

IN THE SUPREME COURT OF THE STATE OF NEVADA

PABLO R. GUERRERO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43115

**FILED**

JUN 15 2005

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND  
REMANDING

This is a direct appeal from a judgment of conviction pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Pablo R. Guerrero was convicted of conspiring with Eriberto Leon to burglarize the residence of Gabriel and Maria Gallardo, commit robbery by stealing the Gallardos' automobile, kidnap Brenda Gallardo (Guerrero's estranged wife), kidnap Sonia Gallardo (Guerrero's sister-in-law), and murder Sonia Gallardo. As a result of his criminal actions, Guerrero was convicted of 12 separate crimes and sentenced to a combination of concurrent and consecutive sentences totaling 30 years to life imprisonment.

On appeal, Guerrero argues that (1) there was insufficient evidence presented at trial to support six of his convictions; (2) he is entitled to reversal because he was convicted of redundant crimes; and (3) he is entitled to a new trial because the district court tried him alongside Leon.

DISCUSSION

Sufficiency of evidence

Guerrero argues that there was insufficient evidence presented at trial to convict him of conspiracy to commit burglary, first

degree kidnapping of Brenda, first degree kidnapping of Sonia, attempted murder of Sonia, conspiracy to commit robbery, and robbery. We disagree.

“A jury conviction will stand where the record reveals substantial evidence that reasonably supports a finding of guilt beyond a reasonable doubt.”<sup>1</sup> “Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based.”<sup>2</sup> In determining the sufficiency of the evidence below, the critical question is “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.”<sup>3</sup>

#### Conspiracy to commit burglary

“A conspiracy is an agreement between two or more persons for an unlawful purpose.”<sup>4</sup> “[T]he crime of conspiracy is completed when the unlawful agreement is reached.”<sup>5</sup> NRS 205.060(1) defines burglary as the entry into any building with the intent to commit a crime.

At trial, the State presented evidence that Guerrero entered the Gallardo residence to confront Brenda about using her cell phone to talk with other men. Guerrero told Brenda that he had a surprise for her at 10 a.m. At 10 a.m., Leon arrived at the residence and Guerrero let him

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<sup>1</sup>Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

<sup>2</sup>State v. Walker, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993).

<sup>3</sup>Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

<sup>4</sup>Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985).

<sup>5</sup>Moore v. State, 117 Nev. 659, 662, 27 P.3d 447, 450 (2001).

in. Brenda asked Leon if he was there to help Guerrero, but he did not respond. Guerrero then told Leon to go upstairs and pack some clothes for Brenda so that Guerrero could take her to Mexico. Leon complied with those instructions.

Guerrero later told Leon to go outside and get Guerrero's gun and a Wal-Mart bag from the car. Leon returned with a Wal-Mart bag containing rope and duct tape, but told Guerrero he could not find the gun. Guerrero told Leon where to locate the gun and Leon retrieved it. Guerrero put Brenda into her parents' van while Leon held the bag. Leon handed Guerrero the rope and duct tape from the bag, and Guerrero tied Brenda's wrists and ankles and stretched duct tape across her mouth. Guerrero then took the van, with Brenda tied up inside, to pick up Sonia from school.

Guerrero then returned to the Gallardo residence and told Sonia to go inside, find Brenda's cell phone, and bring it to him. Guerrero told Leon to go with her. When Sonia and Leon returned with the cell phone, Guerrero told Leon to go back inside and fetch the bag of Brenda's clothes. After Leon returned with the clothes, Sonia ran inside and locked the doors. Guerrero gave Leon a key to the house and told Leon to meet him at a casino on the California state line in one hour. Guerrero then drove away with Brenda tied up inside the van.

The State presented sufficient evidence at trial for a reasonable jury to conclude, beyond a reasonable doubt, that Guerrero and Leon formed an agreement for the unlawful purpose of entering the Gallardo residence with the intent to commit a crime. Accordingly, we affirm Guerrero's conviction for conspiracy to commit burglary.

First degree kidnapping of Brenda with use of a deadly weapon

NRS 200.310(1) defines first degree kidnapping as the willful seizure, confinement, or abduction of a person with the intent to sexually assault, murder, or cause substantial bodily harm to the person.

At trial, the State presented evidence that Guerrero, carrying a handgun, bound and gagged Brenda and abducted her in her parents' van. The State also presented evidence that when Guerrero arrived at a state line casino, he parked and confronted Brenda about her cell phone bill. During that confrontation, Guerrero pressed his gun to Brenda's head and punched her in the face. Guerrero eventually gave up waiting for Leon and began driving west into California. A police chase ensued sometime after Guerrero drove through Baker, California. During the chase, Guerrero told Brenda that when the police stopped the van, he would shoot her and then shoot himself.

The State presented sufficient evidence at trial for a reasonable jury to conclude, beyond a reasonable doubt, that Guerrero abducted Brenda with the intent to sexually assault, murder, or inflict substantial bodily harm upon her. Accordingly, we affirm Guerrero's conviction for first degree kidnapping of Brenda with use of a deadly weapon.

First degree kidnapping of Sonia with use of a deadly weapon resulting in substantial bodily harm

NRS 200.310(1) defines first degree kidnapping as the willful seizure, confinement, or abduction of a person with the intent to sexually assault, murder, or cause substantial bodily harm to the person. Under NRS 200.320(1), a person convicted of first degree kidnapping will receive an enhanced sentence if the victim actually suffers substantial bodily harm.

At trial, the State presented evidence that Guerrero gave Leon a key to the house shortly before Guerrero left for the state line. Guerrero also asked Leon if he still had his gun. Leon responded in the affirmative and patted his right pocket, indicating that his gun was there. After Guerrero left, Leon used the key to re-enter the house. Leon approached Sonia with his right hand in his right pocket and ordered Sonia upstairs. Leon then grabbed a baby blanket from the living room couch and pushed Sonia toward the stairs.

When they reached the top of the stairs, Leon pushed Sonia into her parents' bedroom closet and closed the bedroom door behind him so that Brenda's child could not come inside. Once inside the bedroom, Leon entered the closet and pushed Sonia to the floor. He then covered Sonia's face with the baby blanket, shot her in the head, and left her for dead.

This court has refused to place a "minimum distance" that must be proven to sustain a kidnapping conviction.<sup>6</sup> "It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping."<sup>7</sup> Thus, the State presented sufficient evidence for a reasonable jury to have concluded, beyond a reasonable doubt, that the act of forcing Sonia up the stairs and into a bedroom closet constituted kidnapping. A reasonable jury could also have concluded, beyond a reasonable doubt, that Leon abducted Sonia with the intent to murder her.

Furthermore, NRS 200.340(1) provides that anyone who aids and abets kidnapping in the first degree will be punished as a principal. A

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<sup>6</sup>Jensen v. Sheriff, 89 Nev. 123, 125, 508 P.2d 4, 5 (1973).

<sup>7</sup>Id. at 125-26, 508 P.2d at 5.

reasonable jury could have concluded, beyond a reasonable doubt, that Guerrero aided and abetted the first degree kidnapping of Sonia by asking Leon if he still had a gun and then providing Leon with a key to the house. Further, the district court properly enhanced Guerrero's sentence, pursuant to NRS 200.320(1), because Sonia suffered substantial bodily harm. Accordingly, we affirm Guerrero's conviction for first degree kidnapping of Sonia with use of a deadly weapon resulting in substantial bodily harm.

Attempted murder of Sonia with use of a deadly weapon

"An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."<sup>8</sup> "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied."<sup>9</sup>

At trial, the State presented evidence that Leon forced Sonia upstairs, shot her in the head, and left her for dead. Miraculously, Sonia survived. A reasonable jury could have concluded, beyond a reasonable doubt, that Leon acted with the intent of, but failed to accomplish, killing Sonia with malice aforethought.

NRS 195.020 provides that "[e]very person concerned in the commission of a felony, . . . whether he directly commits the act constituting the offense, or aids or abets in its commission, . . . is a principal, and shall be proceeded against and punished as such." The State presented sufficient evidence for a reasonable jury to have concluded, beyond a reasonable doubt, that Guerrero aided and abetted

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<sup>8</sup>NRS 193.330(1).

<sup>9</sup>NRS 200.010.

the attempted murder of Sonia by asking Leon if he still had a gun and then providing Leon with a key to the house. Accordingly, we affirm Guerrero's conviction for the attempted murder of Sonia with use of a deadly weapon.

Conspiracy to commit robbery

"A conspiracy is an agreement between two or more persons for an unlawful purpose."<sup>10</sup> "[T]he crime of conspiracy is completed when the unlawful agreement is reached."<sup>11</sup> NRS 200.380(1) defines robbery as "the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future."

At trial, the State presented evidence that Leon met Guerrero at the Gallardos' residence, as planned, at 10 a.m. and Guerrero let him into the house. Once inside, Guerrero, with Leon's assistance, bound and gagged Brenda and used the Gallardos' van to kidnap her. The State presented sufficient evidence at trial for a reasonable jury to conclude, beyond a reasonable doubt, that Guerrero and Leon formed an agreement to unlawfully take the van in Brenda's presence, against her will, and by means of force. Accordingly, we affirm Guerrero's conviction for conspiracy to commit robbery.

Robbery with use of a deadly weapon

NRS 200.380(1) defines robbery as "the unlawful taking of personal property from the person of another, or in his presence, against

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<sup>10</sup>Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985).

<sup>11</sup>Moore v. State, 117 Nev. 659, 662, 27 P.3d 447, 450 (2001).

his will, by means of force or violence or fear of injury, immediate or future.”

At trial, the State presented evidence that Guerrero, with Leon’s assistance, bound and gagged Brenda and used the Gallardos’ van to kidnap her. Both Guerrero and Leon carried handguns. During the kidnapping, Guerrero kept his handgun in his lap, pointed the gun at Brenda’s head, and told her that if the police caught them he would shoot her and then himself.

The State presented sufficient evidence at trial for a reasonable jury to conclude, beyond a reasonable doubt, that Guerrero used a deadly weapon to unlawfully take the van in Brenda’s presence, against her will, and by means of force. Accordingly we affirm Guerrero’s conviction for robbery with use of a deadly weapon.

#### Redundancy of convictions

Guerrero argues that several of his convictions should be reversed because he was convicted of redundant crimes. We disagree.

“When a defendant receives multiple convictions based on a single act, this court will reverse ‘redundant convictions that do not comport with legislative intent.’”<sup>12</sup> In determining whether the convictions are redundant, this court considers “whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions.”<sup>13</sup> “The question is

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<sup>12</sup>State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837-38 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

<sup>13</sup>Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).



whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.”<sup>14</sup> We conclude that Guerrero’s convictions are not redundant because each conviction punishes separate illegal conduct.

Conspiracy charges

Guerrero argues that the convictions for conspiracy to kidnap Brenda, conspiracy to kidnap Sonia, and conspiracy to murder Sonia are redundant with the conviction for conspiracy to commit burglary. Guerrero’s argument rests on the assertion that to the extent he conspired to commit burglary, that alleged conspiracy included the conspiracy to commit murder and/or kidnapping. We disagree.

NRS 205.070 provides that “[e]very person who, in the commission of a burglary . . . commits any other crime, may be prosecuted for each crime separately.” Thus, though the crime of burglary requires entry into a structure with the intent of committing another crime, the actual commission of an additional crime constitutes a separately punishable offense. This reasoning is equally applicable here. The conspiracy to commit burglary charge required proof that Guerrero agreed to enter the Gallardo residence with the intent to commit a crime. However, to the extent that Guerrero reached separate agreements to commit additional crimes, he may be separately punished for those agreements.

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<sup>14</sup>Id. at 227-28, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. at 136, 994 P.2d at 698).

