IN THE SUPREME COURT OF THE STATE OF NEVADA

RICARDO BELTRAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46617

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Ricardo Beltran was convicted, pursuant to a jury verdict, of two counts of first-degree kidnapping and six counts of sexual assault with the use of a deadly weapon.[1] He was sentenced to multiple concurrent and consecutive terms of life in prison with the possibility of parole.

Beltran's convictions stem from three separate instances in which he sexually assaulted three young women. On appeal, Beltran first claims that the district court erred in refusing to sever the counts relating to each of the three events. He argues that although joinder is proper in circumstances where crimes are connected by a common scheme or plan, the only commonality present here was that the three victims were prostitutes. This commonality, Beltran argues, was insufficient to permit

[1]Beltran was acquitted of two counts of robbery with the use of a deadly weapon, one count of open or gross lewdness, and one count of first-degree kidnapping.

06-22837

joinder of all counts arising from these three separate events. We disagree.

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
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> 1. Based on the same act or transaction; or
>
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The district court enjoys discretion in deciding severance matters and will not be reversed absent an abuse of discretion.[2] "Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict."[3] Even when joinder is proper under NRS 173.115, a district court should sever charges where joinder would unfairly prejudice the defendant.[4]

Here, joinder was proper under NRS 173.115(2) because the acts charged constituted parts of a common scheme or plan on Beltran's part to sexually assault young women. The similarities between the crimes against AL, AH, and DV include: all three victims were of similar

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[2]See Tabish v. State, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003); Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002), overruled on other grounds by Carter v. State, 121 Nev. ___, 121 P.3d 592 (2005).

[3]Weber v. State, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005).

[4]Id. at 571, 119 P.3d at 119.

age (between 17 and 20 years old); all three were assaulted in the span of 21 days and in the same vicinity in Las Vegas; Beltran transported all three victims to dark or quiet parking lots to facilitate the sexual assaults; all the assaults were committed in the early morning hours; all three victims were sexually assaulted at knifepoint; Beltran sexually assaulted all three victims in his champagne-colored Chrysler Sebring; all three victims were prostitutes; and Beltran stole items from all three victims such as money, perfume, and cell phones. Further AL, AH, and DV each testified that as she sat in the passenger seat of Beltran's car, he put a knife to her neck, leaned over and reclined her seat, climbed on top of her, and proceeded with the sexual assault.[5]

Moreover, Beltran has not shown that he was unfairly prejudiced by the joinder of charges. He contends that joining the offenses related to AH in the same trial as the other charges prejudiced him because evidence of the AH offenses was weak. Beltran stresses two facts. First, during cross-examination, AH testified that a few weeks after the assault, while in a night club, she identified a man to her boyfriend as being the person who assaulted her. The man was not Beltran. Second, Beltran points to the sexual assault nurse's testimony that none of the victims exhibited any physical trauma.

Beltran fails to fully develop his argument, but he appears to suggest that had the AH offenses been separately tried, her misidentification of him and the sexual assault nurse's finding of no physical trauma would have resulted in an acquittal. However, AH

[5]Beltran's defense at trial was that the sexual contact with all of the victims was consensual and that afterward he refused to pay the women.

unequivocally identified Beltran in court as the man who sexually assaulted her. She also testified that she sprayed mace in Beltran's face in an attempt to fend him off. A can of mace was recovered from Beltran's car. Further, a business card recovered from AH's purse contained a bloodstain from which a partial DNA profile consistent with Beltran's DNA was obtained. Moreover, the sexual assault nurse explained that it was not unusual to find an absence of physical trauma in sexual assault cases. Considering all the evidence presented, we conclude that Beltran has not shown any prejudice by the joinder of the AH offenses with the others.

