IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT EDWARD DAVIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36009

FILED

NOV 22 2000

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 robbery with the use of a deadly weapon (count I) and conspiracy to commit the crime of robbery with the use of a deadly weapon (count II). The district court sentenced appellant to serve two consecutive prison terms of 26-120 months for count I, and a concurrent jail term of 12 months for count II. Appellant was given credit for 64 days time served.

First, appellant contends the district court erred by admitting into evidence photographs of his co-defendant and a witness-accomplice. More specifically, appellant argues that he was prejudiced by the photographs showing his co-defendant snarling and covered in tattoos, and the accomplice in handcuffs. We disagree.

"The admissibility of photographs is within the sound discretion of the trial court, whose decision will not be disturbed in the absence of a clear abuse of that discretion." Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997). Furthermore, this court has stated that any improper inference that may be drawn by a jury "may be cured by providing an adequate jury instruction to prevent the jury from associating evidence admissible for one defendant with the other

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defendant." Lisle v. State, 113 Nev. 679, 689, 941 P.2d 459, 466 (1997).

The district court gave the following instruction to the jury:

> It is your duty to give separate, personal consideration to the case of each individual defendant. When you do you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against the other defendant. Each defendant is entitled to have his or her case determined from his or her own acts and statements and the other evidence in the case which may be applicable to him or her.

We conclude that the district court did not err by admitting into evidence the photographs in question. Additionally, appellant has not demonstrated that he was prejudiced by the admission of the photographs, or that the jury did not follow the instructions of the district court judge. See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds by, 114 Nev. 221, 954 P.2d 744 (1998). Therefore, we conclude that appellant's contention is without merit.

Second, appellant contends the district court erred by admitting into evidence a statement made by appellant to his co-defendant after their arrest. Appellant concedes that the statement was spontaneously made and not the result of an interrogation; therefore, not requiring the application of Miranda.[1] Appellant argues, however, that the statement implicates his involvement in uncharged misconduct and should have been the subject of a Petrocelli hearing to determine its

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

admissibility.[2] Appellant contends that he was prejudiced by the admission of the statement which amounted to impermissible character evidence in violation of NRS 48.045. We disagree.

Initially, we note that appellant failed to contemporaneously object to the admission of the evidence at trial. This court has held that "[a]s a general rule, failure to object below bars appellate review." Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991). Nevertheless, upon review we conclude that appellant's contention lacks merit.

According to the testimony of one of the arresting officers, appellant stated to his co-defendant, after their arrest and in a voice loud enough for the officer to hear, that the victim approached the two of them in order to buy drugs. Our review of the trial transcript reveals that before this testimony was admitted, the district court held a hearing outside the presence of the jury. This court has held that "[t]he trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error." Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998). We conclude that appellant has not demonstrated that he was prejudiced by the admission of the evidence in question, or that the evidence was admitted in violation of NRS 48.045; in fact, the State offered the evidence not to show impermissible character evidence but rather to show the defendants' desire to defame the victim. Therefore, we conclude that the district court did not err in admitting the evidence.

Third, appellant contends it was error to allow the jury to hear inadmissible hearsay evidence. Appellant argues that, upon elicitation by his co-defendant's counsel, he was

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

prejudiced by the testimony of one of the arresting officers who stated that appellant took a cell phone away from and punched the victim. We disagree with appellant's contention.

Initially, we note that appellant did not cite to any authority, case law, or statute in support of his contention. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Furthermore, appellant, once again, failed to object to the testimony; failure to object at the trial court level generally precludes the right to assign error on appeal. See Emmons, 107 Nev. at 60-61, 807 P.2d at 723.

Nevertheless, we must note that the State, in fact, objected to the officer's testimony, and the district court sustained the objection and struck the testimony from the record. The district court also admonished the jury to disregard the testimony of the officer. We must presume that the jury followed that instruction. See Lisle, 113 Nev. at 558, 937 P.2d at 484. Moreover, the testimony was not so prejudicial that it could not be neutralized by an admonition to the jury. See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983). We therefore conclude that appellant's contention is without merit.

Fourth, appellant contends the State adduced insufficient evidence to support the robbery conviction and deadly weapon enhancement. Appellant argues that (1) the witnesses' contradictory testimony is insufficient to support a robbery conviction, and (2) the deadly weapon penalty enhancement was improper because appellant did not know that his co-defendant was going to use his knife during the

commission of the robbery.[3] We disagree with appellant's contention.

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted). Furthermore, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In other words, a jury "verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court." Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972); see also Nev. Const. art. 6, § 4; NRS 177.025.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Origel-Candido, 114 Nev. at 378, 956 P.2d at 1378. In particular, we note that (1) the victim reported the crime immediately after its occurrence; (2) the victim's physical injuries were noted by police; (3) a knife was found on appellant's co-defendant; and (4) an accomplice's testimony confirmed that the robbery was committed by the accomplice, appellant, and his co-defendant. Moreover, as an unarmed participant in the robbery, appellant benefited from the actual possession of the knife and its use by his co-defendant, and is properly subject to the deadly

[3]Appellant does admit to knowing, however, that his co-defendant possessed a knife.

weapon penalty enhancement. See Jones v. State, 111 Nev. 848, 851-53, 899 P.2d 544, 546 (1995); Anderson v. State, 95 Nev 625, 629-30, 600 P.2d 241, 243-44 (1979). We therefore conclude that appellant's contention is without merit.

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction.[4]

It is so ORDERED.

Rose, C.J.

Young, J.

Becker, J.

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Calvert & Wilson
Washoe County Clerk

[4]In the fast track statement, counsel raises other legal issues but concedes that they are without merit. Counsel is reminded that "[a]ttorneys must argue for their clients without conceding an appeal is without merit." Ramos v. State, 113 Nev. 1081, 1084, 944 P.2d 856, 858 (1997). Furthermore, if an appellant insists on arguing a meritless point, "counsel's accurate summary of the facts and law will make that obvious." State v. Cigic, 639 A.2d 251, 254 (N.H. 1994).