

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY REED,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59254

FILED

APR 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Ingerson
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery (count I), burglary while in possession of a deadly weapon (count II), attempted murder with the use of a deadly weapon (count III), and robbery with the use of a deadly weapon (count V). Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Sufficiency of the evidence

Appellant Anthony Reed contends that insufficient evidence was adduced to support the jury's verdict. We disagree and conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Trial testimony indicated that the victim, Anthony Harris, was sitting in his car waiting to sell marijuana when two individuals possessing firearms entered the vehicle at the same time from the passenger side of the vehicle and threatened to shoot Harris; the individual in the front passenger seat pointed his gun at Harris and demanded that he turn over his watch, wallet, and the marijuana. The

other individual sat in the back. Harris attempted to flee but was shot from behind, approximately five feet from the vehicle. Harris' vehicle was stolen from the scene and located the following day; Reed's fingerprints were found outside the driver's side door. Harris was unable to state which individual was the shooter. Although his testimony was equivocal, Harris did identify Reed, at both the preliminary hearing and trial, as one of the two individuals involved in the incident. The firearm used to shoot Harris was later found in Reed's possession.

Circumstantial evidence alone may sustain a conviction. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (noting that conspiracy "is usually established by inference from the parties' conduct"), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 193.165; NRS 193.330(1); NRS 199.480(1); NRS 200.010; NRS 200.380(1); NRS 205.060(1).

Prosecutorial misconduct

Reed contends that the prosecutors committed misconduct by (1) alluding to facts not in evidence, (2) injecting opinion, (3) misrepresenting the evidence, (4) disparaging himself and defense counsel, and (5) misstating the law on robbery and reasonable doubt. Reed did not

object to any of the alleged instances of prosecutorial misconduct and we conclude that he failed to demonstrate reversible plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (challenges to unobjected-to prosecutorial misconduct are reviewed for plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when reviewing for plain error, “the burden is on the defendant to show actual prejudice or a miscarriage of justice”); see also NRS 178.602. We also reject Reed’s contention that “[a]lthough each individual instance of misconduct, standing alone, may not have affected [his] substantial right,” the cumulative effect of the alleged prosecutorial misconduct violated his right to a fair trial. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

Leading questions

Reed contends that the district court abused its discretion by allowing the State to ask leading questions during the victim’s direct and redirect examination. See NRS 50.115(3)(a); Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001). The district court, however, sustained Reed’s sole objection to a leading question during the victim’s direct examination. Reed failed to object to any subsequent leading questions during either the victim’s direct or redirect examination and, on appeal, cannot demonstrate that the prosecutor’s conduct substantially affected the jury’s verdict or “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Valdez, 124 Nev. at 1189, 196 P.3d at 477 (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). We conclude that Reed is not entitled to relief on this ground.

Abuse of discretion at sentencing

Reed contends that the district court abused its discretion by imposing a disproportionate sentence constituting cruel and/or unusual punishment. See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. In a related argument, Reed claims the district court violated NRS 193.165(1)(d) by failing to make express findings on the record regarding the mitigating factors.

Reed has not alleged that the district court relied solely on impalpable or highly suspect evidence or that the sentencing statutes are unconstitutional. See Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489-90 (2009). Reed's sentence falls within the parameters provided by the relevant statutes¹ and is not so unreasonably disproportionate to the gravity of the offense as to shock the conscience, Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); see also Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Therefore, we conclude that the district court did not abuse its discretion at sentencing. See Parrish v. State, 116 Nev. 982, 988-89, 12 P.3d 953, 957 (2000). Additionally, Reed did not object to the sufficiency of the district court's findings with regard to the deadly weapon enhancements and we conclude that he fails to demonstrate plain error affecting his substantial rights.

¹The district court sentenced Reed to serve 13-60 months for count I, see NRS 199.480(1)(a); a concurrent prison term of 35-156 months for count II, see NRS 205.060(4); a concurrent prison term of 43-192 months plus a consecutive prison term of 24-192 months for count III, see NRS 193.165(2), NRS 193.330(1)(a)(1); and consecutive prison terms of 35-156 and 24-156 months for count V, see NRS 193.165(2), NRS 200.380(2). The district court also ordered Reed to pay \$27,228 in restitution.

See NRS 178.602; Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 507-08 (2009). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Valorie J. Vega, District Judge
Wendy D. Leik
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk