IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KAYSHAWN DWAYNE SMITH-HARPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78208-COA

FILED
APR 23 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kayshawn Dwayne Smith-Harper appeals from a judgment of conviction, pursuant to a jury verdict, of burglary, grand larceny, home invasion while in possession of a firearm, burglary while in possession of a firearm, attempted grand larceny of a firearm, and robbery with use of a firearm. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

In November of 2017, Smith-Harper, Raymond Banks,[1] and at least one other unknown person broke into John Moore's home while he was out running errands.[2] When Moore returned home, he discovered a blue Lexus parked in his driveway, which was halfway inside his garage. Moore also noticed that three men were attempting to load his gun safe and other personal items, which were removed from his house, into the Lexus. Moore pulled into the driveway, attempting to block the Lexus and the perpetrators from leaving the garage. Within minutes, Banks emerged from the house, through a door leading into the garage, and approached

[1]The State tried Smith-Harper and Banks together in this matter. Banks has also appealed his conviction. *See Banks v. State*, Docket No. 78175-COA.

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

Moore. Banks pointed a handgun at Moore, ordered him to move his car, and threatened to shoot Moore if he did not. Moore complied, and the assailants fled in the Lexus, hitting Moore's car in the process.

As the assailants were fleeing, Moore called 911 and informed the operator that he was robbed by three or four black males in their early twenties, one of whom possessed a handgun. Moore also provided the operator with a partial license plate number for the Lexus. Meanwhile, as the assailants were absconding, their vehicle collided with a tow truck, forcing them to abandon the vehicle and flee on foot. Police quickly apprehended Smith-Harper and Banks, but the other suspects escaped. Officer Sean Meeks with the Sparks Police Department then instructed Moore to follow him to the location where Smith-Harper and Banks were being detained to see if he could identify them, using a field identification procedure known as a show-up. Moore arrived at the location approximately an hour and thirty minutes after the crimes were committed at his house.

Before conducting the show-up procedure, Officer Meeks administered to Moore a standard admonition, cautioning Moore that it was just as important to exonerate innocent people as it was to implicate guilty ones, and that he was not required to identify anyone if he could not make a positive identification. Moore then sat inside a police vehicle and viewed the suspects individually, first one and then the other, and positively identified both suspects. During the show-up procedure, both Smith-Harper and Banks were handcuffed and standing in front of police vehicles.

The State charged Smith-Harper and Banks, as relevant to this appeal, with (1) burglary, (2) grand larceny, (3) home invasion while in possession of a firearm, (4) burglary while in possession of a firearm, (5)

attempted grand larceny of a firearm, and (6) robbery with use of a firearm. Prior to trial, Smith-Harper moved to suppress Moore's identification from the show-up hearing, arguing that it was unnecessarily suggestive and unreliable. The district court held a hearing on the motion and denied the request. After a four-day trial, the jury returned a guilty verdict on all counts, and the district court imposed an aggregate sentence totaling 108 months to 300 months in prison with 420 days' credit for time served.

On appeal, Smith-Harper argues that (1) the district court abused its discretion by allowing the jury to hear identification evidence from the show-up procedure because the show-up was unnecessarily suggestive; and (2) there was insufficient evidence to convict him of possession and use of a deadly weapon, because the State's evidence did not establish that he had constructive possession over Banks' gun or that he had knowledge of Banks' use of the firearm. We disagree and therefore affirm the judgment of conviction.

The show-up procedure

Smith-Harper argues that the district court erred when it denied his motion to suppress a pretrial show-up identification, which he contends was unnecessarily suggestive. Specifically, Smith-Harper argues that the show-up was unnecessarily suggestive because he was "in handcuffs and surrounded by police," he and Banks were the only black suspects, and no exigent circumstances existed to justify the procedure.

"Suppression issues present mixed questions of law and fact." *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013) (internal quotation marks omitted). This court examines a district court's "findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *Id.* at 486, 305 P.3d at 916. The

Due Process Clauses of the United States and Nevada Constitutions prohibit the use of a pretrial identification if, based on the totality of the circumstances, the identification was unnecessarily suggestive and conducive to irreparable mistaken identification. *Johnson v. State*, 131 Nev. 567, 574-75, 354 P.3d 667, 672-73 (Ct. App. 2015); *see also Stovall v. Denno*, 388 U.S. 293, 301-02 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537, 543-44 (1982).

