

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE SHERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37352

FILED

JUN 05 2002

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Andre Sherman appeals from a conviction, pursuant to a jury verdict, of two counts of robbery. First, Sherman contends that the conditions under which the out-of-court identifications were made by the robbery victims were unnecessarily suggestive, thus tainting their subsequent in-court identifications. He asserts that the district court erred when it denied his motions to suppress and preclude the victims from making in-court identifications. Since the out-of-court identifications of Sherman by the robbery victims preceded any formal charges, the issue is analyzed in a two-step inquiry: (1) whether the procedure was unnecessarily suggestive; and (2) whether, under all the circumstances, the identification was reliable despite an unnecessarily suggestive identification procedure.¹ This determination is made after a review of the totality of the circumstances.²

Showup confrontations, as occurred here, are "inherently suggestive because it is apparent that law enforcement officials believe

¹See Bias v. State, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989); Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

²Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (citing Stovall v. Denno, 388 U.S. 293, 302 (1967)).

they have caught the offender."³ Moreover, a showup is unnecessarily suggestive in the absence of exigent circumstances.⁴ Policy considerations justifying a showup confrontation include the likelihood of a more reliable identification when the witness's memory is fresh and the desirability of exonerating innocent people more expeditiously.⁵

Here, the showup procedure used against Sherman was unnecessarily suggestive. The police drove the victims to view Sherman, who was handcuffed and surrounded by four uniformed police officers. It was apparent that the police believed they had caught the offender. Further, policy considerations did not justify the unnecessarily suggestive procedure. The showup confrontation occurred only one day after the robbery, and although the victims were visitors to Las Vegas, the police knew that they would be in town for approximately one week after the robbery. One consideration weighing against the utilization of a less suggestive identification procedure, such as a lineup, however, is that Sherman was detained, but not under arrest. The police could not require Sherman to participate in a lineup.

Despite the unnecessarily suggestive identification, "the key question is whether the identification was reliable."⁶ A suggestive and unnecessary pretrial identification procedure does not violate due process

³Jones, 95 Nev. at 617, 600 P.2d at 250.

⁴See Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

⁵See Jones, 95 Nev. at 617, 600 P.2d at 250.

⁶Gehrke, 96 Nev. at 584, 613 P.2d at 1030; Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Jones, 95 Nev. 613, 600 P.2d 247.

so long as the identification possesses sufficient indicia of reliability.⁷ In determining the reliability of an out-of-court identification, the following factors are to be considered:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness's degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation.⁸

These factors, then, are to be balanced against the "corrupting effect of the suggestive identification itself."⁹

On balance, the victims' identifications were reliable. The robbery occurred during daylight, and both victims had a substantial opportunity to view Sherman during the commission of the robbery. Both victims identified Sherman with certainty and without hesitation. Finally, the victims made their out-of-court identifications the day after the robbery, when their memories were fresh. The victims' out-of-court identifications possessed sufficient indicia of reliability and, therefore, did not violate due process.

Both victims testified at trial that they recognized Sherman based on the shape of his head and his physical features. Based on their opportunity to clearly view Sherman during the commission of the robbery, both victims were certain of their identification of Sherman, independent from their observations of Sherman at the out-of-court

⁷Manson, 432 U.S. at 106.

⁸Id. at 114 (citing Neil v. Biggers, 409 U.S. 188 (1972)).

⁹Id. at 114.

identifications. Accordingly, the victims were properly permitted to make in-court identifications of Sherman at the preliminary hearing and at trial.

Second, Sherman contends that the district court erred because it did not instruct the jury that the practice of showing suspects singly to persons for the purpose of identification is inherently suggestive. However, Sherman never requested an instruction pertaining to the inherent suggestiveness of an out-of-court identification. Generally, the failure to object or to request a special instruction to the jury precludes appellate review.¹⁰ This court may nonetheless address plain or constitutional error sua sponte, despite a failure to object.¹¹ The jury can make credibility determinations as to whether the in-court identifications were reliable. Additionally, the jury was instructed on the reasonable doubt standard, which embodies any questions the jury may have had regarding the reliability of the identification. Accordingly, the district court did not err.

Third, Sherman argues that he was denied due process because the State failed to produce a supplemental report regarding the police response to the initial suspicious person call. When determining whether evidence should be considered material to either guilt or punishment, this court should consider three elements: "[1] suppression by the prosecution after a request by the defense; [2] the evidence's favorable character for the defense; and [3] the materiality of the

¹⁰Etcheverry v. State, 107 Nev. 782, 784, 821 P.2d 350, 351 (1991).

¹¹Mitchell v. State, 114 Nev. 1417, 1427, 971 P.2d 813, 819 (1998).

evidence."¹² The identity of the woman who placed the suspicious person call fails the Brady test for materiality. The fact that Sherman was not identified as the perpetrator in an unrelated robbery is irrelevant to the question of his guilt in the robbery with which he was charged. Moreover, the jury was informed that the suspicious person caller could not identify Sherman. Therefore, the name of the caller does not have a reasonable probability of affecting the judgment of the trier of fact or the outcome of the trial.¹³

Sherman also claims a Brady violation in that he was not notified that the police searched the apartment in which he resided at the time of the Alexis Park Hotel robberies. The record reflects that the police visited the apartment for the sole purpose of speaking with the owner to verify Sherman's alibi, and that they did not search the premises. Accordingly, there was no exculpatory evidence for the State to disclose.

Finally, Sherman claims insufficient evidence was presented to convict him of robbery. Sherman asserts that the police did not have reasonable suspicion to detain him, and that the only basis for the victims' out-of-court identifications was the shoes he was wearing. Sherman points out that at trial, the victims did not recognize the shoes Sherman wore at the out-of-court identification as the shoes the robber wore.

The standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the

¹²Homick v. State, 112 Nev. 304, 314, 913 P.2d 1280, 1287 (1996) (quoting Moore v. Illinois, 408 U.S. 786, 794-95 (1972)).

¹³See Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

defendant's guilt beyond a reasonable doubt."¹⁴ The conviction will stand if "after reviewing 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."¹⁵

NRS 171.123(1) codifies the United States Supreme Court's holding in Terry v. Ohio¹⁶ and authorizes a peace officer to "detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime." Pursuant to this standard, this court has held that "in order to justify a stop and detention, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, lead the officer reasonably to conclude, in light of his experience, that criminal activity may be afoot."¹⁷ The United States Supreme Court articulated a two-prong test for determining whether an investigative detention passes constitutional muster: first, "whether the officer's action was justified at its inception," and second, "whether it was reasonably related in scope to the circumstances which justified the interference in the first place."¹⁸

¹⁴Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

¹⁵Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

¹⁶392 U.S. 1 (1968).

¹⁷State v. Sonnenfeld, 114 Nev. 631, 633, 958 P.2d 1215, 1216 (1998).

¹⁸Id. (quoting Terry v. Ohio, 392 U.S. 1, 19-20 (1968)).

Based upon an earlier suspicious person call, the police noticed that Sherman matched the description of the perpetrator of an unrelated crime. Additionally, Sherman was near the scene of the other crime when the police detained him. Therefore, the police had specific, articulable facts creating a reasonable suspicion of criminal activity, justifying Sherman's detainment. During the stop, the police observed that Sherman matched the description of the suspect in the Alexis Park Hotel robberies. Additionally, Sherman was detained only two or three blocks from the Alexis Park Hotel. Therefore, the police had reasonable suspicion to detain Sherman for identification purposes as to the Alexis Park Hotel robberies while he was still lawfully detained in regard to the suspicious person call.

Sufficient evidence was presented at trial to convict Sherman of both counts of robbery. Both victims identified Sherman as the perpetrator. Although both were startled by the robbery, they had the presence of mind to chase Sherman. This afforded them a greater opportunity to view Sherman at close range as he turned to gauge their progress in their pursuit. And although neither victim could identify Sherman on the basis of his shoes, they were extremely confident in their identification of Sherman on the basis of his face, using phrases such as "positive" and "one hundred percent sure" to describe their certainty.

The testimony of one witness, if believed, is sufficient to uphold a verdict.¹⁹ The State presented three eyewitnesses who identified Sherman as the robber. Based on their testimony, any rational trier of

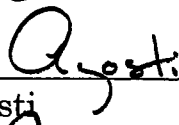
¹⁹See Washington v. State, 96 Nev. 305, 308, 608 P.2d 1101, 1103 (1980).


fact could have found the essential elements of robbery beyond a reasonable doubt. Accordingly, the State presented sufficient evidence to convict Sherman on both counts of robbery.

After reviewing the record on appeal, we conclude that none of Sherman's contentions have merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
Michael V. Cristalli
Clark County Clerk