IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT STEVEN YOWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55083

FILED

NOV 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and sexual assault with the use of a deadly weapon. Fifth Judicial District Court, Nye County; John P. Davis, Judge. Appellant Robert Steven Yowell raises four contentions on appeal.

First, Yowell argues that the district court erred in denying his proposed jury instruction directing the jury how to evaluate the eyewitness identification. We disagree. While "the defense has the right to have the jury instructed on its theory of the case . . . no matter how weak or incredible that evidence may be," Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991), the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by the instructions given to the jury, Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). As the instructions for credibility of witnesses and proof beyond a reasonable doubt adequately covered the substance of Yowell's proffered instruction, the district court

did not abuse its discretion in refusing to give it. See Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985) (concluding that a similar instruction on eyewitness identification was properly refused because the jury received "instructions on credibility of witnesses and proof beyond a reasonable doubt"); see also Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (reviewing district court's refusal to give jury instruction for abuse of discretion).

Second, Yowell contends that insufficient evidence was presented to support his convictions. We conclude that this claim lacks merit. The evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson, 443 U.S. at 319; Mitchell, 124 Nev. at 816, 192 P.3d at 727. The victim identified Yowell as the man who threatened her with a knife, forced her to drive to a remote location, penetrated her with an object, and then fled with her belongings. Although Yowell complains that conflicting evidence rendered the verdict unreliable, it was for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See NRS 200.310(1); NRS 200.366(1); NRS 200.380(1); NRS 195.165(1); Bolden, 97 Nev. at 73, 624 P.2d at 20.

Third, Yowell argues that the district court erred in denying his motion for a new trial and judgment of acquittal. He contends that the district court failed to grant his motion for a judgment of acquittal where the evidence was insufficient to sustain his conviction. NRS 175.381(2) provides that the trial court may set aside a verdict and enter a judgment

of acquittal "if the evidence is insufficient to sustain a conviction." As explained above, sufficient evidence supports the convictions. Regarding the motion for a new trial, Yowell contends that the district court abused its discretion in denying his motion for a new trial based on conflicting evidence supporting his convictions. See Zana v. State, 125 Nev. ___, ___, 216 P.3d 244, 248 (2009). We disagree. While some of the evidence may have been conflicting, it was not so at odds with the verdict that the "totality of evidence fail[ed] to prove the defendant guilty beyond a reasonable doubt." State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993).

Fourth, Yowell argues that the district court plainly erred in admitting evidence related to a photographic lineup. We conclude that Yowell failed to demonstrate that the district court plainly erred in this regard. See Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008) (failure to object to the admission of evidence precludes appellate review unless it constitutes plain error). The victim in this case was with Yowell for roughly four hours, had initially given a description of Yowell so accurate that the officers immediately thought of him, and immediately picked him out of the photographic lineup hours after the crime. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (setting forth factors for evaluating the reliability of a prior identification). Thus, based on the totality of the circumstances, Yowell has not demonstrated that "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968); see Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997).

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Gibson & Kuehn
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye Co. Clerk