"An on-the-scene confrontation [i.e., show-up identification] between [an] eyewitness and [a] suspect is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). But a show-up identification "may be justified by countervailing policy considerations," such as the witness' fresher memory or the exoneration of innocent suspects. *Id.* In other words, show-up procedures may be warranted where exigent circumstances exist. Moreover, even if the identification procedure used by law enforcement was unnecessarily suggestive, due process is not necessarily offended if the identification was otherwise reliable. *Johnson*, 131 Nev. at 579, 354 P.3d at 675; *see also Bias v. State*, 105 Nev. 869, 872, 784 P.2d 963, 965 (1989). Indeed, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

In *Johnson*, this court concluded that a show-up identification was not unnecessarily suggestive, even though the defendant "was wearing handcuffs and spotlighted in front of a marked police car during the show-up" identification. 131 Nev. at 577, 354 P.3d at 674. First, we noted that prior to the show-up identification officers had "specifically cautioned [the witnesses] that it was just as important for the show-up to exonerate

innocent people as it was to implicate guilty ones." *Id.* Thus, we concluded that the witnesses were not "unduly pressured into a false or mistaken identification." *Id.* at 578, 354 P.3d at 675.

Furthermore, we concluded that "[e]ven if the show-up contained elements of suggestiveness, strong countervailing policy considerations existed" justifying the identification procedure. *Id.* Specifically, we observed that the show-up procedure was conducted "while the victims' memories were still fresh," that the crimes were violent and it was therefore crucial that police quickly determine whether or not the detainee was the true perpetrator, and that the defendant was potentially dangerous because he purportedly used a firearm during the commission of the crime. *Id.* Therefore, we held that the show-up procedure was not unnecessarily suggestive because "the decision to employ a show-up rather than another more onerous method of identification was warranted under the exigencies that existed" at the time. *Id.*

The show-up procedure was not unnecessarily suggestive

The facts of the instant matter are significantly analogous to *Johnson*. Here, shortly after the crime was committed, Officer Meeks notified Moore that additional officers at a nearby location had detained two black males, matching the description that he provided the 911 operator. Officer Meeks requested that Moore meet him at that location so that Moore could attempt to identify the suspects. Once he arrived, Officer Meeks gave Moore an admonishment regarding the identification procedure and then Moore sat inside a police vehicle to observe the men and attempt to make an identification. Moore viewed the potential suspects separately, i.e., one at a time, while each stood in front of police vehicles, wearing handcuffs. After a few minutes, Moore confidently identified both suspects.

Although some elements of this show-up procedure were suggestive, we conclude that they were not *unnecessarily* suggestive based on the totality of the circumstances. For instance, prior to making the identifications, Officer Meeks administered a standard admonition, which Moore read and signed, cautioning Moore that it was just as important to exonerate innocent people as it was to implicate guilty ones. Specifically, the admonishment warned Moore that the detained persons "may or may not be the [persons] who committed the crime now being investigated"; that "[y]ou do not have to identify anyone"; and "[i]t is just as important to free innocent persons from suspicion as it is to identity those who are guilty." Thus, similar to *Johnson*, there was no undue pressure on Moore to make a false identification.

The countervailing policy considerations that existed in *Johnson*, which justified the use of the show-up procedure there, also existed in this case. First, Moore's memory was still fresh when he made the identification, approximately an hour and thirty minutes after the incident occurred. Second, the crimes were violent in nature—e.g., robbery and burglary with use of deadly weapon—making timely apprehension of the guilty parties imperative. *See, e.g., Johnson*, 131 Nev. at 578, 354 P.3d at 675 (explaining that "had the police mistakenly detained the wrong people and employed a more time-consuming method of identification . . . the true criminals could have committed additional violent offenses . . . or escaped apprehension entirely"). And finally, a firearm was used during the commission of the instant crimes. The record shows that Moore testified to this fact and informed the 911 operator that one of the suspects was armed. Thus, the police knew that they were likely dealing with an armed suspect and therefore needed to act promptly to

ensure public safety. Based on this record, we conclude that the show-up identification procedure in this case was not unnecessarily suggestive.

The identification was reliable

Even assuming that the show-up procedure was suggestive, "suggestiveness by itself does not necessarily preclude the use of identification testimony at trial if the identification was otherwise reliable." *Johnson*, 131 Nev. at 579, 354 P.3d at 675. Reliability is assessed using the following factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Canada v. State*, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988) (quoting *Brathwaite*, 432 U.S. at 114).

Here, the incident occurred in broad daylight in Moore's driveway. Moore testified that he observed the suspects for at least one minute and that Banks was within six feet of him when he brandished the firearm. When the perpetrators backed their vehicle out of Moore's driveway, they struck Moore's car, bringing all of the suspects within feet of him. Further, Moore provided the 911 operator with detailed information regarding the suspects, including the make and model of the vehicle; a partial license plate number; the race, gender, and approximate age ranges of the suspects; the number of suspects involved; and a description of some of the suspects' clothes. Thus, the record demonstrates that Moore had a good opportunity to view the suspects and that his degree of attention was high, resulting in an accurate prior description of the suspects. *See Riley v. State*, 86 Nev. 244, 245-46, 468 P.2d 11, 12 (1970) (concluding that a witness' identification was reliable where he observed the suspect for seven seconds

from twelve to fifteen feet away); *see also United States v. Drake*, 543 F.3d 1080, 1089 (9th Cir. 2008) (providing that less than one minute was ample time for the witness to properly view the robber).

Additionally, Moore testified that he was confident when he made the identifications at the show-up, and Officer Meeks attested that Moore "was very confident and made a very confident identification of both" suspects. The record also demonstrates that subsequent to the show-up Moore positively identified Smith-Harper on at least two other occasions: first at the suppression hearing, and later at trial. And furthermore, police completed the show-up procedure approximately an hour and thirty minutes after the crimes were committed while Moore's recollection was still fresh. Therefore, consistent with *Johnson*, we conclude that the district court did not abuse its discretion because, based on the totality of the circumstances, the show-up procedure was not unnecessarily suggestive and Moore's identification was reliable.

Possession and use of a deadly weapon

Smith-Harper also argues that there was insufficient evidence to convict him of possession and use of a deadly weapon. Specifically, he contends that (1) there was insufficient evidence to support a finding of constructive possession related to counts IV (home invasion while in possession of a firearm) and VI (burglary while in possession of a firearm); and (2) the evidence was insufficient to show that he used a deadly weapon to commit robbery (count VIII–robbery with use of deadly weapon).

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

Possession of a deadly weapon

A deadly weapon enhancement under NRS 205.060(4) (burglary) or NRS 205.067(4) (home invasion), is appropriate if the assailant "has . . . or gains possession of any firearm or deadly weapon *at any time during the commission of the crime,* any time before leaving the structure or upon leaving the structure." (Emphasis added.) An unarmed accomplice is liable under a statutory possession enhancement if he aids and abets "the actual user in the unlawful use of the weapon." *Anderson v. State*, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979), *abrogated on other grounds by Brooks v. State*, 124 Nev. 203, 180 P.3d 657 (2008) (distinguishing between enhancements based on the use of a weapon and those based on the possession of a weapon). The "possession necessary to justify statutory enhancement may be actual or constructive." *Id.* at 630, 600 P.2d at 244. But "[c]onstructive or joint possession may occur only where the unarmed participant has knowledge of the other offender's being armed, and where the unarmed offender has . . . the ability to exercise control over the firearm." *Id.* This is so because "the unarmed offender benefits from the use of the other [offender's] weapon, adopting derivatively its lethal potential." *Id.* In addition, the unarmed offender's ability to

exercise control over the weapon may come in the form of either physical or verbal control. *See, e.g., Moore v. State*, 105 Nev. 378, 382, 776 P.2d 1235, 1238 (1989) (concluding that the unarmed offender had constructive possession of the deadly weapon because he had knowledge of the possession and "had the ability to exercise control, even if only to verbally deter [the armed offender] from throwing the rock"), *overruled on other grounds by Peck v. State*, 116 Nev. 840, 7 P.3d 470 (2000).

Here, Moore testified that when he arrived home he observed Smith-Harper and two or three other assailants in his garage, along with their vehicle, which was parked in the driveway half-way inside the garage. Moore pulled in behind the offenders' vehicle, attempting to block them in. Moments later, Banks, armed with a handgun, appeared from the house, walked down the driveway, and pointed the gun at Moore. Banks then ordered Moore to move his car and threatened to shoot Moore if he did not move. Moore complied with the order, and the perpetrators drove away, hitting Moore's car in the process. Notably, all involved were within feet of each other when the incident occurred, namely, everyone was either on the driveway or inside the garage. In other words, they were close enough to either hear or see one another, or both. Based on this evidence, a rational jury could reasonably infer that Smith-Harper knew Banks was armed.

Likewise, the record supports a finding that Smith-Harper had constructive possession of the firearm because he had the ability to exercise control over it. Specifically, Smith-Harper was mere feet away from Banks when he brandished the handgun; consequently, the jury could have reasonably concluded that he was close enough to exercise control over the weapon, "even if only to verbally deter" Banks from using the handgun. *Moore*, 105 Nev. at 382, 776 P.2d at 1238. Moreover, Smith-Harper also

benefitted from Banks' use of the gun, thus "adopting derivatively its lethal potential," because Banks' use of the weapon permitted the perpetrators, including Smith-Harper, to flee and escape the scene. *Anderson*, 95 Nev. at 630, 600 P.2d at 244. Therefore, we conclude that the evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that Smith-Harper had constructive possession of the firearm.

Use of a deadly weapon to commit robbery

Additionally, the evidence was sufficient to show that Smith-Harper *used* the firearm to commit robbery because he had knowledge of its use to commit the crimes at Moore's house. "To determine whether an unarmed offender is subject to an enhanced sentence under NRS 193.165, the relevant inquiry is whether the unarmed offender 'used' the deadly weapon in the commission of the offense." *Brooks*, 124 Nev. at 210, 180 P.3d at 661. An unarmed suspect uses a deadly weapon when (1) "the unarmed offender is liable as a principal for the offense that is sought to be enhanced";[3] (2) "another principal to the offense is armed with and uses a

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[3]Under Nevada law, a principal is defined as follows:

> Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor *is a principal*, and shall be proceeded against and punished as such.

NRS 195.020 (emphasis added).

deadly weapon in the commission of the offense"; and (3) "the unarmed offender had knowledge of the use of the deadly weapon." *Id.*

Smith-Harper does not contest that he was a principal to the crimes charged, nor does he contest that Banks used a firearm in the commission of the crimes charged. Thus, the only question before this court related to this issue is whether Smith-Harper had "knowledge of the use of the deadly weapon." *Id.*

Smith-Harper argues that it is "unclear whether [he] had knowledge of Mr. Banks' use of the gun." Despite this contention, a jury found otherwise, and this court does not reweigh the evidence or determine the credibility of witnesses. *McNair*, 108 Nev. at 56, 825 P.2d at 573. Instead, this court reviews the record to determine whether the evidence was sufficient for a rational jury to conclude that the State proved each element of a charge beyond a reasonable doubt, not whether this court would have convicted based on that same evidence. *See Origel-Candido*, 114 Nev. at 381, 956 P.2d at 1380.

Here, the incident occurred in broad daylight, and all of the involved parties were in close proximity to each other. At trial, Moore testified that when he pulled into his driveway, Smith-Harper and the other offenders were in his garage loading some of his personal property into their vehicle. Once they realized that Moore had blocked them in, they began yelling at him to move. Next, Banks came out of the house and passed through the garage, which is where Smith-Harper and the others were located. Moore testified that Banks "walked right up to [my] car and [he] was pointing the gun right through the window at my face, and he was yelling at me to move." Banks then ordered Moore to move the car or "I am going to shoot you." Moore complied with Banks' order, permitting Smith-

Harper and the others to escape. Based on this testimony, the jury could have reasonably inferred that Smith-Harper knew Banks was using a firearm. Therefore, viewing Moore's testimony in the light most favorable to the prosecution, we conclude that any rational jury could have found that Smith-Harper had knowledge of Banks' use of the deadly weapon such that an enhanced sentence was appropriate. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk