IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY EARL DOWNS A/K/A JAMES ROBINSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35460

FILED

AUG 10 2001

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 burglary, grand larceny, and robbery. The district court sentenced appellant Jimmy Earl Downs to concurrent prison terms of 16 to 72 months for the burglary, 16 to 72 months for the grand larceny, and 26 to 120 months for the robbery.

Appellant claims that the district court erred in denying relief on his pretrial petition for a writ of habeas corpus and also raises numerous other challenges to his judgment of conviction. We conclude that appellant has failed to demonstrate any error and that none of his claims warrant relief.

First, appellant contends that the State improperly re-filed its complaint against him after it was dismissed by the justice court. He relies on NRS 174.085(5), which permits the State in certain circumstances to re-file its complaint after voluntarily seeking a dismissal. He argues that this provision prohibits the State from re-filing its complaint where, as here, the dismissal of the prior complaint was granted upon the defendant's motion. However, appellant's contention that the State re-filed its complaint is belied by the record.

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The record shows that at the preliminary hearing in this case, the prosecutor informed the justice court that, due to the State's failure to subpoena necessary witnesses, it was unable to proceed but would be seeking a grand jury indictment. Appellant then moved for a dismissal, which the justice court granted. Thereafter, the State proceeded by way of grand jury indictment and did not re-file its complaint. We conclude that this procedure was proper.[1]

Second, appellant contends that the State's inability to proceed with the preliminary hearing should have barred further proceedings against him. He argues that the State's failure to subpoena necessary witnesses stemmed from its "conscious indifference" and "willful failure" to follow procedural rules. However, the record does not support this contention.

Here, the State attempted to subpoena its witnesses, but due to clerical inadvertence, the subpoenas were not served. We have held in previous similar cases that the failure to subpoena necessary witnesses did not demonstrate either "conscious indifference" or "willful failure."[2] Therefore, we conclude that appellant's claim lacks merit.

Third, appellant contends that Mary Jolivette's pretrial identification was unreliable and should have been excluded from evidence. We conclude that the district court properly admitted this evidence.

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[1]See NRS 178.562(2) (stating that "discharge of a person accused upon preliminary examination is a bar to another complaint against him for the same offense, but does not bar the finding of an indictment").

[2]See Sheriff v. Simpson, 109 Nev. 430, 433, 851 P.2d 428, 430 (1993); State v. Lamb, 97 Nev. 609, 610, 637 P.2d 1201, 1202 (1981).

Whether a pretrial identification is sufficiently reliable is determined by the totality of circumstances.[3] Further, "the test is whether the identification 'was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'"[4]

The record demonstrates that Jolivette had ample opportunity to view appellant during the crime. She observed him inside the Jeep Cherokee. She had a conversation with him at that time. She also viewed him as he pushed her aside and ran away down the alley. Following the crime, Jolivette gave a description of appellant to at least three people, including a police officer. In each instance, Jolivette stated that the assailant was a white male, standing six-feet tall, with reddish brown hair, and wearing tan pants, a blue shirt, and a cap. The description matched that of appellant, who was found with the stolen property just minutes after the crime. Jolivette also testified before the grand jury that she was sure that appellant was the assailant. Based on the foregoing circumstances, we conclude that Jolivette's pretrial identification was sufficiently reliable. Accordingly, the district court did not err in admitting evidence on the matter.

Fourth, appellant contends that the district court erroneously excluded the Fitzgeralds Hotel surveillance tape from evidence at trial on the ground that appellant did not seek its introduction in a timely manner. Appellant asserts

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[3]See Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

[4]Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

that this ruling improperly limited his opportunity to cross-examine witnesses. Again, we disagree.

Questions regarding the admissibility of evidence are within the sound discretion of the trial court.[5] When that evidence involves matters of impeachment, "[a] trial court has broad discretion to restrict cross-examination attacking the witness's credibility."[6] Further, "[t]his court will not set aside the district court's ruling to admit or exclude evidence unless it is manifestly wrong."[7]

Because the surveillance tape in question contained references to appellant's prior criminal history, appellant sought to introduce only excerpts from the tape. Moreover, appellant did not seek to introduce any portion of the tape until the conclusion of the State's case-in chief. He failed to notice any custodian of records or make any motion to redact the tape prior to trial. Under these circumstances, we conclude that the district court was within its discretion in excluding the surveillance tape evidence.

Fifth, appellant contends that double jeopardy proscriptions prohibit his conviction of both grand larceny and robbery. We conclude that appellant has not demonstrated error.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is . . . whether each

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[5]Wesley v. State, 112 Nev. 503, 512, 916 P.2d 793, 799 (1996).

[6]Crew v. State, 100 Nev. 38, 45, 675 P.2d 986, 990-91 (1984).

[7]Sherman v. State, 114 Nev. 998, 1006, 965 P.2d 903, 909 (1998) (citing Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985)).

provision requires proof of a fact which the other does not."[8] If so, a defendant may be convicted under both provisions.[9]

Grand larceny is defined as the intentional stealing, taking and carrying away of personal property of another.[10] The value of the property taken must equal or exceed $250.[11] In contrast - robbery is defined as:

> "[T]he unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery."[12]

"A taking is by means of force or fear if force or fear is used to . . . facilitate escape."[13]

We conclude that the crimes of grand larceny and robbery each require proof of an additional fact which the other does not. Specifically, value is an element of grand larceny but not of robbery, and force or intimidation is an element of robbery but not of grand larceny. As a result, we conclude that appellant's conviction of both grand larceny and robbery does not violate the rule against double jeopardy.

Sixth, appellant contends that the prosecution committed misconduct on numerous occasions. Specifically, appellant notes that the prosecution: (1) made facial gestures and feigned disbelief while appellant examined witnesses; (2) called appellant "a piece of shit" under his breath; and (3) injected personal opinion into his closing argument. We

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[8]Blockburger v. United States, 284 U.S. 299, 304 (1932).

[9]Id.

[10]NRS 205.220(1).

[11]Id.

[12]NRS 200.380(1).

[13]NRS 200.380(1)(c).

conclude that appellant has failed to preserve this issue for appeal.

As a general rule, this court has held that to preserve issues of prosecutorial misconduct on appeal, "objections must be made to the challenged remarks at the time, and the court must be requested to rule upon the objection, to admonish counsel, and instruct the jury."[14] We will make exceptions to this general rule only "in instances where 'the errors are patently prejudicial and require the court to intervene sua sponte to protect the defendant's right to a fair trial.'"[15]

Appellant failed to object at trial to any of the alleged instances of prosecutorial misconduct and thus failed to preserve his right to appeal this issue. Further, our review of the record reveals that much of the conduct took place outside the presence of the jury and the remainder was not patently prejudicial error such as might warrant our intervention despite appellant's failures.

Having considered all of appellant's arguments and determined that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

[14]Kelso v. State, 95 Nev. 37, 44, 588 P.2d 1035, 1040 (1979) (citing Moser v. State, 91 Nev. 809, 544 P.2d 424 (1975)).

[15]Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (quoting Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987)).

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk