

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JEFFREY RUSK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 84062

FILED

FEB 16 2023

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

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, first-degree murder with use of a deadly weapon, invasion of the home, and robbery. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.<sup>1</sup> Appellant challenges his convictions for first-degree murder and conspiracy to commit murder.

Appellant first argues that there is insufficient evidence to support the jury's finding of guilt for his first-degree murder and conspiracy to commit murder convictions. He asserts that his codefendant, who admitted to killing the victim but asserted it was a crime of passion, acted without his involvement or foreknowledge.

A jury's verdict will not be disturbed on appeal where substantial evidence supports it. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "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

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<sup>1</sup>Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

beyond a reasonable doubt.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.” *Id.* A jury is free to rely on both direct and circumstantial evidence in returning its verdict. *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). And we have long recognized that circumstantial evidence may constitute the sole basis for a conviction. *Canape v. State*, 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993).

We conclude that sufficient evidence supports the convictions. Appellant admitted that he picked up the codefendant and drove him to the victim’s apartment, first changing into a disguise, and stopping on the way for the codefendant to cover appellant’s license plate with a stolen plate. He admitted that they backed his vehicle into a parking spot in the apartment complex and waited over an hour for the victim to arrive—during which time appellant saw the codefendant make a mask from a t-shirt and pull out gloves, that both he and the codefendant exited the vehicle after driving up to the victim, and that appellant drove himself and the codefendant away after the shooting, fleeing from the police. The State presented eyewitness testimony that two men wearing masks exited appellant’s vehicle, both men had guns and shot at the victim, the man who exited the passenger side used a black semiautomatic pistol, and both men got back into appellant’s vehicle and fled the scene. The State also introduced evidence that two guns were used in the shooting, a black .40 caliber semiautomatic pistol and a silver .38 caliber revolver, and a case for a .38 caliber revolver was recovered from appellant’s vehicle. A t-shirt fashioned into a mask as well as three gloves were also found in appellant’s vehicle, and when appellant was arrested, a fourth glove was found on his person.

Based on that evidence, a rational juror could have found the elements of the offenses beyond a reasonable doubt. See NRS 199.480 (conspiracy); NRS 200.010 (murder); NRS 200.030(1)(a) (first-degree murder). It is the jury, not this court, that weighs the evidence and determines witness credibility. *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (providing that this court will not reweigh evidence or substitute its judgment for that of the jury on conflicting evidence).

Appellant next argues that the district court abused its discretion in denying his motion to sever his and his codefendant's joint trial. A district court's denial of a motion for severance is reviewed for an abuse of discretion and subject to harmless-error review. *Chartier v. State*, 124 Nev. 760, 764-65, 191 P.3d 1182, 1185 (2008). NRS 174.165(1) provides that a trial judge may sever a joint trial if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together." Severance is appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Chartier*, 124 Nev. at 765, 191 P.3d at 1185 (quoting *Marshall*, 118 Nev. at 647, 56 P.3d at 379). "To establish that joinder was prejudicial requires more than simply showing that severance [makes] acquittal more likely," and reversal is warranted only if misjoinder "has a substantial and injurious effect on the verdict." *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002).

Appellant argues that severance was necessary because there was no evidence that he was involved in the murder and thus the jury must have confused evidence brought against his codefendant as evidence against him. However, as highlighted above, there was significant evidence presented at trial that supported the jury's verdict, including eyewitness

testimony and appellant's own admissions. Accordingly, the district court did not abuse its discretion in denying the motion to sever on this ground.

Appellant next argues that potential jurors who may have been favorable to him but were not death-penalty certified had to be dismissed even though he, unlike his codefendant, was not facing the death penalty. This claim is a bare and naked assertion. *See McKenna v. State*, 101 Nev. 338, 343-44, 705 P.2d 614, 618 (1985) (rejecting a presumption that a death-qualified jury favors the prosecution), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776-77, 263 P.3d 235, 254 (2011). Accordingly, the district court did not abuse its discretion in denying the motion to sever on this ground.

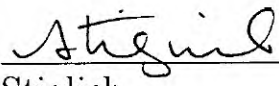
Appellant also raises several other arguments as to why severance was necessary. Because appellant did not seek severance on these grounds below, we review them for plain error. *See Rimer v. State*, 131 Nev. 307, 332-33, 351 P.3d 697, 715 (2015) (applying plain error review when "the grounds that [appellant] urges on appeal are different from those he presented below"); *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (stating that plain error review requires an error to be plain from the record and prejudicial).

First, appellant asserts that if the district court had granted his motion to sever, he would have been able to obtain beneficial testimony from his codefendant, corroborating his testimony that he knew nothing about the plan and played no part in the actual shooting. However, this is purely speculative, and, as argued by the State, appellant does not demonstrate how such testimony would not be cumulative with appellant's own testimony. Second, appellant argues that he was prejudiced by the joint trial because he was denied his right to a speedy trial due to his

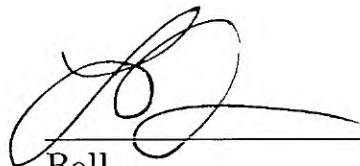
codefendant's continuances. Appellant, however, waived his right to a speedy trial and does not explain how the lack of a speedy trial resulted in any prejudice such that severance was required. Third, appellant contends that, because of the joint trial, he was not given an opportunity for a settlement offer, as any offer to him would have been contingent on his codefendant accepting a settlement offer as well. Appellant's assertion that he would have received a favorable plea offer but for the joint trial is purely speculative and he fails to demonstrate that severance was warranted on this basis. We therefore conclude that appellant has not demonstrated any error, plain or otherwise, from being tried jointly with his codefendant. See *Saletta*, 127 Nev. at 421, 253 P.3d at 114 (2011).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Stiglich

  
\_\_\_\_\_, J.  
Lee

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Jacqueline M. Bluth, District Judge  
Sandra L. Stewart  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk