IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG ALLEN HARRISON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36174

FILED

NOV 20 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 72-180 months for count I, and a concurrent jail term of 12 months for count II. Appellant was given credit for 210 days time served.

First, appellant contends the State adduced insufficient evidence to support his conviction. Appellant argues that the victim's testimony was not credible and that it changed during each stage of the criminal process. We disagree.

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; and (4) witness-accomplice testimony confirmed that the robbery was committed by the witness, appellant, and his co-defendant. We therefore conclude that appellant's contention is without merit.

Second, appellant contends the State committed prosecutorial misconduct thus constituting reversible error. Appellant argues that the State violated his due process rights by (1) failing to disclose to the defense the identity and location of a witness-accomplice; and (2) eliciting inappropriate statements from the witness that were intended to incite and inflame the emotions of the jury. We disagree.

Initially, we note that appellant raises the issue of access to the witness for the first time on appeal. 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.

This court has stated that "[w]hen an accused is charged by indictment, a list of witnesses need not be supplied." Lischko v. State, 87 Nev. 493, 494, 489 P.2d 89, 90 (1971). Additionally, NRS 173.045, "which requires the

endorsements of witnesses on an information [does] not apply to an indictment." Smithart v. State, 86 Nev. 925, 932, 478 P.2d 576, 581 (1970) (citing Mathis v. State, 82 Nev. 402, 419 P.2d 775 (1966)). In this case, appellant was charged by indictment. We therefore conclude that appellant's contention that the State committed prosecutorial misconduct by not properly endorsing the accomplice as a potential witness is without merit.[1]

Appellant also contends the State committed prosecutorial misconduct by eliciting inappropriate comments from a witness. We disagree. When asked by the prosecutor why she did not want to testify, the witness stated, "Because I am scared shitless." The State then asked, "Of who?" which resulted in an objection from the defense counsel. The prosecutor withdrew the question, and the district court sustained the objection and admonished the jury to disregard the comment. We conclude that appellant has not demonstrated that the jury did not follow the instructions of the district court judge. This court has stated that "[t]here is a presumption that jurors follow jury instructions." Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998). Moreover, the testimony was not so prejudicial that it could not be neutralized by an admonition to the jury. See Allen v. State,

---

[1]The State originally proceeded against appellant by way of an information that did not list the individual in question as a potential witness, as required by NRS 173.045(2). The State, however, subsequently convened a grand jury which returned a true bill resulting in the indictment from which appellant was charged. As stated above, the witness in question was not listed in the indictment and the State was not required to do so. See Lishko, 87 Nev. at 494, 489 P.2d at 90. After the jury verdict was reached, the State filed a second information supplementing the indictment solely for the purpose of adjudicating appellant a habitual criminal. The State did not list the witness in the second information, and we conclude that this was not error.

99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983). We therefore conclude that appellant's contention is without merit.

Third, appellant contends his due process rights were violated by an impermissibly suggestive and tainted witness-victim identification. Appellant argues that the on-the-scene confrontation arranged by the police resulted in an unreliable identification of appellant by the victim. We disagree.

Once again we note that appellant raises an issue for the first time on appeal. This court has held that "[a]s a general rule, failure to object below bars appellate review." Emmons, 107 Nev. at 60-61, 807 P.2d at 723. Nevertheless, upon review we conclude that appellant's contention lacks merit.

This court has stated that the standard for out-of-court identifications is whether, upon review of the totality of the circumstances, the identification "'was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'" Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)). Even if the identification procedure is found to be unnecessarily suggestive, however, "the key question is whether the identification was reliable." Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980). The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." Id. Based on our review of the record, we conclude that even if the out-of-court identification of appellant was suggestive, it was,

nonetheless, reliable; and therefore, appellant's due process rights were not violated.

Fourth, appellant contends the district court erred by failing to provide the jury with a cautionary instruction regarding the testimony of a witness. Appellant argues that (1) the testimony of the witness was not properly corroborated pursuant to NRS 175.291;[2] (2) the district court erred by not instructing the jury that the witness testified pursuant to a plea bargain; and (3) the district court erred by not providing the jury with a "drug addict-witness instruction." We disagree.

This court has stated that "[t]he evidence required to corroborate accomplice testimony need not, in itself, be sufficient to establish guilt. If the evidence, independent of the accomplice testimony, tends to connect the accused with the commission of the offense, then the corroboration requirement contained in NRS 175.291 is satisfied." Ramirez-Garza v. State, 108 Nev. 376, 379, 832 P.2d 392, 393 (1992). In this case, the testimony of the victim and the arresting officers sufficiently connects appellant to the commission of the crime, thus satisfying the requirements of NRS 175.291. Moreover, appellant failed to request an accomplice instruction and his right to assign error on appeal is waived. See Gebert v. State, 85 Nev. 331, 333-34, 454 P.2d 897, 899 (1969). We therefore conclude that appellant's contention is without merit.

---

[2]NRS 175.291 provides:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

Appellant also contends that the district court erred by not instructing the jury that a witness testified pursuant to a plea bargain. The district court judge, however, orally instructed the jury as follows:

> The witness who is now testifying has made an agreement with the State in exchange for her testimony here today. She was charged initially with the identical offenses with which these two defendants have been charged.
>
> Through her agreement with the State, she has effectively cut her exposure by more than half. In addition, two unrelated cases against her have been dismissed or will be dismissed. You will be provided with a copy of the agreement between this witness and the State.
>
> You are instructed to treat her testimony with the recognition of the fact that she has received a benefit for it.
>
> After reading the agreement and understanding the circumstances, you are free to give it the weight you think it deserves under those circumstances.

Furthermore, the district court provided the jury with written instructions to the same effect. We therefore conclude that the district court did not err and that appellant's contention is belied by the record.

Appellant further contends that the district court erred by not providing the jury with a "drug addict-witness instruction." Once again we note that appellant raises an issue for the first time on appeal. This court has held that "[a]s a general rule, failure to object below bars appellate review." Emmons, 107 Nev. at 60-61, 807 P.2d at 723. Nevertheless, a review of the record on appeal reveals that the witness was not known to be or deemed unreliable by the State, her testimony was sufficiently corroborated by other witnesses, and as noted above, the district court instructed the jury to consider the plea bargain in order to weigh her credibility. We therefore conclude that the district court did not err by not providing the jury with a "drug addict-witness

instruction." See King v. State, 116 Nev. ___, ___, 998 P.2d 1172, 1176 (2000).

Fifth, appellant contends the district court erred by not severing the trial of the two defendants. Appellant argues that "the State obtained an illegal joinder," and that severance was necessary for appellant to prove his theory of the case. We disagree.

Once again we must note that appellant raises an issue for the first time on appeal. This court has held that "[a]s a general rule, failure to object below bars appellate review." Emmons, 107 Nev. at 60-61, 807 P.2d at 723. Nevertheless, upon review we conclude that appellant's contention lacks merit.

NRS 174.165(1) states that "[i]f it appears that a defendant . . . is prejudiced by a joinder of . . . defendants in an indictment or information, or by such joinder for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires." The decision to sever a trial is left to the discretion of the trial court and will not be reversed absent an abuse of discretion. See Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990); see also Schaffer v. United States, 362 U.S. 511, 516 (1960). Moreover, this court has stated that defendants jointly indicted should be tried together "absent compelling reasons to the contrary." Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). Finally, implicit in this formula is the requirement that the defendant actually file a motion for severance and support the motion with sufficient facts. See State of Nevada v. McLane, 15 Nev. 345, 358-60 (1880); see also Anderson v. State, 81 Nev. 477, 480, 406 P.2d 532, 533 (1965).

In this case, appellant never moved for a severance of trials. Additionally, appellant failed to articulate what theory of defense he would have offered if he had filed and was granted such a motion, and he failed to demonstrate any prejudice suffered from the joinder with the co-defendant. We therefore conclude that appellant's contention is without merit.

Sixth, appellant contends the district court erred by admitting into evidence a photograph of appellant. Appellant argues the photograph was more prejudicial than probative. 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). Appellant has not demonstrated that he was prejudiced by the admission of the photograph, nor has he demonstrated how the photograph was more prejudicial than probative. We therefore conclude that the district court did not err by admitting into evidence the photograph in question, and that appellant's contention is without merit.

Having considered appellant's contentions and concluded that they are without merit, we affirm the judgment of conviction.

It is so ORDERED.

Shearing, J.

Agosti, J.

Leavitt, J.

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Mary Kandaras Petty
Karla K. Butko
Washoe County Clerk