IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, CLARK COUNTY,
Appellant,
vs.
DAVID LEE TURNER,
Respondent.

No. 45386

FILED

AUG 2 4 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a sheriff's appeal from an order of the district court granting in part respondent David Lee Turner's pretrial petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On March 4, 2003, Turner was charged by way of a criminal complaint with one count each of battery with use of a deadly weapon, battery with substantial bodily harm, and first-degree kidnapping. The charges stem from Turner's alleged attack of his girlfriend on Valentine's Day, February 14, 2003. Following a preliminary hearing in the justice's court, Turner was bound over for trial in the district court on all three counts. A criminal information was filed in the district court on November 10, 2004.

On January 26, 2005, Turner, with the assistance of stand-by counsel, filed a proper person pretrial petition for a writ of habeas corpus in the district court. In his petition, Turner contended, among other things, "that this is not a conventional kidnapping. . . . It is no more than a domestic violence dispute." The extent of Turner's argument consisted of citing to the following statement made by the prosecutor during closing remarks at the preliminary hearing: "The State would submit that

perhaps it's not your conventional kidnapping, where the kidnapping starts before any violence is inflicted." The district court subsequently appointed counsel to represent Turner, and counsel filed an amended and supplemental pretrial petition for a writ of habeas corpus. The petition filed by counsel on Turner's behalf did not address any issues pertaining to the one count of first-degree kidnapping. The State opposed the petition.

After conducting a brief hearing on May 26, 2005, the district court granted Turner's petition in part and dismissed the one count of first-degree kidnapping. The district court stated, without explanation, "I just don't see kidnapping here." The district court's written order summarily denied in part and granted in part Turner's petition and contained no findings of fact and conclusions of law.[1]

On June 13, 2005, Turner entered an Alford[2] plea to one count of battery with substantial bodily harm; pursuant to negotiations, the State agreed to the dismissal of the one count of battery with use of a deadly weapon. The State now appeals from the portion of the district court's order granting Turner's petition. We conclude that the district court erred by granting in part Turner's petition and dismissing the one count of first-degree kidnapping.

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[1]NRS 34.830(1) provides that "[a]ny order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court."

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

On appeal from an order granting a pretrial petition for a writ of habeas corpus based on lack of probable cause, "[t]he sole function of the supreme court is to determine whether all of the evidence received at the preliminary hearing establishes probable cause to believe that an offense has been committed and that defendant committed it."[3] As a general rule, this court will not overturn an order granting a pretrial petition for a writ of habeas corpus for lack of probable cause absent a showing of substantial error by the district court.[4]

The probable cause determination has two components: (1) that an offense has been committed; and (2) that the accused committed the offense.[5] Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused."[6] "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."[7] "Although the [S]tate's burden at the preliminary examination is slight, it remains incumbent upon the [S]tate to produce some evidence that the

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[3]Lamb v. Holsten, 85 Nev. 566, 568, 459 P.2d 771, 772 (1969).

[4]Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

[5]NRS 171.206.

[6]Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted).

[7]Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

offense charged was committed by the accused."[8] Finally, this court has stated that "[w]hether the movement of the victims is incidental to the associated offense and whether it increased the risk of harm to the victims are questions of fact to be determined by the trier of fact in all but the clearest cases."[9] The issue on appeal in this case is whether the State presented sufficient evidence to establish probable cause to believe that Turner committed the crime of first-degree kidnapping.

Here, the victim testified at the preliminary hearing that after exiting a bar, and while waiting for the valet to bring their car, Turner hit her in the face with a beer bottle, breaking her nose. The victim then quoted Turner as saying, "Get in the car or I will kill you in front of these people." The victim was bleeding and did as she was ordered and got into the car. Before getting into the car, the victim asked the valet for help, but got no response. While Turner was driving to another bar, he continued hitting her. The victim stated:

> [Turner] continued to hit me with his right hand, driving with the left hand, because I had my hands over my face. And he's driving and this hand continued to swing back at me.
>
> I think that's where I had the bloodshot eyes, because I was protecting my nose at that point.

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[8]Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

[9]Turner v. State, 98 Nev. 243, 245, 645 P.2d 971, 972 (1982); see also Davis v. State, 110 Nev. 1107, 1114, 881 P.2d 657, 662 (1994) ("where kidnapping is incidental to another crime, the evidence of kidnapping must include an element of asportation, physical restraint, or restraint which either increases the risk of harm to the victim or has an independent purpose and significance").

When they arrived at the next bar, Turner went inside and got a towel and gave it to the victim waiting in the car; he told her to wipe off the blood before they went in. The victim stated, "I had to go with him into another bar." The two stayed at the bar for approximately 20-30 minutes while Turner had a drink, and after leaving the bar, Turner hit the victim again and she fell to the ground. There was a brief tussle, and the victim eventually managed to escape from Turner and ran back into the bar where the bartender called the police. The victim was hospitalized for approximately seven days.

Based on our review of the record, we conclude that the State presented enough evidence to support a reasonable inference that Turner committed first-degree kidnapping.[10] As noted above, after breaking the victim's nose with a beer bottle, Turner threatened to kill her if she did not get up off the ground and get into their vehicle. By getting into the car with Turner, the risk of harm to the victim increased. In fact, while in the vehicle, on their way to the second bar, Turner continued punching the victim, causing more bodily harm. As a result of the substantial bodily harm suffered by the victim, she was required to stay in the hospital for approximately seven days. Therefore, we conclude that the district court

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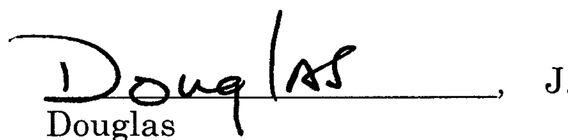
[10]NRS 200.310(1) states that:

> A person who willfully seizes, confines, . . . abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains . . . for the purpose of killing the person or inflicting substantial bodily harm upon him . . . is guilty of kidnapping in the first degree.

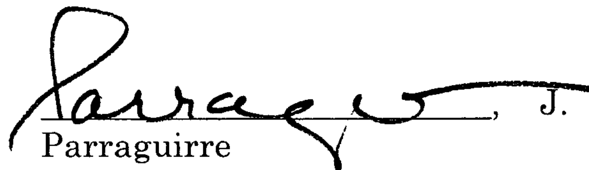
erred by granting in part Turner's pretrial habeas petition and dismissing the charge of first-degree kidnapping. Accordingly, we

ORDER the judgment of the district court REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_______________, J.
Maupin



_______________, J.
Douglas



_______________, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Anthony M. Goldstein
Clark County Clerk