Furthermore, the conspiracies are not redundant because each conspiracy requires proof of an element that the other does not.<sup>15</sup> Conspiracy to commit kidnapping requires a plan or scheme to abduct the victim with the intent to sexually assault, murder, or inflict substantial bodily harm upon the victim.<sup>16</sup> Conspiracy to commit burglary requires a plan or scheme to enter a structure with the intent to commit a crime.<sup>17</sup> Conspiracy to commit murder requires a plan or scheme to unlawfully kill another person with malice aforethought.<sup>18</sup>

Thus, the kidnapping conspiracy requires proof of the extra element of abduction, the burglary conspiracy requires proof of the extra element of entry into a structure, and the murder conspiracy requires proof of the additional element of intent to take life with malice aforethought. Accordingly, Guerrero's conspiracy convictions are not redundant. The gravamen of each conspiracy is separate, and the Legislature did not intend these crimes to be punished together.<sup>19</sup> Further, each conspiracy requires proof of an extra element that the other conspiracies do not.<sup>20</sup> Accordingly, we affirm Guerrero's convictions for

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<sup>15</sup>Gordon v. District Court, 112 Nev. 216, 230, 913 P.2d 240, 249 (1996).

<sup>16</sup>Myatt, 101 Nev. at 763, 710 P.2d at 722; NRS 200.310(1).

<sup>17</sup>Myatt, 101 Nev. at 763, 710 P.2d at 722; NRS 205.060.

<sup>18</sup>Myatt, 101 Nev. at 763, 710 P.2d at 722; NRS 200.010.

<sup>19</sup>Salazar, 119 Nev. at 227, 70 P.3d at 751; NRS 200.010; NRS 200.310; NRS 205.060.

<sup>20</sup>Gordon, 112 Nev. at 230, 913 P.2d at 249.

conspiracy to kidnap Brenda, conspiracy to kidnap Sonia, conspiracy to murder Sonia, and conspiracy to commit burglary.

Kidnapping/attempted murder

Guerrero further argues that his conviction for first degree kidnapping of Sonia is redundant with his conviction for attempted murder of Sonia. This argument rests on the assertion that the “movement” of Sonia to an upstairs bedroom was incidental to the attempted murder. We disagree.

Guerrero cites to Wright v. State in support of his assertion.<sup>21</sup> In Wright, we noted that a kidnapping conviction is redundant where the movement of the victim was wholly incidental to another crime and did not substantially increase the victim’s risk of harm.<sup>22</sup> However, a kidnapping conviction is not redundant where the movement or restraint of the victim increased the victim’s risk of harm or aided in the accomplishment of the additional offense.<sup>23</sup> Movement of a victim aids the commission of an additional offense where the movement makes it less likely that a passerby will hear the victim.<sup>24</sup>

In this case, the movement of Sonia upstairs and into her parents’ bedroom closet increased her risk of harm. When Leon entered the house, Sonia was downstairs between the garage and the kitchen. From that location, Sonia could have escaped through the front door or

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<sup>21</sup>94 Nev. 415, 581 P.2d 442 (1978).

<sup>22</sup>Id. at 417, 581 P.2d at 443-44.

<sup>23</sup>Davis v. State, 110 Nev. 1107, 1114, 881 P.2d 657, 662 (1994).

<sup>24</sup>Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1139-40 (1994).

through a window. However, once Leon forced her upstairs, Sonia's only means of escape was to climb through a window and jump to the ground.<sup>25</sup>

Furthermore, the movement of Sonia made it less likely that a passerby would hear her. The movement of Sonia upstairs also made it possible for Leon to shoot Sonia without doing so in front of Brenda's small children. The movement of Sonia in this case was not incidental to the attempted murder since it significantly increased her risk of harm and aided in the accomplishment of the attempted murder. Thus, the kidnapping and attempted murder convictions are not redundant.

### Joinder

Guerrero argues that the district court committed reversible error by failing to sever his trial from Leon's trial. We disagree.

Under NRS 174.155, two defendants may be tried together if their crimes "could have been joined in a single indictment or information." In this case, Guerrero and Leon were charged together under a single information. At calendar call, the prosecutor told the district court that the State intended to try Guerrero and Leon together. Defense counsel made no objection and the case proceeded to jury trial.

"[J]oinder of defendants is within the discretion of the trial court and its decision will not be reversed absent an abuse of discretion."<sup>26</sup> "[A] defendant is entitled to a separate trial if he presents a sufficient showing of facts demonstrating substantial prejudice would result in a

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<sup>25</sup>Sonia eventually jumped out a window and crawled to a neighbor's house for help.

