IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSH SPEARMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68414

FILED

APR 2 0 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of robbery with the use of a deadly weapon, burglary while in possession of a deadly weapon, two counts of assault with a deadly weapon, and coercion with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

First, appellant Josh Spearman claims there was insufficient evidence presented at trial to convict him of coercion. Specifically, Spearman claims the State failed to demonstrate he had the specific intent to compel Amber Dulaney to stay in the back room of the Baskin Robbins or to prevent her from leaving the Baskin Robbins. We disagree.

"The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). Evidence is sufficient to support a conviction if, "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell*

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v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). To prove coercion, the State must have demonstrated Spearman had "the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing" by "attempt[ing] to intimidate the person by threats or force." NRS 207.190(1)(c).

We conclude the jury could reasonably infer from the evidence presented that Spearman coerced Amber Dulaney, with a deadly weapon, and kept her from leaving the Baskin Robbins. At trial, testimony was presented Spearman entered the Baskin Robbins and went to the manager, Paul Oden, who was sweeping the lobby of the restaurant and told Oden to go behind the counter. When Oden did not immediately obey, Spearman showed Oden a gun in his waistband and then told Oden if he did not comply he would hurt Dulaney because she was white, and Oden and Spearman were both black. Dulaney heard the exchange and saw the butt of the gun. When Oden headed back behind the counter and told Dulaney to move into the back room, she complied because she was afraid. While Oden opened the cash register and handed Spearman the money Spearman looked in Dulaney's direction a few times, seemingly to make sure she had not moved. Dulaney testified she was afraid and did not feel like she could leave because Spearman had a gun. Based on this evidence, we conclude sufficient evidence was presented by which the jury could reasonably conclude Spearman committed coercion with the use of a deadly weapon.

Second, Spearman claims there was insufficient evidence presented at trial regarding him being the perpetrator. Spearman claims neither victim had much time to observe him, Oden did not tell the 9-1-1 operator the suspect had facial hair, Oden said the suspect was taller than him but Spearman was shorter, and a fingerprint was found on the outside of the freshly cleaned door but it was not Spearman's.

Both of the victims testified Spearman was the perpetrator and they both picked him out of a photo-lineup. Further, Dulaney testified she did not do a thorough job while cleaning the door and other testimony was presented it was possible the fingerprint could have been old. "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Lisle v. State*, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), *holding limited on other grounds by Middleton v. State,* 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). We conclude sufficient evidence was presented by which the jury could reasonably conclude Spearman was the perpetrator in this case.

Third, Spearman claims the State committed prosecutorial misconduct during closing arguments. Specifically, Spearman claims the prosecutor disparaged the defense and injected personal opinions, vouched for the victims' testimony, and misstated the evidence. Spearman failed to object; therefore, no relief would be warranted absent a demonstration of plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under the plain error standard, we determine "whether there was an error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Anderson v. State,* 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks and citation omitted).

Spearman claims the prosecutor disparaged the defense and injected his personal opinions when the prosecutor said an argument by the defense was offensive and outrageous. However, the prosecutor's argument was in response to Spearman's argument the police should have detained and obtained fingerprints from a person who one of the victims specifically stated was not the person who committed the crime. While the

prosecutor's word choice was strong, it was not improper for the prosecutor to argue the police should not detain people who are not suspects. Therefore, Spearman failed to demonstrate plain error.

Spearman also claims the prosecutor disparaged the defense and injected his personal opinions when the prosecutor said a comment by defense counsel was offensive. In closing argument, Spearman argued Dulaney only identified him as the robber at the preliminary hearing because she was white and the defendant was the only black man at a table labeled defendant. The prosecutor in rebuttal stated, "This was an offensive comment even if it's delivered with a smile on the face, it is still offensive." While again the prosecutor's word choice was strong, he was responding to Spearman's argument regarding race and went on to argue this case is not about race but about who robbed the Baskin Robbins. Therefore, Spearman failed to demonstrate plain error.

Next, Spearman claims the prosecutor improperly vouched for Oden and Dulaney's identification of Spearman by referencing his own personal experiences in other trials. Spearman challenges the following statements: "You know, I've done many trials where a victim is cross-examined and they get defensive" and

> And then there was this suggestion that you know, when they're on the stand the victims always pick people out. Well, ladies and gentlemen, that's simply not true. I know someone that I've tried a case – the last case I tried, that didn't happen with a victim. She wasn't willing to do it, even though that victim had done it at a prior proceeding. That is not necessarily true. Victims, even at trials, don't always do that. I speak from personal experience and I know someone in the courtroom who was with me when it happened.

We conclude Spearman fails to demonstrate the first statement resulted in plain error. The second statement was improper and we caution the

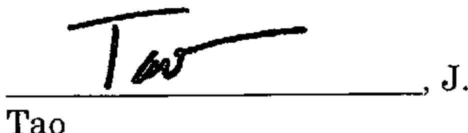
prosecutor to refrain from making such comments. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) ("A prosecutor may not vouch for the credibility of a witness."); *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (Vouching occurs "when the prosecution places the 'prestige of the government behind the witness by providing 'personal assurances of [the] witness's veracity.'"'). However, given the strength of the identifications by the victims, we conclude this error does not arise to plain error and relief is not warranted.

Finally, Spearman claims the prosecutor misstated the evidence when he stated during closing arguments Spearman told Dulaney to go to the back of the store. While this was a misstatement of the facts, Spearman fails to demonstrate the misstatement resulted in plain error. The jury was properly instructed that statements, arguments and opinions of counsel are not evidence in the case and the jury is presumed to follow its instructions. *See Leonard v. State,* 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Therefore, relief is not warranted.

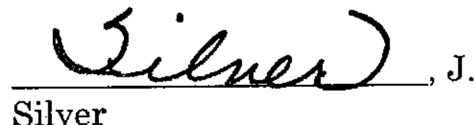
Having reviewed Spearman's contentions on appeal and concluded he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_______________________, C.J.
Gibbons



_______________________, J.
Tao



_______________________, J.
Silver

cc: Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk