IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RICHARD BRUINGTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38262

FILED

JAN 22 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of burglary while in possession of a firearm and three counts of robbery with the use of a deadly weapon. The district court sentenced appellant Michael Richard Bruington to serve multiple concurrent and consecutive prison terms totaling 80 to 240 months.

Bruington first contends that the district court erred in granting the State's motion to join Bruington's three robbery and burglary trials because there was insufficient evidence of a common scheme or plan to justify joinder pursuant to NRS 173.115. We conclude that Bruington's contention lacks merit.

It is well recognized that "joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse

of discretion."[1] In Tillema v. State,[2] we held that the district court did not abuse its discretion in joining cases arising from two vehicle burglaries because they were part of a common scheme in light of the temporal proximity and the similarities between the crimes. Namely, in Tillema, the factual similarities upon which we relied included that both burglaries involved vehicles parked in casino parking lots and occurred seventeen days apart.[3]

As in Tillema, we conclude that the district court did not abuse its discretion in finding a common scheme or plan in the three robberies charged because sufficient similarities existed between them. First, the three robberies occurred within a four-day period. Second, all three robberies occurred at retail shops in strip malls, sometime near 5:00 p.m., and were all in close proximity to each other and to Bruington's home. Third, all three robberies occurred in a similar manner in that the robber entered the store, pointed a black gun at the lone employee, and demanded money. Fourth, in two of the three robberies, the robber then complained about the amount of money given to him, and thereafter drove away in a four-door sedan. Given the temporal proximity and the similar circumstances of the robberies, the district court did not abuse its discretion in concluding that they were part of a common scheme or plan, and therefore that joinder was appropriate.

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[1]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (citing Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976)).

[2]112 Nev. 266, 268-69, 914 P.2d 605, 606-07 (1996).

[3]See id. at 268, 914 P.2d at 606-07; see also Graves v. State, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996).

Bruington next contends that the prosecutor acted improperly in arguing that Bruington's motive for committing the robberies was that he was poor and needed money for drugs. Specifically, Bruington contends that the prosecutor's argument about Bruington's motive was prejudicial and not supported by the evidence. We disagree.

We conclude that the prosecutor did not engage in misconduct by arguing that Bruington committed the robberies to obtain money to buy drugs because there is sufficient evidence in support of that argument.[4] In particular, Bruington's wife testified that Bruington was unemployed, resulting in some money problems because they were normally a two-income family. Bruington's wife also testified that, in the past, Bruington went to a methadone clinic in order to stop using pain medication. Additionally, the State presented evidence that Bruington was found with drug paraphernalia at the time of his arrest, namely a glass pipe and several spoons. Because there was evidence presented to support the State's theory that Bruington committed the robberies to obtain money to buy drugs, we conclude that the prosecutor did not engage in misconduct in making this argument.

Bruington next contends that the district court erred in denying his pretrial motion to exclude the admission of evidence of prior bad acts; namely, admission of and testimony about two spoons that were found on Bruington at the time of his arrest. We disagree.

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[4]See Jain v. McFarland, 109 Nev. 465, 474-76, 851 P.2d 450, 457 (1993) ("Counsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial. During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence.").

Evidence of prior bad acts committed by a defendant may be admitted at trial "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[5] Prior to admitting bad act evidence, the district court must determine whether the evidence offered for admission is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value "is not substantially outweighed by the danger of unfair prejudice."[6] A district court's decision to admit or exclude evidence rests within the sound discretion of the court and will not be disturbed on appeal unless it is manifestly wrong.[7]

In the instant case, we conclude that the district court's decision to admit evidence that Bruington had drug paraphernalia, including two spoons and a glass pipe in his possession at the time of his arrest, was not manifestly wrong. The drug paraphernalia evidence was highly relevant to the State's theory that Bruington's motive for committing the robberies was to obtain money to buy drugs, and substantially outweighed its prejudicial effect. Accordingly, we conclude that Bruington's contention lacks merit.

Finally, Bruington contends that Catherine Esperian's eyewitness identification of Bruington as the robber should have been excluded because it was the product of coercive police practices. We conclude that Bruington's contention lacks merit.

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[5]NRS 48.045(2).

[6]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

[7]Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983).

The standard for reviewing an out-of-court identification is whether, upon review "of the totality of the circumstances, the identification 'was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'"[8] Even if the identification procedure is found to be unnecessarily suggestive, however, "the key question is whether the identification was reliable."[9] The relevant factors for determining whether an identification is reliable include: "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [her] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[10]

Assuming, without deciding, that the show-up identification of appellant was suggestive, the district court did not err in admitting this evidence because Esperian's identification of Bruington as the robber was reliable. In particular, Esperian had ample time to view the robber during the commission of the crime. Esperian testified that Bruington entered the store, walked to the right of the counter, pointed a gun at her, and demanded money. Further, immediately after the robbery, Esperian found Bruington's wallet containing his photo identification in the doorway of the store and identified the photo on the identification as that of the robber. Finally, the show up identification occurred within hours of

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[8]Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (quoting Stovall v. Denno, 388 U.S. 293, 302 (1967)).

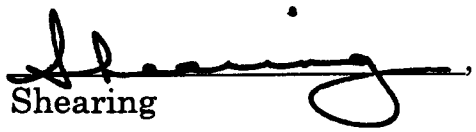
[9]Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

[10]Id.

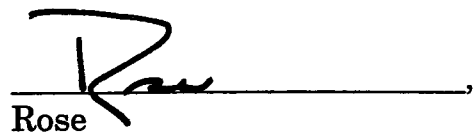
the commission of the crime and Esperian identified Bruington from the three participants as the robber. Accordingly, because Esperian's identification of Bruington was highly reliable, we conclude that the district court did not err in admitting her testimony.

Having considered Bruington's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing



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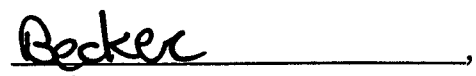

_____, J.
Becker

cc: Hon. Valorie Vega, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk