

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVEON KYREE HAYES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75405-COA

**FILED**

JUL 17 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Daveon Kyree Hayes appeals from a judgment of conviction entered pursuant a jury verdict of grand larceny of a firearm, five counts of conspiracy to commit robbery, eight counts of robbery with a deadly weapon, two counts of burglary, possession of credit or debit card without cardholders consent, fraudulent use of a credit or debit card, two counts of robbery, possession of stolen property, and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

First, Hayes argues a photo line-up was unduly suggestive because his photograph in the array had a lighter background than the others and his photograph was the only one depicting a person that conclusively had facial hair. Hayes did not raise an objection to the photo line-up based on its suggestiveness, and, therefore, he is not entitled to relief absent a demonstration of plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record." *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872

(2002). “In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights.” *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted).

Hayes fails to meet his burden to demonstrate plain error. Preliminarily, Hayes did not include a copy of the photo line-up in his appendix. As the appellant, it is Hayes’ obligation to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009); *see also* NRAP 30(b)(3) (stating the appellant’s appendix filed on appeal shall include “any other portions of the record essential to determination of issues raised in appellant’s appeal”).

In addition, one of the victims testified that she viewed Hayes’ face during the robbery, she gave an accurate description of him to the police shortly after the incident, and she viewed the photo line-up a few hours after the incident. She was advised prior to viewing the photo line-up that the perpetrator may not be depicted among the photographs, but she picked the photograph depicting Hayes when she viewed the photo line-up. She then wrote on the identification form that she was one-hundred percent certain that the person she picked from the photo line-up was the person that took her purse. Given this testimony, Hayes failed to demonstrate plain error concerning the photo line-up. *See Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980) (identifying factors for determining whether an identification is reliable); *see also Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (stating that the court considers the totality of the circumstances to determine whether the photo line-up procedure was “so unduly prejudicial as to fatally taint [the defendant’s] conviction”). Therefore, Hayes is not entitled to relief.

Second, Hayes argues a show-up identification was unduly suggestive because he was in handcuffs and he was the only person for that victim to view. Hayes did not object to testimony concerning the show-up identification based on its suggestiveness, and, therefore, he is not entitled to relief absent a demonstration of plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

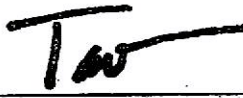
Based upon our review of the record, we conclude Hayes failed to meet his burden to demonstrate plain error. The record reveals another victim testified she observed the perpetrator's face as he took her purse and fled the scene. Shortly after that incident, two potential suspects were detained and the victim viewed each suspect separately. The victim was advised that the persons detained may not be the perpetrator, and she stated that the first person she viewed was not the man that took her purse. She then viewed the second suspect and identified that suspect as the perpetrator. The second suspect was later determined to be Hayes. Given the testimony concerning the show-up identification, Hayes failed to demonstrate under the totality of the circumstances that the show-up identification violated his right to due process. *See Gehrke*, 96 Nev. at 583-84, 613 P.2d at 1029-30. Therefore, we conclude Hayes failed to demonstrate plain error.


Third, Hayes argues he was entitled to relief due to cumulative error, particularly in light of his challenges to the identification processes. However, Hayes failed to demonstrate there were any errors, and, therefore, he is not entitled to relief due to cumulative error.

Fourth, Hayes argues the district court erred by entering an amended judgment of conviction that Hayes contends improperly altered his sentence. Because this claim challenges events that occurred after entry

of the judgment of conviction, it is not properly raised in this appeal and we decline to consider it. See NRS 177.015(3); NRS 177.045. Accordingly, we ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. William D. Kephart, District Judge  
Kenneth G. Frizzell, III  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk