

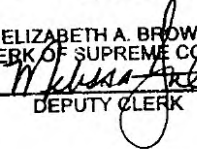
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN KENNY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90493-COA

FILED

APR 22 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

John Kenny appeals from a judgment of conviction, entered pursuant to a jury verdict, of first-degree arson. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

First, Kenny claims the State elicited testimony from its expert witness and a lay witness which was impermissibly suggestive and improper identification testimony. Kenny argues that the two witnesses' identification of him as the person depicted in a video surveillance was improper because "this type of identification requires that they have some familiarity with Kenny or are qualified experts in videotape identification," and that neither witness was "more likely to correctly identify the defendant from the video than the jury was." Kenny also argues that the show-up identification with both witnesses was unduly suggestive and that the witnesses "viewed the video before seeing Kenny in police custody, and just naturally assumed [the perpetrator of the arson] was Kenny."

Because Kenny did not object below to either witness's testimony, he is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To demonstrate plain error, an appellant must show that: "(1) there was an

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‘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.* “[A] plain error affects a defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a ‘grossly unfair’ outcome).” *Id.* at 51, 412 P.3d at 49.

Kenny was charged with first-degree arson following a fire that partially destroyed a vacant commercial building. At trial, the State presented testimony from a witness who was a security supervisor at a self-storage facility adjacent to the vacant building. The security supervisor testified that, when he was driving into work in the evening before the fire started, he saw a white male near the vacant building throwing a shoe into the middle of the road. He testified the white male had a medium build, long hair, and was not wearing a shirt. The security supervisor testified that there were four to five unhoused people whom he regularly saw in the area, but the shirtless man was not one of them. The security supervisor then continued on to the storage facility to start his shift.

After learning the vacant building was on fire, the security supervisor reviewed the storage facility’s video surveillance to determine if any of the facility’s units had been affected by the fire. The video surveillance captured a white male with a medium build, long hair, and no shirt manipulating a part of the vacant building shortly before the fire started.¹ The video surveillance also showed the male take off his pants,

¹This video surveillance was played for the jury during trial. We note that Kenny did not include a copy of the video in the record on appeal. See *McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009) (“The burden is on the appellant to provide this court with an adequate record enabling this court to review assignments of error.”); see also *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135

slam them against the ground a few times, and then stuff them into a void space in the vacant building. The security supervisor testified the man depicted in the video surveillance was the same man he had seen earlier throwing a shoe into the road. Later, after law enforcement had Kenny in custody, the security supervisor identified Kenny as the person he saw in the road throwing a shoe and in the video surveillance. The security supervisor also noted when he was asked to identify Kenny in the courtroom that Kenny's hair was shorter than it had been on the date of the fire.

The State's expert witness was a county fire investigator who had investigated the cause of the fire. The fire investigator testified he went to the storage facility and reviewed the video surveillance. He stated the video surveillance showed a white male with a medium build, long hair, and no shirt manipulate a part of the vacant building, take off his pants, slam the pants on the ground, and stuff them into a void space in the vacant building. The fire investigator also testified that Kenny made a spontaneous statement during an interrogation about taking off his pants because he felt like he had ants in them. The investigator also testified that Kenny asked him whether the "shit I stuck in the wall" was on fire. And like the security supervisor, the fire inspector noted Kenny's hair during trial was shorter than it had been on the date of the incident.

With respect to the security supervisor's testimony, "a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the

(2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

photograph than is the jury.” *Rossana v. State*, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997) (quotation marks omitted). As discussed above, the security supervisor saw Kenny exhibiting odd behavior shortly before the fire began and had noted that Kenny was not someone he had previously seen in the area. The security supervisor told law enforcement that Kenny matched the physical appearance of the person depicted in the video surveillance and testified at trial that Kenny’s hair was shorter at trial than it had been in the video. Given this, the security supervisor was more likely to correctly identify Kenny from the video surveillance than the jury. As to the fire investigator’s testimony, the record demonstrates the fire investigator had independent evidence—namely, the security supervisor’s identification of Kenny, the investigator’s personal observation of Kenny’s appearance, and Kenny’s statements during the interrogation—to confirm the identity of Kenny in the video surveillance. *Cf. id.*; *Burnside v. State*, 131 Nev. 371, 388, 352 P.3d 627, 639 (2015) (holding that police detectives’ identification of defendants in surveillance videos did not invade the province of the jury because it assisted the jury in making sense of the images depicted in the videos).

As to Kenny’s claim that the circumstances surrounding both witnesses’ identification of him while he was in custody was unduly suggestive, while the supreme court has held that show-up identifications are “inherently suggestive,” *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979), they are “nonetheless permissible when the totality of the circumstances surrounding the identification demonstrate that they are reliable,” *Johnson v. State*, 131 Nev. 567, 575, 354 P.3d 667, 673 (Ct. App. 2015) (quotation marks omitted). Here, the record does not plainly indicate the totality of the circumstances surrounding the security supervisor’s

show-up identification were unduly suggestive.² But even assuming the show-up identification was unnecessarily suggestive, “the key question is whether the identification was reliable.” *Gehrke v. State*, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980). Here, the show-up identification occurred shortly after the arson, and the security supervisor had seen Kenny on the street prior to the arson and on video surveillance shortly after the arson occurred. *See id.* (holding that the show-up identification was reliable because the witnesses had an opportunity to see the defendant’s face during the crime, testified they had no doubt the defendant was the perpetrator, and the identification took place within an hour of the crime). We therefore conclude Kenny has not demonstrated a plain error affecting his substantial rights. Accordingly, Kenny is not entitled to relief on this claim.

Second, Kenny claims the State elicited testimony from the fire investigator which invaded the province of the jury. During the fire investigator’s testimony, he described his investigation into the point of origin and cause of the fire, his review of video surveillance footage depicting a person who appeared to be Kenny setting the fire at the vacant building, and Kenny’s statements during the interrogation. After the fire investigator summarized his conclusions about the cause of the fire, the State elicited testimony from him that Kenny started the fire. Kenny argues this testimony invaded the province of the jury because it was “a factual conclusion that identifie[d] Kenny as the perpetrator” of the arson.

Because Kenny did not object to the testimony, we review this

²We note that, while Kenny also claims the circumstances surrounding the fire investigator’s identification of him was unduly suggestive, such a claim is misplaced because the fire investigator was not a percipient witness; he was a member of law enforcement investigating the crime.

claim for plain error. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Even assuming the fire investigator's testimony exceeded the bounds of admissible expert testimony, the testimony did not affect Kenny's substantial rights given the strength of the evidence demonstrating Kenny's guilt. We therefore conclude Kenny has not identified a plain error warranting relief.

Finally, Kenny argues the State committed prosecutorial misconduct at sentencing in two ways. First, he claims the State violated his Fifth Amendment rights by arguing that he had not shown remorse or taken any accountability for his conduct. Second, Kenny claims in essence that the State violated his right to equal protection by arguing the district court should not place him on probation because he was unhoused.

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will reverse a sentence that is within the statutorily prescribed limits when: (1) the record "demonstrate[s] prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence," *Silks v. State*, 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976); (2) "the statute fixing punishment is unconstitutional," *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); (3) "the sentence is so unreasonably disproportionate to the offense as to shock the conscience," *id.*; and (4) when the court "consider[s] a defendant's nationality or ethnicity in its sentence determination," *Martinez v. State*, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998). Because Kenny did not object to the State's arguments at sentencing, we review this claim for plain error. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

With respect to Kenny's claim that the State violated his Fifth Amendment rights by arguing he had not shown any remorse or taken accountability for his actions, a defendant retains their Fifth Amendment rights after a jury verdict because the appellate process is still available. *Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981). Thus, a defendant's Fifth Amendment rights are violated, and an abuse of discretion occurs, when a district court considers a defendant's lack of remorse in its sentencing decision. *Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245-46 (1997). The record here, however, does not indicate that the district court considered Kenny's alleged lack of remorse in imposing sentence; indeed, the fact that the district court imposed a prison sentence that was half the length of the sentence requested by the State circumstantially indicates the district court did not take this argument into consideration.³

As to Kenny's claim that the State violated his right to equal protection by arguing his unhoused status weighed against probation, there is no indication in the record that the district court considered Kenny's unhoused status in sentencing him. Furthermore, the record indicates there were other factors the district court may have considered in weighing whether probation was appropriate, including the fact that Kenny had been revoked from probation in connection with a 2013 conviction and had an outstanding warrant from another state at the time of the incident. Additionally, Kenny has not identified any precedent prohibiting a district court from considering a defendant's residential status when determining

³The State argued for a prison sentence of four to ten years, but the district court sentenced Kenny to a prison term of two to five years, a sentence that is within the parameters provided by the relevant statute. See NRS 205.010.

whether probation is appropriate. Accordingly, we conclude Kenny has failed to demonstrate a plain error affecting his substantial rights. Accordingly, we

ORDER the judgment of conviction affirmed.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Adras & Altig Attorneys at Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk