IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKIE LAMONT SLAUGHTER A/K/A RICKIE LAMONT SLAUGHTER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61991

FILED

MAR 12 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit kidnapping, conspiracy to commit robbery, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon,[1] attempted robbery with the use of a deadly weapon, robbery with the use of a deadly weapon, burglary while in the possession of a deadly weapon, burglary, first-degree kidnapping with the use of a deadly weapon causing substantial bodily harm, and five counts of first-degree kidnapping with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On June 26, 2004, appellant and his companion entered the home of Ivan Young and his family armed with guns and restrained Ivan, his wife, his 10-year-old son, and his 12-year-old nephew with electrical cords. The men repeatedly demanded money and drugs from Ivan and his wife. During the event, an acquaintance of Ivan's, Ryan John, was called

[1]Appellant was not adjudicated on the offense of battery with the use of a deadly weapon because it was pleaded in the alternative to attempted murder with the use of a deadly weapon.

over to Ivan's house by appellant as John was leaving his girlfriend's house. When John entered Ivan's garage, appellant forced him at gunpoint into the home and restrained him. Ivan's friend, Jermaun Means also arrived at Ivan's house and was forced into the home and restrained. Appellant and his companion took money and wallets from the victims and broke their cell phones. Appellant also took John's Wells Fargo Bank card, demanded the pin number, and threatened John if he provided the wrong pin number. During the robbery, appellant and his companion beat Ivan and John and appellant shot Ivan in the face. The State introduced a surveillance video from a 7-Eleven and testimony that John's Wells Fargo bank card had been used at an ATM in the 7-Eleven to withdraw $300 an hour after the crimes. Appellant raises three issues on appeal.

First, appellant argues that a suggestive pretrial photographic lineup impermissibly tainted in-court identifications, thereby violating his due process rights. In this, he contends that the photographic lineup was impermissibly suggestive because his photograph had a white background, whereas the other five photographs had a blue background, and his photograph differed from the others in age and condition. In assessing a challenge to a pretrial identification, we consider "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989). Considering the totality of the circumstances, a photographic lineup is suggestive when the procedure is so unduly prejudicial as to fatally taint a defendant's conviction. *Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009). "[A] photographic identification must be set aside 'only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very

substantial likelihood of irreparable misidentification.'" *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

After reviewing the photographic lineup, the district court found that appellant and four of the five remaining persons in the photographs wore black or dark blue shirts, they all had the same hairstyle, facial hair and features, and appeared to be about the same age. The district court further concluded that the background of appellant's photograph was blue but that it was "just a lot lighter than the background in the others." Determining that the photographic lineup was proper, the district court denied appellant's motion to preclude the evidence. We conclude that the district court did not err in this regard.

Second, appellant argues that the district court abused its discretion by admitting the 7-Eleven surveillance video because it was not properly authenticated and its probative value was outweighed by its prejudicial effect because it was confusing and misleading to the jury. Appellant concedes that the 7-Eleven store owner was qualified to authenticate the surveillance video as to the location of the ATM machine, the time the video was recorded, and that the video was kept in the ordinary course of business. He argues, however, that the video surveillance was improperly authenticated because the State failed to establish that it was what the State represented it to be—a video of appellant entering the 7-Eleven and using John's Wells Fargo bank card to withdraw money. Rather, appellant argues, the State impermissibly authenticated the video through hearsay evidence. We conclude that the surveillance video was properly authenticated under NRS 52.015.

It appears that appellant really takes issue with evidence the State introduced to show that the individual on the video was him, namely the 7-Eleven store owner's testimony that the police requested him to

retrieve the video surveillance that corresponded to an ATM transaction on June 26, 2004, around 8:00 p.m., and John's testimony that he learned that his bank card had been used at a 7-Eleven ATM to withdraw $300 around 8:00 p.m. on the evening of the robbery. Because appellant did not object to the admission of this testimony, we review his challenge for plain error affecting his substantial rights. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). We conclude that the 7-Eleven manager's testimony was not offered for the truth of the matter asserted, *see* NRS 51.035, but to explain his actions in responding to a police request. *See Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay."). And John's testimony was not hearsay because it did not concern an out-of-court statement. *See* NRS 51.035. We also reject appellant's contention that the video was unfairly prejudicial because it was confusing and misleading to the jury, as it was for the jury to decide, based on the evidence presented, whether the man depicted in the surveillance video was appellant.

Finally, appellant argues that the prosecutor engaged in several instances of misconduct. Because appellant did not object to any of the comments he challenges, his claim is reviewed for plain error affecting his substantial rights. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). For the following reasons, we conclude that appellant has not established plain error. First, appellant's contention that the prosecutor's comments throughout the trial concerning the connection between the surveillance video and the stolen bank card lacks merit because those comments were reasonable inferences from the evidence presented at trial. *See Truesdell v. State*, 129 Nev. ___, ___, 304 P.3d 396,

402 (2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 651 (2013). Second, appellant's argument that the prosecutor improperly suggested that two persons had procured a defense witness to testify falsely on his behalf lacks merit where evidence was presented that appellant had attempted to construct an alibi and the prosecutor's comments challenged the witness' credibility in that regard. Third, appellant argues that the prosecutor improperly shifted the burden of proof by commenting that if appellant was not doing anything wrong at the time of the crimes, "he wouldn't need anybody to come in here and lie for him. That alone would make him guilty." Considering the challenged comment in context, *see Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), we conclude that the prosecutor's comments were a permissible response to evidence appellant presented suggesting that he was elsewhere at time the crimes were committed. Fourth, appellant contends that the prosecutor improperly interjected his personal beliefs to inflame the jury by stating, "I got to tell Appellant this, too, you shoot a guy in the face, you don't just get 10 years." *See Aesoph v. State*, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986) ("[P]rosecutors must not inject their personal beliefs and opinions into their arguments to the jury."). To the extent that the comment may be construed as personal opinion, no relief is warranted given the evidence presented. Fifth, appellant contends that the prosecutor's comment that appellant knew he committed the crimes and suggested to the jury that "if you are doing the job, 12 of you will go back in that room, you will talk about it, and come back here and tell him you know, too," suggested to the jury that it had a duty to convict him. To the extent that the comment may be deemed improper, *see Anderson v. State*, 121 Nev. 511, 517, 118

P.3d 184, 187-88 (2005), no relief is warranted considering the evidence presented.[2]

Having considered appellant's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Douglas W. Herndon, District Judge
Law Offices of Gamage & Gamage
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]We conclude that any prosecutorial misconduct considered cumulatively does not warrant relief. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (setting forth the factors to be considered in assessing a claim of cumulative error).