IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR BENJAMIN LOYA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79505-COA

FILED

DEC 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Oscar Benjamin Loya appeals from a judgment of conviction, pursuant to a jury verdict, of trafficking in controlled substances, and a judgment of conviction, pursuant to a guilty plea, of possession of a stolen vehicle, failure to stop upon the signal of a police officer, burglary, and possession of burglary tools. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Police officers learned that a car driving in front of them was reported stolen by the owner and they attempted to pull it over.[1] Instead of complying, the driver, Loya, led the police officers on a dangerous, high-speed pursuit, which was discontinued on the ground and taken over by an air unit. The air unit recorded the pursuit on video as Loya and his passenger left their car and fled on foot, jumping over a residential fence, jumping into a swimming pool, exiting the pool and then entering a home owned by a stranger without permission. Police officers entered the home and found Loya hiding inside and also discovered a plastic bag floating in the pool, which was later determined to contain methamphetamine. After

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

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police officers arrested Loya and read him his *Miranda*[2] warnings, Loya spontaneously said, "I am very thirsty, I just smoked meth."

The State charged Loya with trafficking in controlled substances, possession of a stolen vehicle, failure to stop upon the signal of a police officer, burglary, and possession of burglary tools. After the district court swore in the jury and the parties were ready to proceed with opening statements, Loya informed the court that he was not comfortable with his counsel, and that his counsel was forcing him to plead guilty. However, the district court found that Loya's counsel was not forcing Loya to plead guilty as he was on the brink of giving his opening statement to the jury.

During trial, the State called the owner of the home that Loya broke into. The homeowner testified that he did not know Loya and never gave Loya permission to enter his home, and that the drugs in the pool were not his. He also described the drugs in the pool as "a bag and then there was another smaller bag or cellophane or something inside of that bag." The police officer who discovered the bag described it as "about the size of a golf ball from where I saw it floating. It's a little clear plastic baggie and through my training and experience it looked like a little bundle of narcotics." The State also called forensic scientist Meghan Castro. Castro testified that she would have noted if there were additional layers in the packaging and "according to my notes it was just the zipper plastic bag containing the off white crystalline substance."

After the State rested its case but before the jury returned its verdict, Loya pleaded guilty to possession of a stolen vehicle, failure to stop upon the signal of a police officer, burglary, and possession of burglary tools. However, he did not plead guilty to the charge of trafficking in controlled

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

substances. That charge proceeded to verdict and the jury found him guilty. The district court deemed Loya a large habitual offender on all the charges, except for possession of burglary tools, and sentenced him to concurrent sentences of 10 to 25 years in prison.

Loya argues on appeal that the jury's verdict on the sole charge of trafficking must be reversed. Loya first asserts that the district court abused its discretion by allowing evidence of the drugs because there were two inconsistent accounts about the description of the bag in which the drugs were found. The State contends that the district court properly admitted the evidence because the differing descriptions of the bag did not affect Loya's substantial rights.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). During trial, Loya did not object to the admission of the drugs on the ground that he now argues on appeal. "The failure to preserve an error . . . forfeits the right to assert it on appeal." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). However, an appellant may seek review of an error he otherwise forfeited if he can show 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.* (citing *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Further, an appellant bears the burden of demonstrating he was prejudiced by the plain error. *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005); *Green*, 119 Nev. at 545, 80 P.3d at 95 ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.").

Loya argues that the drugs should not have been admitted into evidence because there was conflicting witness testimony describing the bag

in which the drugs were found. Evidence can be admitted if it is properly authenticated or identified. NRS 52.015(1). However, simply because witnesses, especially lay witnesses, give varying descriptions regarding certain evidence does not mean the evidence becomes inadmissible. In fact, witnesses frequently do not recall events identically and with perfect clarity. Often during a trial the jury is called upon to resolve conflicts in the evidence, and there is no rule barring the district court from allowing the jury to consider such evidence. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Further, the jury's role as the fact-finder is to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Accordingly, we conclude that there was no plain error because the evidence was sufficiently identified.

Loya next argues that inconsistencies in the witnesses' testimonies about the bag establishes a breach in the chain of custody, thereby rendering evidence of the drugs inadmissible. We disagree.

As noted above, we review a district court's decision to admit evidence for an abuse of discretion. *See Mclellan*, 124 Nev. at 267, 182 P.3d at 109. Because Loya did not timely object to the chain of custody at trial, we review this issue for plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

For the State to establish chain of custody, it must (1) make a "reasonable showing that substitution, alteration or tampering of the evidence did not occur," and (2) demonstrate that "the offered evidence is the same, or reasonably similar to the substance seized." *Burns v. Sheriff, Clark Cty.*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976). However, the State does

not have to negate every possibility of tampering or substitution as any doubt goes to the weight of the evidence, not its admissibility. *Sorce v. State*, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972).

Here, the State made a reasonable showing that there was no substitution, altering, or tampering with the evidence and that the evidence offered at trial was found at the scene. The police officer who recovered the evidence from the pool and impounded it, and Castro both testified that they followed procedure; Castro also testified that she checked for tampering and found the seal was intact and there were no signs of holes in the package. As such, our review of the record does not demonstrate plain error in the chain of custody.

Finally, Loya claims ineffective assistance by his trial counsel. However, such a claim must generally first be pursued by way of a post-conviction petition for a writ of habeas corpus in the district court. *See generally Franklin v. State*, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994) (a claim of ineffective assistance of counsel must be brought first in post-conviction proceedings in the district court), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). As such, we do not address the merits of this claim.

Therefore, we

ORDER the judgments of conviction AFFIRMED.

________________________, C.J.
Gibbons

________________________, J.
Tao

________________________, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Allen Lichtenstein
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk