IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK BRANDON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40650

FILED

MAR 0 5 2004

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 one count of burglary and two counts of robbery. The district court sentenced appellant Jack Brandon to serve a prison term of 12 to 72 months for the burglary count and two concurrent prison terms of 24 to 120 months for the robbery counts.

Brandon first contends that the district court erred in admitting evidence of a 1997 casino robbery, which Brandon investigated in the course of his duties as a police officer, because the evidence was irrelevant and more prejudicial than probative.[1] Specifically, Brandon contends that the district court abused its discretion in admitting the evidence because: (1) the disguise worn by the perpetrator of that robbery was not sufficiently similar to the disguise at issue; (2) the 1997 robbery was too remote in time to support the State's argument that Brandon got the idea for his unique disguise from his police investigation in that case; and (3) the district court failed to view the videotape of the 1997 robbery before admitting it into the evidence. In this case, we conclude that any

[1]The evidence consisted of the testimony of casino security officer Charles Cauwel and a casino surveillance videotape.

error with regard to the admission of the evidence of the 1997 robbery was harmless in light of the negligible value of the evidence and the overwhelming circumstantial evidence presented by the State that Brandon committed the charged offenses.[2]

Brandon next contends that the district court erred in permitting eyewitness Eric Culp's testimony regarding the similarities in appearance between Brandon and the robber because it was tainted by an impermissibly suggestive show-up identification. Preliminarily, we note that Culp was unable to identify Brandon as the robber at trial, but only testified that he could not exclude Brandon because of the similarities in appearance between Brandon and the robber. Nonetheless, even assuming Culp's testimony could be considered an identification, we conclude that the district court did not err in admitting it because the identification was reliable.[3]

Finally, Brandon contends that his trial counsel was ineffective for failing to offer a GPS printout into evidence because it

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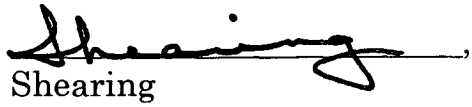
[2]See Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993) (recognizing that the erroneous admission of evidence is subject to harmless error review, and that the factors to be considered include "the margin of difference between innocence and guilt, the quantity and character of the error, and the gravity of the charged crime") (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

[3]See Gehrke v. State 96 Nev. 581, 583-84, 613 P.2d 1028, 1029-30 (recognizing the factors to be weighed in determining whether an identification is reliable are "the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation") (citing Neil v. Biggers, 409 U.S. 188 (1972)).

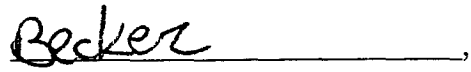
discredited Culp's testimony that he observed Brandon's vehicle leaving the scene of the robbery thereby proving that Brandon was actually innocent of the charged offenses. While acknowledging that this court will not generally review claims of ineffective assistance of counsel on direct appeal, Brandon argues that his claim should be considered on direct review because trial counsel's ineffectiveness is apparent from the face of the record. We disagree. In this case, there has been no evidentiary hearing on Brandon's allegation of ineffective assistance of counsel, and trial counsel's purported ineffectiveness is not apparent from the face of the record. Accordingly, we conclude that Brandon's claim is more appropriately raised in a post-conviction proceeding in the district court in the first instance.[4]

Having considered Brandon's contentions and concluded that they are either inappropriate for review on direct appeal or lack merit, we

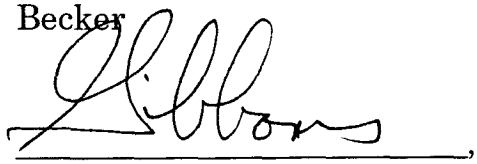
ORDER the judgment of conviction AFFIRMED.



, C.J.
Shearing



, J.
Becker



, J.
Gibbons

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[4]See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

cc: Hon. Donald M. Mosley, District Judge
Goodman & Chesnoff
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk