IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEAUNTAE DARNELL SWEEDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87476-COA

FILED

OCT 18 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Deauntae Darnell Sweeden appeals from a judgment of conviction, pursuant to a jury verdict, of residential burglary. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On December 28, 2022, around 3:00 a.m., Diane Hancock was awakened by the sound of her garage door opening and, upon investigating, observed a man rummaging through her car inside the garage.[1] When she told the intruder to leave and yelled to her husband to get his gun, the intruder said, "that's not very Christmassy," and Hancock replied, "neither is breaking into my home." The intruder fled down the street. Hancock called 9-1-1 and described the intruder as a black male adult, around six feet tall, with a slim-to-medium build wearing dark clothing. While she was on the phone with the police, the intruder returned to the front of Hancock's home and yelled various obscenities before leaving again. Hancock found a single flip-flop sandal in her driveway.

Two LVMPD Officers responded to the scene and noticed Sweeden, who matched Hancock's description, walking down the sidewalk in the direction the intruder had left. No one else was on the street at that

[1]We recount the facts only as necessary for our disposition.

time and one of the officers noticed that Sweeden was wearing only one flip-flop sandal. The officers searched Sweeden and discovered property belonging to Hancock, including her business card, her debit card, and a small yellow bag containing approximately $15 in cash that Hancock had reported missing. After the officers found these items, Sweeden stated, "[a]ll right, then I'm going to jail, I'm guilty, all right."

The officers decided to conduct a "show-up" identification.[2] Prior to the show-up, LVMPD Officer Iakopo Unaite told Hancock that the suspect they had detained possessed Hancock's cards, and that this was a "pretty clear indicator." Officer Greg Henderson read Hancock the show-up witness instructions, and when Officer Henderson drove Hancock to Sweeden's location, she immediately identified Sweeden as the intruder. Following that identification, Officer Henderson asked Hancock to complete the statement portion of the witness instructions form. He suggested that she write, "[t]he gentleman I viewed matched the description of the gentleman I saw in my car, in my garage," which Hancock then wrote on the form.[3] When Officer Henderson asked Hancock if she was sure of her identification, she indicated that she was. Sweeden was subsequently arrested and charged with one count of residential burglary.

Prior to trial, Sweeden moved to suppress Hancock's identification. At an evidentiary hearing, Hancock testified that while it

---

[2]A "show-up" is an identification tool where a police officer shows an eyewitness a detained suspect and asks the eyewitness to indicate whether they can identify that suspect as having committed a crime the eyewitness observed.

[3]Hancock later testified that she only needed help filling out the form and that Officer Henderson told her what to write after she had already identified Sweeden.

was difficult to see the intruder's face because of the low lighting, she did see his face. She further stated that she based her identification of Sweeden at the show-up on his clothing, body type, and distinct hairstyle. The district court found that there were aspects of the show-up that were suggestive, but it was not overly suggestive such that suppression was warranted.

The matter proceeded to a four-day jury trial in August 2023. When the parties settled jury instructions, Sweeden proposed an instruction on two reasonable interpretations of the evidence and an instruction on cross-racial eyewitness identifications. The district court rejected both proposed instructions. The jury ultimately found Sweeden guilty, and the court sentenced him to 19-60 months in prison. This appeal follows.

The district court did not err in declining to suppress Hancock's identification of Sweeden

Sweeden first argues that the district court erred in failing to suppress Hancock's show-up identification. Specifically, he argues that the show-up procedure was unnecessarily suggestive, the identification was unreliable, and there were no exigent circumstances that necessitated the show-up. Whether evidence should be suppressed "present[s] mixed questions of law and fact." *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250-51 (2011). This court reviews the district court's relevant factual findings for clear error and reviews the court's ultimate legal conclusions de novo. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005); *see also Ybarra v. State*, 127 Nev. 47, 58, 247 P.3d 269, 276 (2011) ("[W]e will give deference to the district court's factual findings so

long as those findings are supported by substantial evidence and are not clearly erroneous.").

When evaluating a pretrial identification procedure, the district court must assess whether, under a totality of the circumstances, the confrontation between the suspect and the witness was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." *Gehrke v. State*, 96 Nev. 581, 583-84, 613 P.2d 1028, 1029 (1980) (quoting *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967)). To determine whether a pretrial identification procedure is unnecessarily suggestive, courts examine the "countervailing policy considerations" that might justify the procedure, including "the presence or absence of any exigent circumstances, the need to quickly clear any incorrectly detained suspects so that police can continue searching for the true culprit, the freshness of the witness's recollection, and the possibility that memories might start to fade if other procedures were to be employed." *Johnson v. State*, 131 Nev. 567, 576, 354 P.3d 667, 674 (Ct. App. 2015) (citations omitted). However, even if a pretrial identification is unnecessarily suggestive, suppression is not warranted if the identification is nevertheless reliable. *Gehrke*, 96 Nev. at 584, 613 P.2d at 1030; *see also Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (stating that "reliability is the linchpin in determining the admissibility of identification").

In *Gehrke*, the Nevada Supreme Court determined that a show-up was unnecessarily suggestive because a police officer told the eyewitness that police "had a suspect in mind" before displaying the suspect, who was positioned in front of the headlights of a police car. 96 Nev. at 584, 613 P.2d at 1029-30. Here, Officer Unaite not only informed Hancock that Sweeden possessed her property, but he also told Hancock that this was a "pretty

clear indicator." Officer Unaite's comments are more suggestive than those deemed unnecessarily suggestive in *Gehrke*. Further, like the detained suspect in *Gehrke*, Sweeden was positioned in front of police cars with spotlights shining on him during the show-up. *Id.* at 584, 613 P.2d at 1030.

However, as noted above, the district court must also assess whether countervailing policy considerations would justify the show-up identification procedure. *Johnson*, 131 Nev. at 576, 354 P.3d at 674. In this case, the district court determined that the show-up was justified because the crime occurred in the early hours of the morning and the community was at risk of further victimization absent the show-up procedure.

The district court's factual finding that the crime occurred during the early morning hours was not clearly erroneous. *See Ybarra*, 127 Nev. at 58, 247 P.3d at 276. However, the record does not support the court's finding that the show-up identification was necessary to prevent further victimization in this case. Sweeden's arrest was not contingent on Hancock's identification; rather, as Officer Henderson testified, Hancock's identification would not have had any impact on the investigation. Further, Hancock did not report that the intruder was armed with a weapon, the intruder never threatened Hancock with violence and promptly left after Hancock confronted him, and there were no reports about other break-ins in the area. *Cf. Johnson*, 131 Nev. at 576, 354 P.3d at 675 (observing that exigent circumstances warranted a show-up identification where the crime was violent and the perpetrator may have had a firearm). The fact that Sweeden allegedly committed a crime and then fled after being confronted by Hancock does not, by itself, indicate a risk of further criminal activity. In any event, there was absolutely no reason for Officer Uniate to tell Hancock that Sweeden possessed her property or to opine as to Sweeden's

likely guilt prior to the identification. Therefore, the countervailing policy considerations identified by the district court did not justify the unnecessarily suggestive show-up procedure used in this case. *See Gehrke*, 96 Nev. at 584, 613 P.2d at 1028.

Nonetheless, we conclude that the show-up procedure did not violate Sweeden's due process rights because Hancock's identification was independently reliable. *See id.* at 584, 613 P.2d at 1030. When assessing reliability, the district court must consider the following factors: (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 the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Gehrke*, 96 Nev. at 584, 613 P.2d at 1030.

Hancock testified that she interacted with the intruder on two occasions, first when she confronted him in her garage and then again when he returned to the front of her home. Hancock also showed a high degree of attention towards the intruder and responded to the intruder's unique comment about Christmas; she further maintained her observation of the intruder and provided a description of him and the direction of his travel while talking to the 9-1-1 operator. Hancock's description of the intruder, while rudimentary, accurately matched Sweeden.[4] After the show-up,

---

[4]Sweeden argues that Hancock's identification of him was unreliable because Hancock subsequently added more details about the intruder's appearance during later court proceedings. Specifically, during the hearing on Sweeden's motion to suppress, Hancock added that the intruder was in his 20s and had "Lyle Lovett" style hair. However, Hancock testified that her initial description of the intruder was guided by the 9-1-1 operator's

Hancock also confirmed that she was positive in her identification of Sweeden. Finally, the district court found that less than an hour elapsed between the crime and Hancock's identification at the show-up. *See Gehrke*, 96 Nev. at 584, 613 P.2d at 1030 (providing that a show-up identification was more reliable when the show-up took place within one hour of the crime). Accordingly, we conclude that Hancock's show-up identification was independently reliable. *See Neil*, 409 U.S. at 199-200. Therefore, the district court did not err in declining to suppress Hancock's identification.

The district court did not abuse its discretion in rejecting Sweeden's proposed jury instructions

Sweeden next argues that the district court abused its discretion by rejecting his two proposed jury instructions. This court generally reviews the district court's denial of a requested jury instruction for an abuse of discretion or judicial error. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). However, any error in refusing to give a jury instruction on the defendant's theory of the case as supported by the evidence is harmless if "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error." *Crawford v. State*, 121 Nev. 744, 756, 121 P.3d 582, 590 (2005).

Sweeden contends that the district court erred in refusing his proffered instruction on two reasonable interpretations of the evidence. However, it is not an abuse of discretion to reject this instruction when the jury has been properly instructed regarding reasonable doubt. *See, e.g.*,

---

questions about the intruder's basic physical characteristics, and Hancock did not contradict her initial description in later proceedings. Thus, Hancock's more detailed description of the intruder during subsequent court proceedings does not establish that her initial identification was unreliable.

Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976); *see also Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002). Here, the jury was properly instructed on reasonable doubt as defined in NRS 175.211(1). Therefore, the district court did not abuse its discretion in rejecting Sweeden's proposed two reasonable interpretations instruction.

Sweeden also argues the district court abused its discretion in rejecting his proposed cross-racial identification instruction. Generally, "the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford*, 121 Nev. at 751, 121 P.3d at 587 (quoting *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002)). In this case, Sweeden's theory of defense was misidentification, as he argued to the jury during his opening statement and closing argument that Sweeden only picked up Hancock's property after it was discarded by the true intruder and that Hancock misidentified Sweeden. This was arguably supported by some evidence in the record: Hancock testified that she did not see the intruder's face clearly, she described the intruder as six-feet tall when Sweeden was five-foot eight-inches, and Hancock and Sweeden are of different races.

However, even if the district court erred in declining to instruct the jury on Sweeden's theory of the case,[5] any error was harmless beyond a

---

[5]Neither party argues on appeal as to whether Sweeden's proposed cross-racial identification instruction was an accurate statement of the law, and so we decline to address that issue. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present."). Nonetheless, we

reasonable doubt given the overwhelming evidence that Sweeden was the individual who burglarized Hancock's residence. Sweeden was the only person located near Hancock's home when she reported the burglary; he was wearing only one flip-fop sandal, and a similar flip-flop sandal was found in Hancock's driveway; Sweeden had Hancock's property in his pockets, including her debit card; and Sweeden spontaneously proclaimed to the police that he was guilty. Further, Sweeden argued to the jury that he was misidentified, but the jury did not credit this argument. Therefore, we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to any error in rejecting Sweeden's proposed cross-racial identification instruction.[6]

Sufficient evidence supports Sweeden's conviction

Sweeden next argues that his conviction is not supported by sufficient evidence. When analyzing the sufficiency of the evidence, this court examines "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

---

note that Sweeden's proposed instruction was incomplete under *People v. Boone*, the authority Sweeden provided in support of the instruction. 91 N.E.3d 1194, 1203 (N.Y. 2017).

[6]The parties also dispute whether Sweeden was required to present expert testimony in order to provide a jury instruction on cross-racial identification. Because we conclude that any error in failing to give the instruction was harmless beyond a reasonable doubt, we need not reach this issue. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

A person is guilty of residential burglary if a jury finds beyond a reasonable doubt that the person "unlawfully enter[ed] or unlawfully remain[ed] in any dwelling with the intent to commit grant or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses." NRS 205.060(1)(a). A dwelling includes "any structure, building, [or] house . . . in which any person lives." NRS 205.060(6)(b). Forcible entry is not required. *See Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1113 (2002) (finding that forcible entry is not an element of burglary and that one commits a burglary so long as they enter with felonious intent).

As noted above, overwhelming evidence established that Sweeden was the individual who burglarized Hancock's residence. Hancock testified at trial that Sweeden was inside her car in her garage, which was attached to her house. Hancock further testified that her garage door was closed when she went to bed, she did not give Sweeden permission to enter, and he was not welcomed there. Because there was evidence presented that Sweeden entered Hancock's garage without permission, a reasonable trier of fact could find, beyond a reasonable doubt, that Sweeden unlawfully entered a dwelling.

As relevant here, petit larceny is the stealing of personal goods or property with a value of less than $1,200 owned by another. NRS 205.240(1)(a)(1). At trial, LVMPD officers testified that Sweeden was arrested while in possession of Hancock's property, including a small yellow bag that contained about $15 in cash. Thus, a reasonable trier of fact could find that Sweeden unlawfully entered a dwelling with the intent to commit

petit larceny beyond a reasonable doubt, and so we conclude that substantial evidence supports Sweeden's conviction.[7]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[7]Sweeden argues that he is entitled to reversal under the doctrine of cumulative error. However, Sweeden cannot prevail on a cumulative error claim because, aside from a potential error in rejecting his proposed cross-racial identification instruction, he has not identified any other error that could be cumulated. *See Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016) (concluding that one error "cannot cumulate" and justify reversal). Therefore, cumulative error does not warrant reversal.

Insofar as Sweeden raises other arguments not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.