<sup>26</sup>Lisle v. State, 113 Nev. 679, 688, 941 P.2d 459, 466 (1997).

joint trial.”<sup>27</sup> However, the district court must also consider the potential prejudice to the State “resulting from two time-consuming, expensive and duplicious trials.”<sup>28</sup> Proof of substantial prejudice to the defendant requires more than a greater likelihood of acquittal if he were tried alone.<sup>29</sup> The fact that the co-defendants raise antagonistic defenses is insufficient to justify severance unless “a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence.”<sup>30</sup>

Guerrero and Leon were charged together as co-conspirators. Thus, under NRS 174.155, it was proper to try them together. Nevertheless, Guerrero argues that he was entitled to a separate trial because he and Leon presented antagonistic defenses. Specifically, Guerrero argued that he did not know about Leon’s plan to kill Sonia; whereas, Leon argued that he attempted to kill Sonia on Guerrero’s orders and that he acted under duress. Guerrero neither argues nor presents evidence that the joinder prevented him from receiving a fair trial or prevented the jury from making a reliable judgment of his guilt. Accordingly, Guerrero has failed to prove that the district court abused its discretion.

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<sup>27</sup>Id. at 689, 941 P.2d at 466.

<sup>28</sup>Id. (quoting United States v. Andreadis, 238 F. Supp. 800, 802 (E.D.N.Y. 1965)).

<sup>29</sup>Id. at 689-90, 941 P.2d at 466.

<sup>30</sup>Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Furthermore, Guerrero concedes that he never moved for a separate trial. “A defendant, jointly indicted with another, who intends to demand a separate trial, must make his motion before the formation of the jury is commenced.”<sup>31</sup> “[S]eparate trials are not to be ordered, unless good cause therefor is shown . . . and this implies that the party desiring a separate trial must apply for it and support his application by a sufficient showing of facts.”<sup>32</sup> Not only has Guerrero failed to show that the district court abused its discretion by failing to sever the trials, he has failed to show that he ever requested severance. Accordingly, the district court properly tried Guerrero and Leon together.

#### Deadly weapon enhancement

The district court sentenced Guerrero to consecutive terms of 24-60 months imprisonment for “conspiracy to commit robbery with use of a deadly weapon.” Guerrero did not raise this issue on appeal. However, we may consider plain error sua sponte.<sup>33</sup>

We recently held that a district court may not use the deadly weapon enhancement to increase the sentence of a defendant found guilty of a conspiracy.<sup>34</sup> That conclusion is based on the fact that Nevada law does not require proof of an overt act in order to sustain a conspiracy conviction.<sup>35</sup> Here, the district court used the deadly weapon

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<sup>31</sup>State v. Johnny, 29 Nev. 203, 217, 87 P. 3, 7 (1906).

<sup>32</sup>State v. Lewis, 50 Nev. 212, 221, 255 P. 1002, 1005 (1927) (quoting State of Nevada v. McLane, 15 Nev. 345, 359 (1880)).

<sup>33</sup>Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002).

<sup>34</sup>Moore v. State, 117 Nev. 659, 663, 27 P.3d 447, 450 (2001).


<sup>35</sup>Id. at 662, 27 P.3d at 450.


enhancement and sentenced Guerrero to consecutive terms of 24-60 months imprisonment for the crime of conspiracy to commit robbery. The sentence imposed by the district court is plainly erroneous. Thus, we reverse Guerrero's sentence for conspiracy to commit robbery.

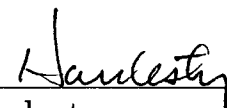
CONCLUSION

We conclude that there was sufficient evidence presented at trial for a reasonable jury to convict Guerrero of all crimes charged. None of Guerrero's convictions are redundant, and the district court's decision to try Guerrero and Leon together did not constitute an abuse of discretion. Nevertheless, the district court's enhancement of Guerrero's sentence for conspiracy to commit robbery constituted plain error. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS ORDER.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Lee A. Gates, District Judge  
Amesbury & Schutt  
Sandra L. Stewart  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk