IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TAMIR GABRIEL MCKINLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76984-COA

ORDER OF AFFIRMANCE

Tamir Gabriel McKinley appeals from a judgment of conviction, pursuant to a jury verdict, of two counts each of burglary while in possession of a deadly weapon and robbery with use of a deadly weapon, and robbery with use of deadly weapon involving a victim 60 years of age or older. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

In May 2013, McKinley burgled and robbed two Las Vegas gaming taverns—the Alibi Casino (Alibi) and Michael's Pub.[1] In both cases, witnesses testified that McKinley possessed a handgun, and Las Vegas Metropolitan Police Department (LVMPD) investigators recovered items that linked McKinley to the incidents at or near both crime scenes. Specifically, police found McKinley's red shirt, white tennis shoes, and currency bands (matching those used by the Alibi) on the ground at an apartment complex near the Alibi where McKinley was seen fleeing. Similarly, at Michael's Pub, McKinley dropped his baseball cap, cell phone, and a piece of red duct tape that he had used to cover part of his face, which police later collected and stored as evidence. Forensic analysts were able to pull DNA profiles from the red shirt, the shoes, the baseball cap, and the red tape. Analysts ran the profiles through the DNA database and found that

[1]We do not recount the facts except as necessary to our disposition.

the profiles were consistent with McKinley's. Subsequently, the State charged McKinley via indictment with two counts each of burglary while in possession of a deadly weapon and robbery with use of a deadly weapon, robbery with use of deadly weapon involving a victim 60 years of age or older, and ownership or possession of a firearm by a prohibited person.

At trial, the State presented, among other things, eyewitness testimony from Alibi employees, Michael's Pub employees, and a Michael's Pub patron. Furthermore, the State produced expert testimony regarding the similarities between McKinley's DNA and the DNA profiles that were obtained from the items recovered near the Alibi and at Michael's Pub. Specifically, the State's DNA expert testified that the probability of the DNA profiles from the red shirt and white shoes, which were recovered near the Alibi, matching a random, unrelated person from the general population was roughly 1 in 1.04 quintillion and 1 in 1.26 quadrillion, respectively. Similarly, the probability of the DNA from the baseball cap and red tape, which were recovered from Michael's Pub, matching a random, unrelated person was 1 in 16.5 quintillion and 1 in 84.1 quintillion, respectively. After a four-day trial, the jury returned a guilty verdict on all counts except ownership or possession of a firearm by a prohibited person. The district court imposed an aggregate sentence totaling 84 to 300 months in prison with 1,221 days' credit for time served.

On appeal, McKinley argues that (1) there was insufficient evidence to convict him of the Alibi burglary and robbery as well as all of the deadly weapon enhancements, and (2) the district court abused its discretion

by failing to sua sponte order severance of the Alibi counts from the Michael's Pub counts. We disagree and affirm the judgment of conviction.[2]

McKinley advances two arguments regarding sufficiency of the evidence. First, McKinley argues that the evidence adduced at trial was insufficient to prove that he committed the Alibi burglary and robbery. Second, he contends that the State failed to produce sufficient evidence to support the deadly weapon enhancements related to both the Alibi and Michael's Pub charges.

When reviewing the sufficiency of the evidence, this court must decide "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378,1380 (1998). It is the jury's role, not the reviewing 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). Thus, "a verdict supported by substantial evidence will not be disturbed by a reviewing court."

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[2]McKinley also argues that trial counsel violated his Sixth Amendment right to effective assistance of counsel when he failed to move the district court for separate trials. "This court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless." *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006); *see also Gibbons v. State*, 97 Nev. 520, 521, 634 P.2d 1214 (1981) (denying defendant's ineffective assistance of counsel claim on direct appeal where the district court had not conducted an evidentiary hearing). Because the district court did not hold an evidentiary hearing on the matter, and because nothing in the record indicates that such a hearing would be unnecessary, we decline to consider this argument on direct appeal.

Id. Moreover, "circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

The crux of McKinley's first argument is that the State failed to "present *any* evidence that placed [him] *inside* the Alibi Casino" because the victims, Alibi bartenders Kim Lamar Williams and Joe Patren, did not and could not positively identify him as the perpetrator. In support of his argument, McKinley cites *Barber v. State*, 131 Nev. 1065, 363 P.3d 459 (2015). Here, unlike *Barber*, the State presented ample evidence linking McKinley to the Alibi crimes. For instance, Alibi employees Williams and Patren both testified that they were robbed by a male assailant with a gun who was wearing a red shirt or jacket and a dark beanie; further, their accounts of the assailant's physical attributes were generally consistent with McKinley's. Patren testified that he observed the suspect fleeing north on Decatur Boulevard and that he appeared to disappear into a nearby apartment complex. Patren recovered the suspect's beanie in the Alibi parking lot. Later, LVMPD investigators discovered a red shirt matching McKinley's on the ground in the apartment complex where he was seen fleeing, along with white tennis shoes and currency straps consistent with the ones used by the Alibi.

Forensic analysts were able to lift DNA from the shoes and the red shirt and recovered a partial major profile. After performing a comparative analysis on the DNA, forensic analysts confirmed that the DNA found on the shoes and red shirt was consistent with McKinley's. Additionally, the State's DNA expert testified that "the probability of randomly selecting an unrelated individual from the general population having a DNA profile that's consistent with that evidence profile is approximately 1 in 1.26 quadrillion" as to the white tennis shoes and "approximately 1 in 1.04 quintillion" as to the red shirt.

Moreover, there is no reasonable or logical alternative explanation accounting for the presence of McKinley's DNA on the recovered items. In fact, nothing in the record indicates that McKinley lived at the nearby apartment complex, that he had friends who lived there, or that he had recently, or ever, visited the apartments. Thus, the most reasonable inference is that McKinley left his DNA on the shirt and shoes the same night the Alibi crimes were committed. *Cf. Carr v. State*, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980) ("When fingerprints of the defendant are found where the crime was committed, and circumstances rule out the possibility that they might have been imprinted at a different time than when the crime occurred, a conviction is warranted."). Therefore, we conclude that any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

Next, relying on *Berry v. State*, 125 Nev. 265, 212 P.3d 1085 (2009), *abrogated in part on other grounds by State v. Castaneda*, 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010); *Bias v. State*, 105 Nev. 869, 784 P.2d 963 (1989); and *McIntyre v. State*, 104 Nev. 622, 764 P.2d 482 (1988), McKinley argues that there was insufficient evidence to support the deadly weapon enhancements because the State failed "to prove that the 'gun' used in the commission of the crimes was indeed a 'deadly weapon.'" We find this argument unpersuasive and conclude the cited cases are inapposite.

In *Berry*, for example, the defendant used a toy pellet gun during the commission of the crimes, and the State produced the toy gun as evidence at trial. 125 Nev. at 272, 212 P.3d at 1090-91. On appeal, the supreme court reversed the deadly weapon enhancements, reasoning that the State did not prove beyond a reasonable doubt that *the pellet gun* was in fact a deadly weapon. *Id.* at 279, 212 P.3d at 1095. Likewise, both *Bias* and *McIntyre* involved the use of a toy gun in the commission of a crime, which the State

produced as evidence at trial. 105 Nev. at 871, 784 P.2d at 964 (vacating the deadly weapon enhancement because "there was no evidence that appellant used or could have used the *toy gun* in a deadly manner" (emphasis added)); 104 Nev. at 623, 764 P.2d at 483 (holding that the use of a *toy gun* cannot support a deadly weapon enhancement absent proof of deadly capabilities). Thus, *Berry*, *Bias*, and *McIntyre* all involved the use of toy guns, which were admitted into evidence, and never proven to be deadly weapons.

But where, as here, the gun is not produced at trial, eyewitness testimony describing the defendant's firearm is sufficient to establish the existence of a firearm. *Harrison v. State*, 96 Nev. 347, 351, 608 P.2d 1107, 1110 (1980) ("The testimony of the victim describing the gun carried by [the defendant] during the robbery was sufficient to support the conviction."). Furthermore, for purposes of a sentence enhancement, a firearm is attributed per se deadly status and, thus, "proof of a firearm's deadly capabilities is not required." *See McIntyre*, 104 Nev. at 623, 764 P.2d at 483; *see also Stalley v. State*, 91 Nev. 671, 541 P.2d 658 (1975).

In this case, similar to *Harrison*, the State did not produce a firearm at trial; however, five eyewitnesses testified that the assailant indeed possessed and used a real firearm during the commission of the crimes. Both Williams and Patren testified regarding the gun's authenticity. Specifically, Williams stated that the gun was "black," "semi-automatic," and "look[ed] real," while Patren testified that he was familiar with guns and that the gun appeared real. The bartenders from Michael's Pub, Monique Garcia and Elaine Tackley, also testified that the gun looked real, and Tackley also described it as semi-automatic. Additionally, Elizabeth Pitman, a Michael's Pub patron, testified that the perpetrator appeared to have a gun.

Notably, nothing in the record indicates that McKinley used a fake gun, despite McKinley's contention to the contrary. McKinley asserts

on appeal that Detective Craig Dunn testified that "the 'gun' used 'absolutely' could have been fake." This, however, patently misstates Dunn's testimony. At trial, McKinley's counsel asked Dunn the following question: "When you're dealing with robberies, can you tell the jury is there ever a fake gun used?" Dunn responded, "There could be. Absolutely." Clearly, Dunn did not testify that, in this case, "the 'gun' used 'absolutely' could have been fake"; rather, he stated, as a general proposition, that sometimes fake guns are used in the commission of robberies. Further, Dunn had no firsthand knowledge of the gun McKinley used, as he was not present when the crimes were perpetrated, nor was he testifying as an expert witness. As a result, even if Dunn had believed the gun McKinley used was fake, he was not competent to testify as to its authenticity. *See* NRS 50.025(1) (Lack of personal knowledge). Accordingly, we conclude that the State presented sufficient evidence via eyewitness testimony to support the deadly weapon enhancements.

McKinley also argues that the district court abused its discretion when it failed to sua sponte sever the Alibi charges from the Michael's Pub charges. More specifically, McKinley contends that there was no valid basis for joinder, and that even if joinder was proper, the district court should have ordered separate trials because he was unduly prejudiced by the joinder. Ordinarily, this court reviews criminal severance issues for an abuse of discretion. *See Rimer v. State*, 131 Nev. 307, 326, 351 P.3d 697, 711 (2015). But because McKinley did not move the district court for severance, he has waived all but plain-error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) ("[A]ll unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension.").

"[T]he decision whether to correct a forfeited error is discretionary." *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49, *cert.*

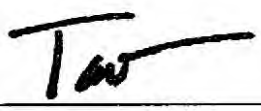
denied, ___ U.S. ___, 139 S. Ct. 415 (2018). "Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* at 50, 412 P.3d at 48. "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted).

Having reviewed the record, we conclude that McKinley has not met his burden under *Jeremias*. A casual inspection of the record does not reveal that joinder was improper, nor is it clear from a casual inspection of the record that McKinley was unduly prejudiced by the joinder, especially because none of the charges presented a particularly close case on the question of guilt. *See, e.g., Weber v. State*, 121 Nev. 554, 575, 119 P.3d 107, 122 (2005) (explaining that prejudicial joinder is more likely in cases where the question of guilt is close), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). Therefore, we conclude that McKinley has failed to establish plain error.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
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