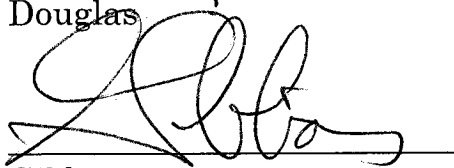
Jim next contends that the district court erred by overruling his objections to hearsay statements made by the victim during his trial testimony. “We review a district court’s decision to admit or exclude evidence for an abuse of discretion.” Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The district court overruled Jim’s first objection, noting, “I’m not sure that’s a statement at all,” and found that it was not offered to prove the truth of the matter asserted. See NRS 51.035(1). We agree and conclude that the district court did not abuse its discretion by overruling Jim’s first objection. We further conclude that the district court did not abuse its discretion by overruling Jim’s second objection because the challenged testimony was admissible pursuant to NRS 51.035(3)(e) as “[a] statement by a coconspirator . . . during the course and in furtherance of the conspiracy.” Jim did not object below to the third alleged hearsay statement and, on appeal, fails to demonstrate reversible plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (reviewing for plain error, “the burden is on the defendant to show actual prejudice or a miscarriage of justice”).

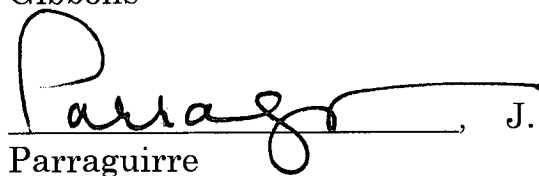
Finally, Jim contends that the district court erred by refusing to provide the jury with his proposed instruction on aiding and abetting. “The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.” Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Here, the majority of Jim’s proposed instruction was an incorrect statement of the law, see Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (defendant not entitled to misleading or inaccurate jury

instructions); see also Daniels v. State, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998) (“Robbery is a general intent crime.”), and the remainder was provided to the jury by other, unobjected-to instructions. Therefore, we conclude that the district court did not abuse its discretion by rejecting Jim’s proposed instruction. Accordingly, we

ORDER the judgment of conviction AFFIRMED.¹


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. David A. Huff, District Judge
The Law Office of Jacob N. Sommer
Attorney General/Carson City
Churchill County District Attorney
Churchill County Court Administrator

¹In light of the disposition of this appeal, we deny Jim’s request for full briefing and oral argument.