IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENE ROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85140

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a bench trial, of burglary while in possession of a firearm, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, battery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Appellant Eugene Ross's convictions arise from an incident where Ross and Kevin Coulter entered Joseph Smalley's apartment with firearms, detained Smalley and the other two occupants (Coulter's ex-girlfriend, Lisa Barksdale, and Miasha Paton), robbed them, and killed Smalley. Coulter also battered and attempted to shoot Paton. Ross raises four issues on appeal.

First, Ross argues that insufficient evidence supports the convictions for aiding and abetting the battery and attempted murder of Paton. When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the 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)). "[I]t is the function of the [fact finder], not the appellate court, to weigh the evidence and pass upon the credibility of the witness[es]." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Ross contends there is no evidence he took "any action that facilitated or aided Coulter's random shooting" of Paton. Ross asserts that he was in the bedroom when Coulter battered and attempted to shoot Paton in the living room. And Ross asserts that the State did not prove he had the requisite specific intent to kill Paton. *See Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) ("[T]he aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime."). Barksdale entered an *Alford*[1] plea to robbery and conspiracy to commit robbery and agreed to testify for the prosecution. At trial, Barksdale testified that she had dated Coulter and met Ross through Coulter. The two men were so close that Barksdale believed Ross and Coulter were brothers. On the day in question, Coulter forcibly entered Smalley's apartment, detained the occupants in the bathroom, and robbed them of valuables. During the incident, Coulter called Ross and told him to come up to the apartment. Ross entered the apartment with a firearm and moved Smalley from the bathroom to the bedroom. Coulter moved Barksdale and Paton to the living room. They heard a gunshot and Coulter ran into the bedroom. Barksdale then heard multiple gunshots fired in the bedroom. With the assailants in the bedroom, Paton attempted to flee but fell before she could exit the apartment. Coulter returned from the bedroom and struck Paton on the head with his firearm. Coulter tried to shoot Paton,

[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

but the gun did not fire. Ultimately, Ross and Coulter fled the apartment and ran together towards Ross's vehicle.

Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that Ross aided and abetted Coulter with the intent that Paton, the only remaining witness, be killed. *See* NRS 193.153 (imposing criminal liability for attempt); NRS 193.165 (deadly weapon enhancement); NRS 195.020 (providing criminal liability for persons who aid and abet the criminal act of another); NRS 200.010 (defining murder); NRS 200.481(1)(a) (defining battery); *see also Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); *Walker v. State*, 113 Nev. 853, 869, 944 P.2d 762, 773 (1997) (holding that mere presence at the crime scene cannot support the inference that one is a party to an offense, but one's "presence, companionship, and conduct before, during, and after the crime" may support such an inference). Thus, sufficient evidence supported the district court's verdict.

Second, Ross contends that the prosecutor committed misconduct by arguing facts not in evidence. *Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) ("It is improper for the State to refer to facts not in evidence."). When reviewing a claim of prosecutorial misconduct, "[f]irst, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (footnote omitted).

During closing arguments, Ross argued that another man, who left a fingerprint at the crime scene, could be the unknown contributor to

DNA found on gloves but law enforcement did not collect a test sample from that individual. In rebuttal, the State explained that the evidence tested for DNA had been handled by several male individuals during the investigation and legal proceedings. Because the State suggested that the DNA evidence may have been contaminated, Ross moved for alternative remedies, including a mistrial, dismissal of the charges, and to strike the argument. The State asserted that it was properly responding to Ross's argument. The district court found the State's comments improper and disregarded the argument in its entirety. Thus, the district court obviated any potential prejudice from the prosecutor's comments. *See Pantano v. State*, 122 Nev. 782, 794, 138 P.3d 477, 485 (2006) (concluding that defendant received the appropriate remedy "when the district court sustained his objection and granted his motion to strike" an improper statement). Accordingly, Ross has not demonstrated that relief is warranted on this ground.

Third, Ross argues that the prosecutor knowingly presented false testimony from Barksdale. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (explaining that it is a constitutional violation for the prosecution to obtain a conviction by knowingly presenting false evidence or failing to correct false evidence). Ross asserts that Barksdale falsely testified that she did not plan with Ross and Coulter to rob Smalley. Even assuming Barksdale testified falsely, *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008) (noting that the first element for a successful *Napue* claim is demonstrating that "the testimony . . . was actually false"), the State corrected any potential falsity by eliciting testimony that Barksdale pleaded guilty to robbery and conspiracy to commit robbery. Therefore, Ross has not shown that relief is warranted on this ground.

Finally, Ross argues that the district court erred in denying his motion to dismiss the charges based on the State's failure to collect evidence or alternatively applying a presumption that the uncollected evidence favored the defense. "In a criminal investigation, police officers generally have no duty to collect all potential evidence." *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). To succeed on a claim that the State failed to collect evidence, the defendant must first show that the evidence was material. *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Evidence is material when there is a reasonable probability that, had the evidence been available, the result of trial would have been different. *Id.* "If the evidence was material, then the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." *Id.*

Ross takes issue with law enforcement's failure to identify two individuals stopped and released near the crime scene. Ross contends that the failure to collect this material evidence constituted gross negligence. We disagree. At trial, Coulter testified that he and another individual were detained by the police. After answering a few questions, they were released. And Coulter testified about his involvement in the incident along with other individuals. Ross presented this evidence along with other witnesses to support the theory that he was not involved in the crimes. On this record, Ross has not demonstrated that the district court erred in concluding that identifying the individuals at the scene would not have resulted in a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not abuse its discretion by denying the motion to dismiss and declining to apply a favorable presumption. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing a district

court's denial of motion to dismiss for abuse of discretion); *see also Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Carli Lynn Kierny, District Judge
Hofland & Tomsheck
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk