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Johnson v. State of Nevada, 131 Nev. Adv. Op. 58 (July 30, 2015)[1]

CRIMINAL LAW: VALIDITY OF "SHOW-UP" IDENTIFICATIONS

Summary

The Court heard an appeal from a sentence and conviction following a jury trial of one count of conspiracy to commit robbery, two counts of robbery, and one count of battery with intent to commit a crime. Affirmed.

Background

Christina Raebel and Albert Valdez were walking to a bar in downtown Las Vegas when they noticed two men following them. Raebel viewed the men directly for about "a second and a half"[2] and Valdez saw them through his peripheral vision for "[o]ne second."[3] Without warning, the two men, later identified as Tabuta Johnson and his brother, Varian Humes, assaulted and robbed Raebel and Valdez.

Minutes later, Las Vegas Metropolitan Police Department (LVMPD) officers arrived at the scene. Raebel and Valdez described the men that had assaulted them and the direction in which they fled. Based on the description, LVMPD issued a radio broadcast for the two fleeing suspects. Moments later, patrolling officers saw Johnson and Humes, who fit Raebel and Valdez's description "to a tee,"[4] three blocks from the crime scene. As the patrolling officers stopped the men for questioning, they saw Raebel's purse, car keys, and Vladez's wallet scattered on the ground. After handcuffing the two men, the officers found Valdez's cell phone in Humes's pocket.

Roughly thirty minutes after the crime, LVMPD officers informed Raebel and Valdez that they had "found people that matched the description"[5] and separately transported them to where Johnson and Humes were being held. On the way there, the LVMPD officers told Raebel and Valdez to state if they recognized the people that would be shown to them, and told them that "[a] person is just as innocent as they are guilty"[6] and also, that it was "just as important to free an innocent man"[7] as it was to identify a guilty one. Raebel and Valdez were separated from each other while LVMPD officers brought out Johnson and Humes, one at a time, and shined spotlights on them. Raebel immediately recognized both Johnson and Humes with 100 percent certainty. Valdez recognized Johnson with 90 percent certainty, but did not recognize Humes at all.

Johnson and Humes were charged with various crimes; Humes pled guilty while Johnson proceeded to trial. During the trial, the jury was informed of the out-of-court "show-up"[8] identification during which Johnson was positively identified by both Raebel and Valdez. Raebel and Valdez also identified Johnson at trial. He was convicted on all counts.

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[1] By Joseph Meissner.
[2] Johnson v. State of Nevada, 131 Nev. Adv. Op. 58, 3 (July 30, 2015).
[3] *Id.*
[4] *Id.* at 15.
[5] *Id.* at 4-5.
[6] *Id.* at 5.
[7] *Id.*
[8] A "show-up" identification is performed by presenting a single suspect (or a very small group of potential suspects) to the victim soon after a crime is committed and inquiring if that person is the perpetrator. *Id.* at 7.

Following the trial, the State sought to have Johnson adjudicated as a habitual criminal, submitting six judgments of conviction for prior felonies.[9] The court adjudicated Johnson a habitual criminal and he was sentenced.

Discussion

On appeal, Johnson claimed that the show-up identification was conducted in an unnecessarily suggestive, and therefore unconstitutional manner. He argued that the district court should not have admitted the out-of-court testimony or the in-court identification at trial. He also argued that the court plainly erred in adjudicating him a habitual criminal. Because Johnson raised both of these issues for the first time on appeal, the Court's review was narrowly limited to determine whether plain error had occurred.

The validity of the show-up identification procedures

When a witness testifies that she personally saw a crime as it occurred, and later recognized the same person she previously saw, she has performed an "identification." Various methods are used by the police force to obtain identifications. Regardless of the method employed, the Due Process Clause of the United States and Nevada Constitutions prohibits criminal prosecution based on identification procured under unnecessarily suggestive circumstances. Here, the Court tested the validity of the show-up identification under a two-part test. It determined "(1) whether the show-up procedure was unnecessarily suggestive, and (2) whether the identification was nonetheless reliable in spite of any unnecessary suggestiveness in the identification procedure."[10]

The show-up in this case was not unnecessarily suggestive

Determining whether a show-up was unnecessarily suggestive turns upon the particular circumstances surrounding the identification. Here, Raebel and Valdez were specifically instructed that it was equally as important that they exonerate an innocent person as it was to identify a guilty one. Additionally, they were separated during the examination, so as not to influence one another. The Court found that even if the show-up contained some elements of suggestiveness, strong countervailing policy considerations existed in this case that justified LVMPD's show-up identification, rather than any other method.

The identification was reliable

The Court held that even if the show-up method used here was suggestive, suggestiveness by itself does not preclude identification testimony at trial in the identification was otherwise reliable. Reliability is measured by: "(1) the opportunity of the witness to view the suspect at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the witness's prior description, (4) the level of the witness's certainty demonstrated at the confrontation, and (5) the length of time between the crime and the confrontation."[11] Here, Raebel testified that she clearly viewed both suspects prior to the crime and that she had paid special attention because she sensed that she was being followed. She remained in close proximity to them during the assault. Valdez testified that his view of the suspects prior to the attack was limited, but that he had more opportunity to view them during the assault. Furthermore, Raebel and Valdez were asked to identify the suspects shortly after the attack while the incident was still fresh in their minds. Finally,

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[9] *Id.* at 6.
[10] *Id.* at 10.
[11] *Id.* at 14.

Raebel and Valdez described the suspects exactly before they were apprehended and subsequently identified. For the foregoing reasons, the Court held that the district court did not plainly err when it permitted testimony regarding the victims' identification of Johnson both before and during the trial.

The district court did not plainly err in adjudicating Johnson a habitual criminal

Johnson argues that the sentencing court incorrectly adjudicated him as a habitual criminal based only on his perceived escalating violence. However, NRS 207.010 states that a defendant who has been convicted of three or more felonies qualifies as a habitual criminal.[12] The Court cited *Tanksley v. State*, which held that adjudication under criminal statutes entails "the broadest kind of judicial discretion,"[13] and found that the statutes do not indicate any express limitations on the judge's discretion. Finally, the Court stated that a sentencing court acts correctly so long as it does not operate "under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication."[14] Because the record did not demonstrate that the district court was unaware of the discretion afforded to it, the Court held that the district court properly exercised its discretion to sentence Johnson as a habitual criminal.

Conclusion

After finding that the district court did not plainly err by admitting the show-up identification testimony into evidence, nor plainly err in adjudicating Johnson as a habitual criminal, the Court affirmed the judgment of conviction and sentence.

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[12] NEV. REV. STAT. § 207.010.
[13] 946 P.2d 148, 152 (1997) (internal quotation marks omitted).
[14] Hughes v. State, 966 P.2d 890, 893 (2000).