IN THE SUPREME COURT OF THE STATE OF NEVADA

JEVYN WILLIAM BERNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65374

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a firearm. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

First, appellant Jevyn William Berney contends that the district court improperly denied both of his proposed jury instructions regarding eyewitness identification testimony. "[S]pecific eyewitness identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt." *Nevius v. State*, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985). Here, the jury was properly instructed regarding the standard of reasonable doubt and witness credibility. Therefore, we conclude that the district court did not abuse its discretion by declining to give the proffered instructions. *See Crawford v. State*, 121 Nev. 744, 748,

121 P.3d 582, 585 (2005).[1] Further, we decline Berney's invitation to reconsider *Nevius* and require an eyewitness identification instruction.

Second, Berney claims that a mistrial was warranted when, in front of the jury, the lead detective improperly referred to Berney's allegation that the police were trying to set him up because of his prior history. After the detective's statement, the State informed the district court that it was not its intention to elicit any evidence about Berney's criminal history and requested that the district court instruct the jury to disregard the final portion referencing Berney's prior history. Berney declined the invitation for a curative instruction. Later, Berney moved for a mistrial based on the detective's comment, and after questioning the detective and concluding that the reference was inadvertent, the district court denied the motion.

Berney failed to make a contemporaneous objection; therefore we need not consider this claim. *McKague v. State*, 101 Nev. 327, 330, 705 P.2d 127, 129 (1985). However, in exercising our discretion to address this claim under plain error review pursuant to *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003), we conclude that Berney failed to demonstrate actual prejudice or a miscarriage of justice because the statement was

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[1]To the extent that Berney claims the district court incorrectly concluded that the giving of either proffered instruction would violate *Nevius*, we note that the district court further concluded that the proffered instructions would be duplicative.

unsolicited, the reference was inadvertent, and Berney declined a curative instruction, *see Rice v. State*, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992).

Third, Berney argues that the district court improperly relied on his juvenile record at sentencing. After the jury returned its verdict, Berney informed the district court that he had a presentence investigation report (PSI) that was less than five years old, and the district court ordered only a supplemental report. *See* NRS 176.135(3)(b). The PSI contained Berney's juvenile history. Berney claims that, because he was 23 years old at the time of sentencing, his juvenile records should have been automatically sealed, *see* NRS 62H.140, that the State used sealed information against him during its argument at sentencing, and that the district court erroneously considered his juvenile record at sentencing.

Pursuant to NRS 62H.030(3)(b), the Division of Parole and Probation may inspect juvenile records which have not been sealed in preparing a presentencing investigation report, *see also* NRS 176.145(1)(b), (2). Berney fails to demonstrate that the information in his PSI, which was prepared for a previous matter, was obtained from sealed records.[2] Furthermore, Berney did not object to the inclusion of the information in his PSI and in fact requested use of the PSI which contained the juvenile history. "We emphasize that a defendant must object to any evidence in a PSI that he believes is unduly prejudicial or

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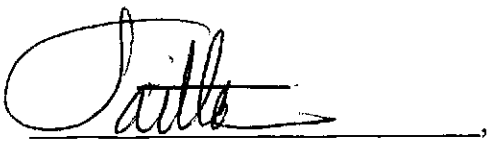
[2]While it contained information about Berney's juvenile history, the PSI was not a sealed, juvenile record but rather was a record from Berney's previous, adult criminal case. *See* NRS 176.145.

otherwise inadmissible; otherwise, he forfeits appellate review of that matter." *Nunnery v. State*, 127 Nev. ___, ___, 263 P.3d 235, 249 (2011). We conclude that Berney fails to demonstrate error plain from the record that affected his substantial rights. *See id.* (reviewing unobjected-to errors at sentencing for plain error).

Having considered Berney's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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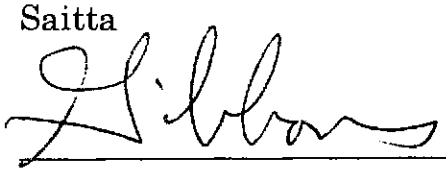

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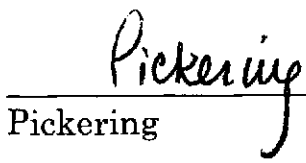

_____, J.
Pickering

cc: Hon. Elliott A. Sattler, District Judge
Washoe County Alternate Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk