

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABRAHAM AUSTIN, JR. A/K/A  
ABRAHAM AUSTINS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67323

FILED

SEP 16 2016

FRANCE K. KINDERMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery, burglary while in possession of a firearm, first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, battery, and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant Abraham Austin, Jr., raises seven issues.

First, Austin claims that there was insufficient evidence to support his kidnapping conviction because any movement or restraint of the victim was incidental to the robbery. We “view[] the evidence in the light most favorable to the prosecution,” to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (alteration in original) (quotation marks omitted). After speaking with the victim outside his home, with the door to the residence shut, Austin and his codefendant attacked the victim from behind as he

attempted to reenter the home and forced him into the residence. Once inside, Austin and his codefendant covered the victim's mouth, slammed him to the floor with his arms behind his back where he had difficulty breathing, hit him in the head causing the victim to bleed, took money from a cookie jar in the kitchen, and then demanded at gunpoint that the victim lead the way to the garage where a safe was located. After the men had located and taken marijuana, they told the victim not to move from where he was (kneeling with his face on a chair) and to count to 100 while the men left. Based on this evidence, we conclude that a rational juror could have found beyond a reasonable doubt that moving the victim "create[d] a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve[d] movement, seizure or restraint substantially in excess of that necessary to [complete the associated crime]." *Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006) (explaining when dual convictions for robbery and kidnapping are permissible and upholding dual convictions where defendant seized the victim, pulled him inside a house, and severely beat him before robbing him); *see also Gonzales v. State*, 131 Nev., Adv. Op. 49, 354 P.3d 654, 665 (Ct. App. 2015) (upholding dual convictions because movement of the victim from a public place, a garage with the door open, into a private one, the residence, can support a jury's conclusion that the movement substantially increased the risk of harm to the victim).

Second, Austin claims that there was insufficient evidence of identity because the victim never identified Austin in court and identified another individual in a photo array. Although the victim was unable to positively identify Austin, the victim's wife and daughter, both of whom

were present during the incident, identified Austin as one of the perpetrators. The victim's wife also identified Austin in a photo array. And the jury was shown surveillance video from the residence depicting the two perpetrators.<sup>1</sup> "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses," *McNair*, 108 Nev. at 56, 825 P.2d at 573, and based on the evidence presented, we conclude that a rational juror could have found beyond a reasonable doubt that Austin was one of the perpetrators.

Third, Austin claims that the district court abused its discretion by allowing the State, over his objection, to misstate identification evidence. He argues that the State asked a leading question during redirect examination of the victim that erroneously stated the victim had identified Austin during trial as one of the perpetrators. When considered in the context of the victim's testimony on direct and cross-examination, the prosecutor's challenged inquiry on redirect did not misstate the victim's earlier testimony. Austin therefore fails to demonstrate the district court abused its discretion by overruling his objection. *See Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009)

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<sup>1</sup>Austin did not ask to have the surveillance video transmitted to this court. *See* NRAP 30(d) ("If the exhibits are too large or otherwise incapable of being reproduced in the appendix, the parties may file a motion requesting the court to direct the district court clerk to transmit the original exhibit."); *see also Thomas v. State*, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (stating that appellant is ultimately responsible for providing this court with portions of the record necessary to resolve his claims on appeal).

("We generally review a district court's evidentiary rulings for an abuse of discretion.").

Fourth, Austin claims that his due process right to a fair trial was violated when he was drawn into his codefendant's theory of defense (that he and Austin were at the victim's house to buy marijuana a few days before the alleged incident), which he claims was antagonistic and irreconcilable to his defense (that he was not present during the alleged incident). Austin did not object below. We conclude he has not demonstrated an error "so unmistakable that it is apparent from a casual inspection of the record" and "that the error affected his [ ] substantial rights, by causing actual prejudice or a miscarriage of justice," *Martinorellan v. State*, 131 Nev., Adv. Op. 6, 343 P.3d 590, 593 (2015) (internal quotation marks omitted) (holding "that all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension"), because Austin could still argue there was insufficient evidence placing him at the victim's residence on the day of the incident and because Austin and his codefendant, who were canvassed at the close of the State's case-in-chief, individually agreed that "before [codefendant counsel's] opening statement when he said that this was a drug deal gone bad, everyone was in agreement, that's their defense," and that it "was a strategic decision" both defendants made with their attorneys.

Fifth, Austin claims that his due process right to a fair trial was violated because the jury found him guilty despite sending a note during deliberations that, he argues, evinced confusion as to whether separate verdicts were permissible. He contends that an instruction

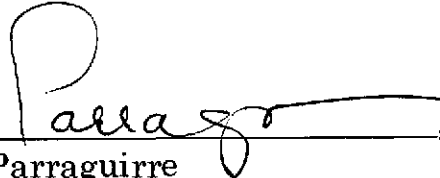
explaining that the jury could render different verdicts as to each defendant would have been beneficial. Austin did not object below or propose any such jury instruction; therefore, our review is limited to plain error. *Bonacci v. State*, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980) (“We have held that when a defendant’s counsel has not only failed at trial to object to jury instructions, but has agreed to them, the failure to object or to request special instructions precludes appellate consideration,” with the only exception being a review for plain error). Because the jury was given complete instructions as to the crimes charged, unanimously found Austin guilty of the crimes for which he was convicted, and confirmed those verdicts when individually polled, we conclude that there is no error plain from the record that caused Austin actual prejudice or a miscarriage of justice.

Sixth, Austin claims that the district court erred in overruling his objection to the flight instruction. Austin concedes the State presented some evidence that the codefendant fled the jurisdiction but argues that there was no evidence that he fled and therefore the district court should have included language limiting the flight instruction to the codefendant. However, Austin fails to support this claim with relevant authority or cogent argument; therefore, we decline to consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Seventh, Austin claims that the prosecutor committed misconduct in closing argument by asking the jury to act as the voice of the community and stating “[t]his is our community, opportunity to speak up and say, dressing up like religious folks and taking advantage of that is not okay.” Austin failed to object below, and we conclude that this

instance of alleged prosecutorial misconduct does not amount to plain error that would warrant relief. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (employing plain-error review for unpreserved error regarding prosecutorial misconduct).

Having concluded that no relief is warranted, we  
ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Michelle Leavitt, District Judge  
The Law Office of David R. Fischer  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk