IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATROY JAQUAN MCLEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73965

ORDER OF AFFIRMANCE

Katroy Jaquan McLean appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery and robbery with a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

McLean was charged with conspiring with an unknown person to commit robbery and robbing Monica Rangel-Procci at gunpoint in the WorldMark timeshare parking lot.[1] A jury found McLean guilty on both counts and the district court sentenced him to concurrent terms in prison for each count. On appeal, McLean argues that: (1) the in-court identifications were tainted by the photographic lineup and out-of-court identifications; (2) there was insufficient evidence to support the verdict; and (3) cumulative error warrants reversal. We disagree.

First, McLean contends that the in-court identifications were tainted, in part, because the photographic lineup was inherently suggestive. Because McLean raises this issue for the first time on appeal, we review for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record." *Garner v. State*, 116 Nev. 770, 783, 6 P.3d

[1]We do not recount the facts except as necessary to our disposition.

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1013, 1022 (2000). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

"[C]onvictions 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 misidentifications." *Coats v. State*, 98 Nev. 179, 181, 643 P.2d 1225, 1226 (1982) (alteration in original) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). Further, in *Odoms v. State*, the supreme court held that a photographic lineup is not impermissibly suggestive when the photographs match the "general description of the assailant . . . provided by the witnesses," "the witnesses independently review[ ] . . . the photographs," and "the officer conducting the lineup [does] nothing to suggest" which photograph is the defendant's. 102 Nev. 27, 31, 714 P.2d 568, 570 (1986).

Here, the lineup was generated based on descriptors of the suspect given by Monica and her husband David, the witnesses independently reviewed the photographs, and the detectives did nothing to suggest which photograph was McLean or that the suspect that robbed them was included in the photographic line-up. Therefore, we conclude the photographic lineup was not impermissibly suggestive; thus, the in-court identification was not tainted by the photographic lineup and we find no plain error.

Second, we address McLean's contention that Monica's and David's in-court identifications were tainted because of their out-of-court

identifications. McLean also raises this issue for the first time on appeal and, accordingly, we review for plain error.

McLean discusses the five *Gehrke v. State* factors the court weighs to determine the reliability of an identification following an "unnecessarily suggestive procedure." 96 Nev. 581, 583-84, 613 P.2d 1028, 1029-30 (1980). However, the *Gehrke* factors are used to determine the reliability of a pretrial identification obtained through police action. Here, the reliability of the in-court identifications are being questioned because Monica and David happened to see McLean in the busy courthouse, not because of any participation by the police or influence from a state actor. Thus, the *Gehrke* factors do not apply to the facts of this case.

In an attempt to apply the *Gehrke* factors, McLean contends that the district attorney has a duty to "sequester" victims from the general public so that the victims do not inadvertently see the defendant before their in-court identifications. However, McLean fails to provide any legal authority to support this specific claim, thereby failing to show there is such a duty, and we need not address it.[2] *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider claims that are not cogently argued or supported by relevant authority).

We next turn to McLean's contention that insufficient evidence supports the verdict. In reviewing a challenge to the sufficiency of the evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

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[2]Nevertheless, we note the record suggests the inadvertent observation of McLean was not so unnecessarily suggestive as to taint the in-court identifications and we would thus find no plain error.

essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction may be upheld even where the State's primary evidence is the testimony of the victim, because it is the jury's province to determine what weight and credibility to give to the evidence. *See Hutchins v. State*, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994). Moreover, "circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

"A conspiracy is an agreement between two or more persons for an unlawful purpose." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004). However, "[c]onspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." *Id.* (quoting *Gaitor v. State*, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990)). Further, "a conspiracy conviction may be supported by 'a coordinated series of acts,' in furtherance of the underlying offense, 'sufficient to infer the existence of an agreement.'" *Id.* (quoting *Gaitor*, 106 Nev. at 790 n.1, 801 P.2d at 1376 n.1).

Here, the State presented sufficient evidence for a rational jury to find that McLean conspired to commit robbery and committed robbery with a deadly weapon. Monica and David testified that prior to being robbed, they saw two men running together nearby; the men approached Monica and David at the car; McLean robbed Monica by displaying a handgun and demanding her purse while the other man stood and watched David; and the two men fled together after McLean grabbed Monica's purse. Monica's and David's testimony is sufficient evidence for the jury to infer the existence of an agreement between McLean and the other man based on their conduct and

series of coordinated acts. Moreover, Monica testified that McLean threatened her with a gun while grabbing and taking her purse off of her shoulder. Furthermore, Monica and David separately identified McLean as one of the robbers in a photographic line-up, and again identified McLean in-court at trial.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See McNair*, 108 Nev. at 56, 825 P.2d at 573. Therefore, based on the record before us, we conclude the evidence was sufficient to support McLean's convictions.

Lastly, cumulative error does not apply here because we conclude there was no error. *See United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("If there are no errors or a single error, there can be no cumulative error."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[3]

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

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[3]We note the judgment of conviction contains a clerical error. Specifically, the maximum aggregate sentence stated in the judgment of conviction exceeds the sentence imposed. The maximum aggregate sentence should be 192 months. Accordingly, after issuance of the remittitur on appeal, the district court shall enter an amended judgment of conviction that correctly states the aggregate sentence. *See* NRS 176.565.

cc: Hon. Carolyn Ellsworth, District Judge
E. Brent Bryson, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk