IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALD GARRETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46354

FILED

JUL 19 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of four counts of sexual assault with a deadly weapon and one count of first degree kidnapping with a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

FACTS

This case arises from the sexual assault of the victim, by appellant Jerald Garrett in Garrett's Las Vegas motel room. The victim, who was hitchhiking across the country, met Garrett in jail after Las Vegas police arrested the victim for loitering in a park. After the victim's release from jail, he accepted Garrett's invitation to stay in his room for a few days. The pair spent two nights in Garrett's room drinking and doing drugs. According to the victim, on the third night, Garrett threatened the victim with a serrated kitchen knife, forced him to perform several sexual acts, and made him remain in the hotel room until Garrett left for work the next morning.

The victim immediately reported the incident to the police. As a result, LVMPD Detective Jon Scott was waiting at Garrett's room when he returned home from work. Garrett spoke with Detective Scott for several minutes, and agreed to accompany him to his unmarked patrol car

to give a formal statement. In his statement, Garrett denied having any sexual contact with the victim.

Shortly after Garrett gave this statement, Detective Scott placed him under arrest. In a post-arrest interview at Detective Scott's office, Detective Scott read Garrett his Miranda rights at least three times, but Garrett refused to acknowledge whether or not he understood his rights. Nonetheless, he continued to speak with Detective Scott, indicating that he and the victim had consensual sex.

After initially filing a petition for a writ of habeas corpus, Garrett proceeded to trial in July of 2005. The district court admitted both of his statements to Detective Scott into evidence. A jury subsequently convicted Garrett of four counts of sexual assault with use of a deadly weapon and one count of kidnapping with use of a deadly weapon. On appeal, Garrett asserts multiple assignments of error, which among other claims, allege that the district court erred in denying his pretrial petition for a writ of habeas corpus, refusing to give Garrett's full proposed jury instruction on mistaken consent, denying Garrett's motion to suppress statements from his pre-arrest and post-arrest interviews with Detective Scott, and instructing the jury that a knife is a deadly weapon as a matter of law.

DISCUSSION

Petition for writ of habeas corpus

Garrett first argues that the district court erred in denying his petition for a writ of habeas corpus because the evidence presented at the preliminary hearing was not sufficient to support the charge of kidnapping with use of a deadly weapon. We disagree.

We will not overturn a district court ruling regarding a writ of habeas corpus premised on insufficient evidence absent a showing of substantial error.[1] Here, the district court's decision depended upon whether evidence presented at the preliminary hearing provided probable cause to believe that Garrett committed the offense of kidnapping.[2] Because a finding of probable cause does not require ultimate determination of guilt or innocence of the accused, it may be based on slight or even marginal evidence.[3]

NRS 200.310 provides that a person who willfully "seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away" a person for the purpose of committing a sexual assault is guilty of first-degree kidnapping. However, as established in Stalley v. State, when first-degree kidnapping is charged in connection with another crime, double jeopardy bars a dual conviction for kidnapping and the underlying offense if movement or restraint of the victim is merely incidental to the underlying offense.[4] Recently, in Mendoza v. State, this court clarified Stalley, and determined that a defendant may be convicted of kidnapping in addition to an underlying offense only when (1) "the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in [the] associated offense," (2)

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[1]Sheriff v. Milton, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993); see Sheriff v. LaMotte, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984).

[2]Overton v. State, 78 Nev. 198, 201, 370 P.2d 677, 679 (1962).

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

[4]91 Nev. 671, 675, 541 P.2d 658, 661 (1975).

"the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged," or (3) "the movement, seizure or restraint stands alone with independent significance from the underlying charge."[5]

Here, we agree with Garrett that use of a knife to threaten and restrain the victim during the assault itself likely did not substantially exceed the amount of restraint necessary to commit the underlying assault. However, the victim's preliminary hearing testimony also indicated that after the assault, he "fell asleep at knife point," that Garrett would not allow him to leave, and even "escorted" him to the bathroom. We determine that this testimony by the victim was sufficient to support a finding that Garrett's extended confinement of the victim substantially exceeded the restraint necessary to commit the underlying assault. Therefore, we conclude that probable cause existed to support the charge of kidnapping, indicating that the district court did not err in denying Garrett's petition for writ of habeas corpus.

Proposed jury instruction on mistaken consent

Garrett next argues that the district court erred in failing to give his entire proposed jury instruction on the issue of reasonable mistaken belief of consent. We agree that this was error, but conclude that it was harmless.

In Honeycutt v. State, we recognized that reasonable mistaken belief of consent is a defense to a charge of sexual assault.[6] As we recently

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[5]122 Nev. 267, 273-75, 130 P.3d 176, 180-81 (2006).

[6]118 Nev. 660, 670, 56 P.3d 362, 368 (2002).

reiterated in Carter v. State, a defendant is entitled to an instruction on the issue of mistaken consent whenever the instruction is supported by some evidence.[7] If requested, this instruction must also include the significance of any findings made on the issue of consent, even if the effect of consent is substantially covered in other instructions.[8] Thus, in Carter, this court determined that the district court committed reversible error when it failed to instruct the jury that "reasonable doubt as to whether the defendant acted under a reasonable but mistaken belief of consent likewise gave rise to a duty to acquit."[9]

Here, as the State appears to concede, the instruction given by the district court on the issue of mistaken consent did not contain Garrett's proposed language instructing the jury regarding the significance of any findings on the issue of consent. Carter clearly establishes that this was error. Nonetheless, under harmless error analysis, reversal is not required if the State can demonstrate, beyond a reasonable doubt, that the error did not contribute to the jury's verdict.[10] Factors a court may consider in determining whether or not an error is harmless include "whether the [question] of innocence or guilt is close, the

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[7]121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

[8]Id. at 766, 121 P.3d at 597.

[9]Id.

[10]See Carter, 121 Nev. at 767-68 n.23, 121 P.3d at 598 n.23 (citing Chapman v. California, 386 U.S. 18, 21-24 (1967)).

quantity and character of the error, and the gravity of the crime charged."[11]

In this case, we conclude that the quantity and quality of the evidence presented against Garrett indicates that any error was harmless. The testimony of the victim clearly established that he did not consent or appear to consent to any sexual activity, and that Garrett forcibly assaulted him. The victim's testimony was corroborated by various law enforcement officers and health care workers, all of whom testified that Berry appeared to be visibly upset after his encounter with Garrett. Sexual assault nurse examiner Linda Ebbert further testified that the tightness of the victim's sphincter muscle and injuries around his anal area all indicated that he did not regularly engage in anal intercourse, and were consistent with assault. Therefore, based on the overwhelming evidence presented against Garrett, we conclude that any error in the mistaken consent jury instruction was harmless beyond a reasonable doubt.

Suppression of pre- and post-arrest statements

As established in Miranda v. Arizona,[12] statements made during a custodial interrogation are inadmissible at trial, unless the police first provide a Miranda warning, and the defendant makes a knowing waiver of his Fifth Amendment rights.[13] Garrett alleges that his

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[11]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[12]384 U.S. 436 (1966).

[13]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (citing Miranda, 384 U.S. at 479).

statements during both his pre- and post-arrest interviews with Detective Scott were inadmissible under Miranda. We disagree.

Pre-arrest statement

Miranda only applies to a suspect's statements made during custodial interrogation. Here, the district court admitted Garrett's pre-arrest statement on the basis that his first pre-arrest interview with Detective Scott was not custodial. This court reviews a district court's factual findings regarding the circumstances of an interrogation for clear error, and the "ultimate determination of whether a person is in custody de novo."[14] For the purposes of Miranda, "custody" means a "'formal arrest or restraint on freedom of movement.'"[15] If no formal arrest occurs, the relevant inquiry is whether a reasonable person in that situation would feel free to terminate the interrogation and leave.[16] Factors relevant to determining whether an interrogation is custodial may include: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of the questioning."[17]

In this case, we discern no error in the district court's admission of Garrett's pre-arrest statements to Detective Scott. In this, we accept the district court's stated findings that Garrett volunteered to go

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[14]Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

[15]Id. at 361, 131 P.3d at 4 (quoting Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996)).

[16]Id.

[17]Alward, 112 Nev. at 155, 912 P.2d at 252.

to Detective Scott's car, and that Garrett was told he didn't have to stay and he didn't have to talk to the officer. His interview with Detective Scott lasted only twenty minutes and was conducted by a plainclothes detective in an unmarked police car. Garrett was not handcuffed or otherwise restrained. Thus, in these circumstances, we conclude that a reasonable person would have felt free to leave, indicating that the interview was non-custodial.

Post-arrest interview

To admit statements made during a post-arrest, "custodial interrogation, the defendant must knowingly and voluntarily waive [his] Miranda rights."[18] This court reviews factual findings regarding whether a waiver was knowing and intelligent for clear error, and the ultimate question, whether a waiver is voluntary, is reviewed de novo.[19] "'A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement.'"[20] Relevant factors include: the age of the accused; his level of education and intelligence; whether he was advised of his constitutional rights; the length of any detention; the repeated or prolonged nature of the questioning; and whether physical punishment was used, such as the deprivation of food or sleep.[21]

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[18]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

[19]Mendoza, 122 Nev. at 276, 130 P.3d at 181-82.

[20]Id. (quoting U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998)).

[21]Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

In addition, an express written or verbal waiver of the Miranda rights is not necessary for the admission of a defendant's confession; waiver may be inferred from the words and actions of the person interrogated.[22] Thus, while an express waiver of rights is preferable, this court concluded in Mendoza that a statement was admissible when the police advised a defendant of his Miranda rights, and the defendant never expressly accepted or rejected his rights, but continued to speak freely to the authorities.[23]

In this case, Detective Scott read Garrett his Miranda rights on three separate occasions. When Garrett claimed that he did not understand these rights, Detective Scott responded multiple times, "You don't have to talk to me if you don't want to," and "Do you understand you don't . . . you don't have to give me a statement." Nonetheless, Garrett continued to talk to Detective Scott. There is no proof that Garrett is of below average intelligence or that intoxication rendered him incapable of understanding his rights. In fact, the district court's findings suggest that Garrett was lucid during the interview, exaggerating any symptoms of intoxication, and that any protests by Garrett that he did not understand his rights were merely attempts to irritate or annoy Detective Scott. Therefore, by continuing to willingly speak to Detective Scott after being informed of his Miranda rights, we conclude that Garrett validly and

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[22]Mendoza, 122 Nev. at 276, 130 P.3d at 182.

[23]122 Nev. at 276-77, 130 P.3d at 182; see also Allen v. State, 91 Nev. 568, 571, 540 P.2d 101, 103-04 (1975).

voluntarily waived these rights, indicating that the district court did not err in admitting statements from Garrett's post-arrest interview.

Jury instruction that a knife is a deadly weapon

Garrett next asserts that the district court erred in instructing the jury that a knife is a deadly weapon for the purposes of the deadly weapon enhancement, rather than allowing the jury to make their own determination. We disagree.

"Generally, it is the district court's duty to determine whether the instrument is an inherently dangerous weapon."[24] It is only "'in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon,'" that the issue is appropriately submitted to the jury.[25] Prior to 1995, this court used the "inherently dangerous" test to determine if an instrument was a deadly weapon as a matter of law.[26] Under this test, an instrument is a deadly weapon only if, when used in its ordinarily intended manner, it is likely to cause injury or death.[27] In 1995, the Legislature revised NRS 193.165 to reinstate the more lenient "functional" test previously rejected by this court, providing that an instrument is also a deadly weapon if "under the circumstances in

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[24]Buff v. State, 114 Nev. 1237, 1243, 970 P.2d 564, 568 (1998) (citing Zgombic v. State, 106 Nev. 571, 577, 798 P.2d 548, 551-52 (1990)).

[25]Id. (quoting Zgombic, 106 Nev. at 577, 798 P.2d at 552).

[26]See Zgombic, 106 Nev. at 576-77, 798 P.2d at 551.

[27]Id.

which it is used, attempted to be used or threatened to be used, [it] is readily capable of causing substantial bodily harm or death."[28]

Even applying the more restrictive "inherently dangerous" test, this court approved an instruction that "'a butcher's knife that you use to cut meat [with a] blade length of five to seven inches,'" was a deadly weapon as a matter of law.[29] Later on, this court found that "a kitchen knife with a seven-and-a-half-inch, serrated blade" was a deadly weapon under both the "inherently dangerous" and "functional" tests.[30] Here, the victim described the knife used by Garrett as a "serrated knife with a rounded tip for prepping, like, vegetables." A LVMPD detective further described the knife found in Garrett's apartment as a "steak knife." Based on this court's previous applications of the "functional" test to similar kitchen knives, we discern no error in the district court's jury instruction that a knife is a deadly weapon as a matter of law.[31]

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[28]NRS 193.165(5)(b).

[29]Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998) (alteration in original).

[30]Hernandez v. State, 118 Nev. 513, 528, 50 P.3d 1100, 1110-11 (2002).

[31]We note that Garrett's reliance on Knight v. State to support his contention that a steak knife is not a deadly weapon as a matter of law is misguided. 116 Nev. 140, 993 P.2d 67 (2000). In Knight, this court did indeed state that "determination of whether a common steak knife is a dangerous or deadly weapon is a question of fact for the jury." Id. at 147, 993 P.2d at 72. However, Knight did not involve interpretation of the term "deadly weapon" under NRS 193.165. Rather, it involved interpretation of a concealed weapon statute prohibiting concealment of a "Dirk, dagger, or machete . . . or other dangerous or deadly weapon." Id. at 145, 993 P.2d at 71. In reaching its holding, this court in Knight stated

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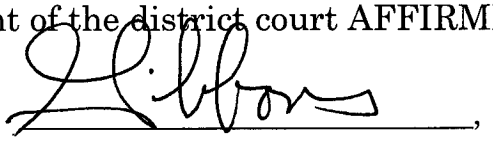
CONCLUSION

In addition to the claims discussed above, we have also considered Garrett's remaining arguments, including those related to the district court's denial of Garrett's request for a jury instruction on voluntary intoxication, and denial of Garrett's proposed CALJIC instruction on specific intent. We conclude that none of these alleged errors deprived Garrett of a fair trial. Therefore, we

ORDER the judgment of the district court AFFIRMED.



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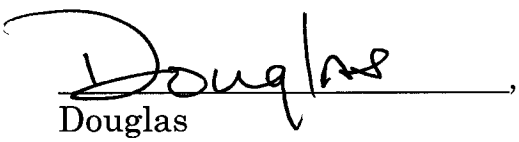
Gibbons



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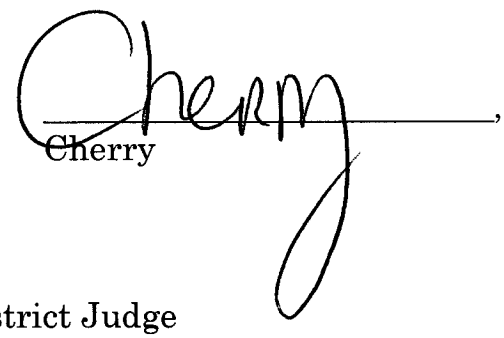

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cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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that it doubted the Legislature intended to bar concealment of "common household items." Id. at 146, 993 P.2d at 72. Conversely, under the "functional" test of NRS 193.165(5)(b), a household item, such as a kitchen knife, can clearly be a deadly weapon.