

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN THOMAS LAVELL JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86153

FILED

NOV 13 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, murder with use of a deadly weapon, and two counts of attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Appellant Adrian Johnson's conviction arises from a shooting at a Maverik gas station. One person was killed and two others were injured. The incident was captured on video by the gas station's surveillance system. Throughout trial, Johnson disputed that he was the shooter depicted in the Maverik surveillance video. A jury found Johnson guilty of all charges. Johnson raises seven issues on appeal.

The district court did not abuse its discretion in admitting photographs of Johnson in jail clothing

Law enforcement ultimately located and arrested Johnson in Dallas, Texas. At trial, the State offered into evidence four photographs of Johnson taken in a Texas jail about five weeks after the shooting. The photographs depict Johnson wearing distinctive black-and-white-striped clothing and standing with his arms behind his back as if handcuffed. Johnson argues that the district court abused its discretion in admitting

these photographs because the images impermissibly undermined the presumption of innocence, denying the right to a fair trial.

Relevant evidence is generally admissible, NRS 48.025, but will be excluded if its prejudicial effect substantially outweighs its probative value, NRS 48.035(1). The decision to admit or exclude evidence lies within the district court's sound discretion. *Daly v. State*, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983). The court must remain alert for factors that might impair the presumption of innocence and "must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Thus, for example, a defendant cannot be compelled to appear before the jury wearing jail clothing or restraints, and the trial court may not reference the defendant's custodial status during trial. *Id.* at 504-05; *Haywood v. State*, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991).

The probative value of the post-arrest photographs was significant. Identity was the central issue at trial. During argument on Johnson's motion to suppress, the district court observed that Johnson's weight and hair had noticeably changed in the six years between the shooting and trial. The arrest photographs showed Johnson's appearance close in time to the shooting, allowing the jury to more accurately determine whether Johnson resembled the perpetrator depicted in the surveillance video and assess the credibility of witness identification testimony. Comparatively, the likelihood of prejudice was minimal. Johnson did not otherwise appear before the jury in jail clothing. *See Estelle*, 425 U.S. at 504-05 (observing that the prejudicial effect of presenting an accused in jail attire results from the "constant reminder of the accused's condition," which is "likely to be a continuing influence throughout the trial"). And the State

elicited testimony emphasizing that the photographs were taken when Johnson was arrested as a suspect in the shooting. *See Browning v. State*, 120 Nev. 347, 358, 91 P.3d 39, 47 (2004) (concluding that a defendant's mugshot "had no appreciable prejudicial effect since jurors had no reason to assume that it had been taken in any other case but the one for which [the defendant] was being tried"). Thus, the photographs gave the jury no reason to infer that Johnson had a prior criminal history or remained in custody at the time of trial. Because Johnson failed to demonstrate that the arrest photographs undermined the presumption of innocence, we conclude that the district court did not abuse its discretion by admitting them into evidence.

The district court did not abuse its discretion by allowing testimony about pretrial identifications

Second, Johnson argues that the district court erred in denying his motions to suppress evidence that victim Robert Ortiz and eyewitness Jeremy Pickett identified Johnson as the shooter while viewing pretrial photographic lineups. Johnson maintains that allowing witnesses to testify about these identifications violated his right to due process because the identifications were the product of unduly suggestive procedures by law enforcement and were therefore unreliable. When assessing the admissibility of pretrial identification evidence, this court considers "(1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." *Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009) (quoting *Bias v. State*, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989)). An identification resulting from a photographic lineup must be set aside if, under the totality of the circumstances, suggestive procedure "give[s] rise to a very substantial

likelihood of irreparable misidentification.” *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

Having reviewed the photographic array in the record, we conclude that the lineup procedures used during Ortiz’s and Pickett’s identifications were not unduly suggestive. Detectives provided Ortiz and Pickett with a lineup consisting of six pictures of African-American men with similar face shapes, complexions, and hair color, all of whom had beards and mustaches. The photographs generally matched Pickett’s description of the shooter as a heavysset Black male with scruffy facial hair, which was also consistent with the images of the shooter captured on surveillance video. *See Odoms v. State*, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986) (finding that a photographic lineup was not impermissibly suggestive where the six photos matched witnesses’ general descriptions of the assailant). Detectives instructed Pickett to disregard any differences in photo backgrounds and advised that he need not identify anyone if he did not see the shooter. While Ortiz’s lineup was not recorded, Johnson offers no evidence to suggest that detectives deviated from the standard instructions used with Pickett. And although Johnson argues that the color of his shirt and centering of his face within the frame caused his picture to stand out, we are convinced that Johnson’s photograph was not so “grossly dissimilar in appearance or clothing” from the other five photographs as to create a substantial likelihood of incorrect identification. *Banks v. State*, 94 Nev. 90, 95, 575 P.2d 592, 595 (1978).

Because we conclude that the lineup procedure was not impermissibly suggestive, it is unnecessary to address whether the resulting identifications were reliable. *See Perry v. New Hampshire*, 565

U.S. 228, 241 (2012) (“The due process check for reliability . . . comes into play only after the defendant establishes improper police conduct.”). The weight given to each identification was a matter properly left to the jury. *Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980). Accordingly, we conclude that the district court did not abuse its discretion by denying the motions to suppress testimony about Ortiz’s and Pickett’s pretrial identifications.

The district court did not abuse its discretion in denying Johnson’s motion for a mistrial

Third, Johnson argues that the district court abused its discretion by denying a motion for a mistrial based on the State’s failure to disclose essential details of Ortiz’s pretrial identification. “The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion.” *Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). Mistrial is an appropriate response to the State’s failure to disclose information when there is evidence of bad faith or intentional suppression of evidence from the defense. *Tinch v. State*, 113 Nev. 1170, 1175, 946 P.2d 1061, 1064 (1997), *holding modified on other grounds by Bigpond v. State*, 128 Nev. 108, 110, 270 P.3d 1244, 1245 (2012).

Before trial, Johnson asked the State to clarify the circumstances of Ortiz’s identification of Johnson in light of Ortiz’s refusal to sign the photograph he selected. The State explained that Ortiz had not responded to prosecutors’ recent attempts to confirm the identification. After conferring with the lead investigator, the State also disclosed the now-retired detective’s inability to recall Ortiz’s interview. The State, however, highlighted its previous disclosures of a police report and arrest affidavit, both of which stated that Ortiz identified Johnson during the photographic

lineup. Ortiz ultimately agreed to be interviewed multiple days into the trial, at which point prosecutors promptly notified defense counsel that Ortiz intended to testify about the pretrial identification.

We find no compelling evidence in the record that the State withheld any information or otherwise misled Johnson. Johnson was free to cross-examine Ortiz about being reluctant to participate in the pretrial lineup and argue that Ortiz's identification was unreliable. In fact, counsel did so at length. Accordingly, the district court did not abuse its discretion by determining that a mistrial was unwarranted.¹

The district court did not abuse its discretion in giving a flight instruction.

Fourth, Johnson challenges the district court's decision to give a jury instruction on flight over an objection. Johnson asserts that the State failed to present evidence that he was in Las Vegas when the shooting occurred, and thus his capture in Texas could not be considered evidence of flight. This court reviews the district court's decision to give a jury instruction for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). A flight instruction is proper where "the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). Flight is "more than a mere going away," and this court will "carefully scrutinize[] the record to determine if the evidence actually warranted the [flight] instruction." *Weber v. State*, 121

¹Johnson similarly moved for a new trial alleging denial of the opportunity to effectively cross-examine Ortiz about the pretrial identification. Because we conclude that the State did not withhold information, we find no abuse of discretion in the district court's denial of the motion for new trial on this basis.

Nev. 554, 581-82, 119 P.3d 107, 126 (2005) (internal quotation marks omitted).

The Maverik surveillance video showed Johnson's nephew, Gerald Fuller, entering the gas station and initiating a lengthy phone call. About thirty minutes later, the shooter arrived, making brief contact with Fuller before the two exited the gas station together. Surveillance video next showed Fuller running across the parking lot and entering a car idling on the roadway. Despite the shooter arriving at the gas station on foot, the video captured him running directly to the same car immediately after the shooting. The waiting car could be seen speeding away moments later. Also in evidence were cellular phone records indicating that the driver of the waiting car had a phone owned by Johnson's sister and Fuller's mother, Shamika Johnson. The cell phone data reflected the phone's travel from Las Vegas to Dallas, Texas, the day after the shooting. Police located Johnson, Fuller, and Shamika in Dallas about five weeks later.

In addition to the Maverik recordings, the State offered Johnson's arrest photographs to allow the jury to compare Johnson and the shooter. The State also presented Ortiz's and Pickett's independent identifications of Johnson as the shooter. Witness identifications, Johnson's physical resemblance to the shooter in the video, and Johnson's familial connection to Fuller and Shamika provided sufficient evidence from which the district court could reasonably infer that Johnson was the shooter for purposes of determining whether flight occurred.

While the State failed to demonstrate when and how Johnson traveled from Las Vegas to Texas, evidence of Johnson's actions right after the shooting established flight from the crime scene regardless of whether Johnson also fled the jurisdiction. Fuller's and Johnson's synchronized

retreats into Shamika's waiting vehicle indicate that Johnson did not simply go away from the gas station after the shooting. Rather, Johnson appears to have prearranged a waiting getaway car that could immediately remove them from the scene before police responded. We therefore conclude that the jury instruction on flight was not an abuse of discretion.

The district court did not abuse its discretion in denying Johnson's motion for a new trial

Fifth, Johnson contends that the district court erred in denying a motion for a new trial based on evidence revealed during Pickett's trial testimony. A transcript of Pickett's police interview, conducted days after the shooting, established that Pickett signed the pretrial lineup photographs in his home. But Pickett testified at trial that he may have been asked to come to the courthouse to sign the photos. Johnson argues that this testimony constituted newly discovered evidence because it raised the possibility that Pickett signed the lineup photographs twice, potentially viewing a different set of photographs each time.

The record indicates that Pickett's recollection of signing the photographs at home was refreshed during the State's redirect. And we are not convinced that Pickett's initial confusion supports the logical jump to the existence of a second, unaccounted-for set of lineup photographs. Regardless, Pickett's testimony did not constitute newly discovered evidence for which the district court may grant a new trial. See NRS 176.515(1); *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991) (requiring that newly discovered evidence could not have been discovered through reasonable diligence either before or at trial). Accordingly, the district court did not abuse its discretion in denying the motion for a new trial. See *Sanborn*, 107 Nev. at 406, 812 P.2d at 1284 (applying abuse of discretion standard).

Family members' emotional displays did not violate Johnson's right to a fair trial

Sixth, Johnson asserts that the district court erred by failing to minimize prejudice resulting from several emotional outbursts by victims' relatives in the presence of the jury. Johnson maintains that these disturbances distracted jurors and compromised their ability to act impartially, violating the right to a fair trial.

Johnson first suggests that the court should have sua sponte removed family members from the courtroom the first time an emotional display occurred. After Johnson raised concerns about spectators' audible reactions during defense opening statements, the district court instructed the State to admonish the victims' families. There were no further issues until the fourth day of trial, when victim Gianni Corsentino's grandfather could be heard breathing loudly and Corsentino's grandparents cried in response to the medical examiner's testimony. But these responses cannot be said to be intentional outbursts of the same character as the conduct during opening statements. And by the time the crying was brought to the court's attention, Corsentino's grandparents had voluntarily left the courtroom and arranged to observe the trial remotely. No additional interruptions appear in the record. Thus, we conclude that further measures barring family members were unwarranted under the circumstances.

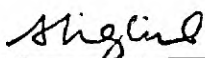
Johnson also argues that the district court should have given a curative instruction contemporaneous to each incident. But at no point did Johnson request such an instruction, object to resuming the trial without one, or move for a mistrial. *See Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (recognizing that failure to object to or request an instruction precludes appellate review unless the error is "patently

prejudicial”). Our review of the record reveals that none of the disruptions by family members conveyed a discernible prejudicial message and each was short-lived relative to the eight-day trial. *See Johnson v. State*, 122 Nev. 1344, 1358-59, 148 P.3d 767, 777 (2006) (recognizing that a brief incident in which a victim’s brother passed out during presentation of a crime scene photograph did not result in a fundamentally unfair penalty hearing). And the district court instructed the jury before deliberations that it must only consider the evidence in the case in reaching its verdict and should not be influenced by sympathy, prejudice, or public opinion. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (“[T]his court generally presumes that juries follow district court orders and instructions.”). To the extent the disruptions had any effect on the jury, we conclude that they did not result in prejudice that prevented Johnson from receiving a fair trial.

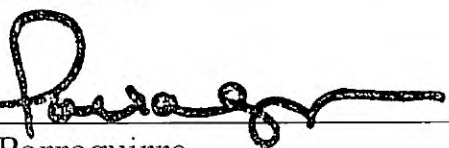
Cumulative error does not require reversal

Finally, Johnson seeks relief based on cumulative error. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (discussing relevant factors for a claim of cumulative error). Because Johnson has not demonstrated any error, there is nothing to cumulate. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Stiglich


_____, J.
Herndon


_____, J.
Parraguirre

cc: Hon. Carli Lynn Kierny, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk