

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DILLON JAMES POTTS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69962

FILED

MAR 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dillon James Potts appeals from a judgment of conviction, pursuant to a jury verdict,¹ of larceny from the person. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Potts claims insufficient evidence supports his conviction because the victim's testimony was the only evidence presented to support the charge, the victim gave contradictory and implausible testimony throughout the trial, and the victim often did not make sense. Potts asserts the victim's testimony was not credible because the victim was coached throughout the process by the State and under the influence of lithium when he testified.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v.*

¹The judgment of conviction erroneously states Potts pleaded guilty. Upon issuance of the remittitur, the district court shall enter an amended judgment of conviction that corrects this clerical error. See NRS 176.565; *Buffington v. State*, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994).

Virginia, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[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 victim testified that on March 2, 2014, he met Potts and invited Potts into his apartment. Potts stayed at the victim’s apartment for approximately two hours and during that time the victim mentioned to Potts that he received his social security disability check on the third day of every month. The next day, the victim went to the bank and withdrew \$1,019. When the victim returned to his apartment, Potts was standing outside and offered the victim a cigarette. As the victim took the cigarette, Potts pulled the victim’s wallet out of the victim’s back pocket, put the wallet on the ground, took the \$1,019 out of the wallet, and ran off laughing. The victim testified he did not offer the money to Potts and he did not give Potts permission to take the money. The victim tried to look for Potts for a short period of time, but could not find him, so he returned to his apartment, where he informed his roommate Brad about the incident. Someone called 911 and the victim, with Brad’s help, reported the crime to the police and informed the 911 operator that he had a phone number for Potts. The victim positively identified Potts as the perpetrator in a photographic lineup, at the preliminary hearing, and at trial.

When considered in the light most favorable to the State, sufficient evidence was presented for the jury to find that Potts, under circumstances not amounting to robbery, with the intent to steal or appropriate for his own use, took the victim’s wallet and money from the victim’s person without the victim’s consent. *See* NRS 205.270. Although there were inconsistencies in the victim’s testimony, it is 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 Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Next, Potts asserts the victim's identification of him from a photographic lineup should have been suppressed because the identification was the product of coaching, the photographic lineup was unnecessarily suggestive, and the identification was unreliable. He specifically asserts the victim testified it was the police who circled the picture of Potts in the photographic lineup and told the victim who the suspect was. He further asserts none of the photographs in the lineup looked anything like Potts.

Pretrial identifications are inadmissible if the procedures used are unnecessarily suggestive, and if, under the totality of the circumstances, the identification is not reliable. *Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009). "[A] photographic identification must be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (internal quotation marks omitted).

When ruling on Potts' objection to the admission of the photographic lineup, the district court stated the challenge to the photographic lineup should have been done before trial. The court further stated all of the photographs used in the lineup appear to have the same shading and they all appear to have been taken from booking photos, and the court concluded the lineup was not unnecessarily suggestive. The

court also stated the victim testified he did not circle Potts' picture, but he never said anyone else circled it, and the victim testified he was the one who signed and dated the picture.

We conclude Potts has failed to demonstrate the district court erred by overruling his objection and allowing the photographic lineup to be admitted.² We note Potts has not provided this court with a copy of the photographic lineup for consideration on appeal.³ See NRAP 30(b)(3) (the appendix shall include the "portions of the record essential to determination of the issues raised in appellant's appeal"). Nevertheless, the district court's determination that the photographic lineup was not unnecessarily suggestive is supported by the record provided on appeal. The detective who compiled the photographic lineup testified all six photographs in the lineup depicted individuals that had white or Caucasian skin tone, dark or brown hair color, and facial hair or a 5 o'clock shadow. Further, contrary to Potts' assertion, the victim never testified the police circled Potts' photograph in the lineup and informed him Potts was the suspect. In fact, during voir dire of the victim regarding the photographic lineup, the victim testified he was the one who circled

²To the extent the district court overruled Potts' objection to the admission of the photographic lineup on the basis that Potts did not timely challenge its admission, we conclude the district court did not abuse its discretion. See NRS 174.125(1), (3), (4).

³We note the Nevada Supreme Court denied Potts' motion to transmit the original photographic lineup without prejudice to Potts' right to file a motion setting forth why the exhibit could not be reproduced for inclusion in the appendix. *Potts v. State*, Docket No. 69962 (Order Granting Motion in Part and Denying Motion in Part, July 14, 2016); see NRAP 30(d). Potts did not renew the motion or file a supplemental appendix containing the photographic lineup.

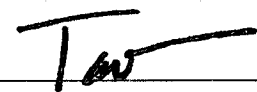
Potts' photograph. And the detective testified he did not circle Potts' picture on the photographic lineup; rather, it was the victim who circled Potts' picture and signed his name under it.


Even if we were to assume the district court erred by finding the photographic lineup was not unnecessarily suggestive, Potts still would not be entitled to relief because he cannot demonstrate the identification was unreliable. Further, even if it was unreliable, any error in its admission was harmless beyond a reasonable doubt. *See Thompson v. State*, 85 Nev. 134, 138-39, 451 P.2d 704, 707 (1969). Potts was a known person to the victim. The victim testified he spent two hours with Potts the day before the incident and he clearly recognized Potts as the person who took his wallet. Further, the victim repeatedly identified Potts as the perpetrator, including at trial, and the victim's in-court identification of Potts as the perpetrator was independent of the photographic lineup. *See Thompson v. State*, 85 Nev. 134, 138-39, 451 P.2d 704, 707 (1969). Accordingly, we deny this claim.

Having concluded Potts has failed to demonstrate he is entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk