

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTWIONNE BROOKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44424

FILED

JUL 06 2005

ORDER OF AFFIRMANCE

JANEITE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery, battery with use of a deadly weapon, and burglary. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Antwionne Brooks to serve three concurrent prison terms of 36 to 120 months.

The criminal charges arose in this case when Brooks walked into a food market, placed a bottle of malt liquor into his pocket, and left the store. When the retail clerk confronted Brooks, Brooks hit him with the bottle of malt liquor with such force that the glass broke, cutting the clerk's head. Brooks then pushed the clerk and attempted to flee the scene. The clerk, however, called police from his cellular phone and proceeded to follow Brooks until the police responded and arrested Brooks.

Citing to Salazar v. State,¹ Brooks first contends that his convictions for robbery and battery are redundant because he sustained

¹119 Nev. 224, 227-28, 70 P.3d 749, 751-52 (2003).

two convictions for a single criminal act, namely striking the retail clerk in the head with a bottle of malt liquor that he had taken from the store. We conclude that Brooks' contention lacks merit.

While the State may bring multiple criminal charges based upon a single incident, this court will reverse "redundant convictions that do not comport with legislative intent."² In considering whether convictions are redundant, this court examines "whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions."³ In other words, two convictions are redundant if the charges involve a single act so that "the material or significant part of each charge is the same."⁴

In this case, the gravamen of the charged battery offense is the act of striking the victim in the head with the bottle of malt liquor. In contrast, the gravamen of the charged robbery offense is the actual taking of the property, in this case the malt liquor bottle, by use of force or fear. The battery offense is complete when the victim is struck, regardless of whether property was taken, whereas the robbery offense is not complete until property is taken by force or fear. We therefore conclude that the

²State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

³Salazar, 119 Nev. at 227, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

⁴Id. at 227-28, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

material part of the battery and robbery charges does not involve a single act and the convictions are not redundant.

Brooks next contends that the prosecutor engaged in misconduct during rebuttal closing argument by commenting on Brooks' failure to testify. During closing argument, defense counsel stated:

What I can tell you is that this is a case about [the victim] exaggerating, embellishing. Of course everything is corroborated with his testimony because that's the only testimony we have.

During rebuttal closing argument, the prosecutor stated:

And let's get something clear at the beginning. There's one comment I think I agree with in [defense counsel's] presentation. At the very beginning defense counsel said [the victim's] here, he's giving testimony. And she said something: Keep this in mind. This, referring to [the victim's] testimony is the only testimony we have. Keep that in mind.

The testimony in this case comes from the witnesses that testify. And what did the witnesses tell you, ladies and gentleman? That this man walked into that store, went right to the back, and took that thing, hid it in his pocket, and walked out.

The prosecutor later commented:

Initial aggressor. Did you hear that word thrown out there? Remember the one statement I agree with, [the victim's testimony], the testimony that we have in this case, the evidence in this case. What does [the victim] say? He tells the defendant, give me my property back.

As a preliminary matter, we note that Brooks did not object to the instances of alleged prosecutorial misconduct. This court has recognized that the failure to object to prosecutorial misconduct at trial precludes appellate review unless the asserted error is plain or constitutional in magnitude.⁵ We conclude that no such error occurred in this case.

An express reference to a defendant's failure to testify is a violation of his constitutional right against self-incrimination.⁶ Even an indirect reference to the defendant's failure to testify is "impermissible if 'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.'"⁷ Here, the prosecutor was merely agreeing with defense counsel that the victim's account of the robbery was the only evidence describing the altercation between the victim and Brooks presented at trial. We therefore conclude that the prosecutor's statement was not one that the jury would "naturally and necessarily" construe as a comment on Brooks' failure to testify at trial. Therefore, we conclude that prosecutor did not engage in misconduct during rebuttal closing argument.


⁵Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).


⁶Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991); see also U.S. Const. amend. V; Nev. Const. art. 1, § 8.

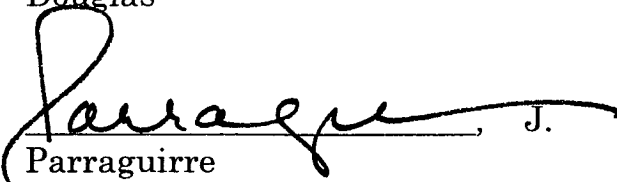
⁷Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989) (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

Having considered Brooks' arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk