

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN KENNEDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42471

FILED

DEC 20 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted burglary. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Late one evening, appellant Kevin Kennedy attempted to break into the home of Mel Westwood. Westwood confronted Kennedy on his porch with the light on, and observed him for a few minutes before the perpetrator ran away. Westwood was the only eyewitness and subsequently identified Kennedy through a photo lineup.

Based on the fact that Westwood was the only eyewitness, Kennedy challenged the identification and requested the assistance of an expert in eyewitness identification. The district court denied the request, concluding it was unnecessary because Westwood had clearly identified Kennedy at the preliminary hearing. Kennedy was convicted of attempted burglary and sentenced as a habitual criminal to a minimum of five years and maximum of twenty years.

We conclude that the district court did not err in its rulings and affirm the conviction and corresponding sentence.

Expert witness

Kennedy argues that the district court abused its discretion when it summarily denied his request for state funding of an expert, without affording a hearing on the matter. Pursuant to NRS 7.135, the district court has discretion to authorize expenses related to investigative services. We have held “that the State has a duty to provide reasonable and necessary defense services at public expense to indigent criminal defendants.”¹ However, “[a]lthough [a defendant is] entitled to attempt to prove his theory of defense, the law does not require an unlimited expenditure of resources in [that] effort.”²

Eyewitness identification experts are necessary when their testimony satisfies the criteria set forth in United States v. Amaral.³ In such instances, exclusion of the expert’s testimony may constitute error.⁴ In Echavarria v. State, this court concluded that the district court erred in refusing to allow the admission of testimony by an eyewitness identification expert when considerable doubt was cast on the State's

¹Widdis v. Dist. Ct., 114 Nev. 1224, 1228, 968 P.2d 1165, 1167 (1998).

²Sonner v. State, 112 Nev. 1328, 1340, 930 P.2d 707, 715 (1996), modified on other grounds on rehearing by 114 Nev. 321, 955 P.2d 673 (1998).

³488 F.2d 1148, 1153 (9th Cir. 1973) (stating that the criteria for permitting eyewitness identification include: (1) a qualified expert; (2) a proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect).

⁴See White v. State, 112 Nev. 1261, 926 P.2d 291 (1996); Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992).

primary identification witnesses against one of the defendants.⁵ In contrast, in White v. State, this court discerned no error in the exclusion of such expert testimony in light of the firm identification of the defendant by three witnesses.⁶

Here, Westwood's testimony concerning the identification of Kennedy was unequivocal. The district court examined whether the expert was reasonably necessary and determined that Westwood had positively identified Kennedy at the preliminary hearing. We conclude, therefore, that no abuse of discretion occurred. The district court is in the best position to determine the credibility of an eyewitness identification. The testimony of Westwood supports the district court's determination.

Photo line-up

We have previously held that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁷ This issue is analyzed in a two-step inquiry: (1) whether the procedure was unnecessarily suggestive; and (2) if so, whether under all the circumstances the identification is reliable despite an unnecessarily suggestive identification procedure.⁸

⁵108 Nev. at 746, 839 P.2d at 597.

⁶112 Nev. at 1262, 926 P.2d at 292.

⁷Odoms v. State, 102 Nev. 27, 31, 714 P.2d 568, 570 (1986) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

⁸Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990).

The array was not so overly suggestive that it rendered the identification improper under a totality of the circumstances. It depicts varying individuals and does not single out a specific race or ethnicity. Westwood saw and spoke to Kennedy for several minutes in light adequate to view the facial features of an individual. He did not waiver on his identification at the preliminary hearing or at trial. Therefore, Kennedy's argument lacks merit and no error occurred.

We have considered Kennedy's other assignments of error, which include the following: his adjudication as a habitual criminal, improper questioning of the alibi witness, erroneous jury instructions, insufficient evidentiary support for the verdict, and cumulative error. We conclude that these arguments are also without merit.

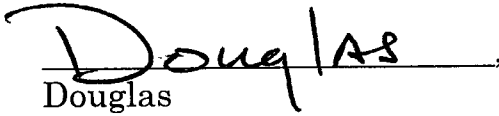
Conduct of respondent's attorney

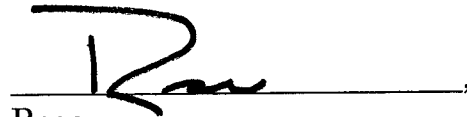
We have reviewed the respondent's brief and observed the multiple NRAP violations and mischaracterization of appellant's counsel's professionalism. We caution that further neglect of the NRAP will not be tolerated and strongly recommend that respondent's counsel review the NRAP before filing anything further with this court.

Conclusion

We affirm the rulings of the district court, Kennedy's judgment of conviction and the corresponding sentence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Douglas

 J.
Rose

 J.
Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General George Chanos/Carson City
White Pine County District Attorney
White Pine County Clerk