Respecting the AL offenses, Beltran argues that although he was acquitted of kidnapping her, he was unfairly prejudiced "when he was subjected to AH's misidentification and the DV incident," which he fails to identify or explain. Beltran contends that "[i]t is likely that, since the jury believed that AL was not kidnapped, it may have concluded that [he] did not sexually assault her." Beltran's argument is unclear, but he appears to suggest that had the AL offenses been tried separately, without the alleged undue influence of AH's and DV's testimony, the jury would have acquitted him of sexually assaulting AL in addition to acquitting him of kidnapping her. We disagree.

AL testified that she voluntarily entered Beltran's car and agreed to have sex with him for payment. Only after Beltran parked the car did he display a knife to facilitate his sexual assault of her. In contrast, AH testified that Beltran produced a knife to coerce her into his car, and DV testified that she got into Beltran's car because he told her that he had a gun. The jury's decision to acquit Beltran of kidnapping AL and convict him of kidnapping the other two victims reflects a factual

distinction as revealed by the evidence. We conclude that the joinder of the AL offenses with the AH and DV offenses did not prejudice Beltran.[6]

Based on the evidence presented, we conclude that Beltran fails to demonstrate that the district court abused its discretion in refusing to sever the counts related to each of the victims.

Beltran next argues that Las Vegas Metropolitan Police Department Officer Ignacio Pulido improperly commented on his constitutional right to remain silent. When Beltran was apprehended, Officer Pulido read Beltran his Miranda[7] rights, which Beltran acknowledged that he understood. At trial, the prosecution asked Officer Pulido whether Beltran admitted to possessing a cell phone and having had a conversation on it. Officer Pulido responded, "The initial questions at the time were, besides identity, it was ownership of the vehicle and questions about a cell phone. . . . He mentioned a cell phone, and immediately when I asked him where it was, then he--at that time he pretty much stopped talking." Defense counsel objected, and a hearing was held outside the jury's presence during which defense counsel moved for a mistrial.

The district court denied the motion for mistrial, concluding that Beltran suffered no prejudice. The district court instructed the prosecution to refrain from commenting in closing argument that Beltran stopped talking or otherwise invoked his Fifth Amendment rights. The

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[6]See Tabish, 119 Nev. at 305, 72 P.3d at 592.

[7]Miranda v. Arizona, 384 U.S. 436 (1966).

next day the prosecution resumed its direct examination of Officer Pulido as follows:

> PROSECUTOR: Where we left off yesterday fair to say that you indicated that you had asked the defendant about the cell phone, is that correct?
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> OFFICER PULIDO: That is correct.
>
> PROSECUTOR: Okay. And at that point is it fair to say that he kind of mumbled something about a Wal-Mart?
>
> OFFICER PULIDO: That is correct, that's what he said.
>
> PROSECUTOR: Or, going to Wal-Mart. At that point did you decide to leave any further questioning, if any, to a detective?
>
> OFFICER PULIDO: That's what I decided to do.

Defense counsel did not object to this exchange. Beltran now argues that this colloquy emphasized the earlier violation of his Fifth Amendment right to remain silent.

"It is constitutionally impermissible to admit evidence of a defendant's invocation of his fifth amendment right to remain silent."[8] Any error in this regard is subject to a harmless error analysis.[9] "Although a comment on a failure to respond can be reversible error, the comment must be more than a mere passing reference and an accused must be prejudiced by the remark to mandate reversal."[10]

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[8]Aesoph v. State, 102 Nev. 316, 321, 721 P.2d 379, 382 (1986); see Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996).

[9]Tillema, 112 Nev. at 271, 914 P.2d at 608.

[10]Deutscher v. State, 95 Nev. 669, 682, 601 P.2d 407, 415 (1979).

Beltran relies on Buff v. State[11] to support his argument. In Buff, the prosecution asked a police officer why he was unable to interview a defendant, to which the police officer responded that the defendant had invoked his constitutional right to remain silent.[12] We held that the police officer's testimony was not an "inadvertent slip . . . but rather, a direct solicitation of this information by the prosecutor from a law enforcement officer."[13]

However, unlike in Buff, the comments at issue here were not a direct solicitation by the prosecution of Beltran's invocation, if any, of his right to remain silent. Although Officer Pulido's first comment may be construed as a comment on Beltran's right to remain silent, it was an unsought supplemental response to the prosecution's inquiry about Beltran's admissions concerning a cell phone.[14] Respecting the second challenged exchange, we conclude that the prosecution did not attempt to elicit evidence that Beltran invoked his right to remain silent, and no such evidence resulted.

To the extent that any of Officer Pulido's initial testimony reflected a comment on Beltran's right to remain silent, we conclude that he fails to demonstrate prejudice. The prosecution did not mention Officer Pulido's testimony in its closing argument, no other evidence relating to

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[11]114 Nev. 1237, 970 P.2d 564 (1998).

[12]Id. at 1248, 970 P.2d at 571.

[13]Id.

[14]See Deutscher, 95 Nev. at 682, 601 P.2d at 415; Tillema, 112 Nev. at 271, 914 P.2d at 608.

Beltran's silence was introduced, and the evidence against Beltran was strong.

Finally, Beltran contends that several offenses of which he was convicted were multiplicitous. Charging a single offense in several counts violates the rule against multiplicity.[15] "The general test for multiplicity is that offenses are separate if each requires proof of an additional fact that the other does not."[16] "[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act."[17]

Here, Beltran was charged with three counts of sexually assaulting AH. She testified that during the assault, Beltran inserted his penis into her vagina. He then removed his penis and penetrated her anally. Afterward, he again penetrated AH vaginally with his penis. Beltran ejaculated, and the sexual assault ended.

Beltran was also charged with two counts of sexually assaulting DV. She testified that during the assault, Beltran penetrated her vaginally with his penis. After a minute or two, he removed his penis and told DV that he wanted to penetrate her anally and that he would kill her if she did not comply. Beltran then penetrated her anally with his penis. After ejaculating, Beltran removed his penis, and the sexual

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[15]See Bedard v. State, 118 Nev. 410, 413, 48 P.3d 46, 47-48 (2002).

[16]Gordon v. District Court, 112 Nev. 216, 229, 913 P.2d 240, 249 (1996).

[17]Skiba v. State, 114 Nev. 612, 616 n.4, 959 P.2d 959, 961 n.4 (1998).

assault ceased. DV testified that the sexual assault lasted less than five minutes.

Beltran argues that for each victim every sexual assault count alleged occurred at the same time during the same course of conduct and therefore the multiple sexual assault convictions for each victim are multiplicitous. We disagree. "[S]eparate and distinct acts of sexual assault may be charged as separate counts and result in separate convictions 'even though the acts were the result of a single encounter and all occurred within a relatively short time.'"[18] We conclude that the evidence shows that each sexual assault charged respecting AH and DV was a distinct event for which Beltran could be separately punished.[19]

Beltran further argues that the lewdness charge was redundant. However, he was acquitted of this charge. Therefore, we conclude that he fails to demonstrate prejudice in this regard.

We note that the judgment of conviction erroneously states that Beltran was convicted pursuant to a guilty plea. Therefore, we remand this matter for the limited purpose of correcting the judgment of conviction to reflect that Beltran was convicted pursuant to a jury verdict.

Having reviewed Beltran's claims and concluded that they lack merit, we

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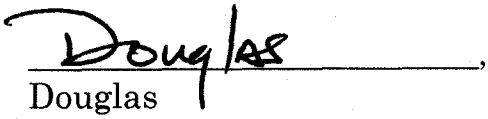
[18]Gaxiola v. State, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005) (quoting Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)); see Peck v. State, 116 Nev. 840, 848-49, 7 P.3d 470, 475 (2000).

[19]See Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) (holding that "separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon").

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for correction of the judgment of conviction.[20]

_____, J.
Gibbons

_____, J.
Maupin



_____, J.
Douglas

cc: Eighth Judicial District Court Department 9
Hon. Jennifer P. Togliatti, District Judge
Gregory D. Knapp
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[20]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.