IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN JACOBO GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47059

FILED

MAY 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court granting in part and denying in part appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Juan Jacobo Garcia was convicted of two counts of burglary while in possession of a firearm, three counts of robbery with the use of a deadly weapon, four counts of first-degree kidnapping with the use of a deadly weapon, two counts of conspiracy to commit burglary, and two counts of conspiracy to commit robbery. He was sentenced to serve combined concurrent and consecutive terms totaling a minimum of 13 years, 4 months and a maximum of life in prison. No direct appeal was taken.

Garcia's successful postconviction Lozada[1] appeal-deprivation claim entitled him to raise direct appeal claims in the instant petition. After a hearing, the district court dismissed one charge of conspiracy to commit robbery but denied Garcia's other claims. This appeal followed.

[1]Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

First, Garcia claims that his convictions for first-degree kidnapping and robbery should have merged as to victims Rosa Nunez, Gregorio Morales, and Jose Luna.[2] We agree and conclude that those three kidnapping convictions must be vacated.

In Mendoza v. State, we set forth three situations in which dual convictions for first- or second-degree kidnapping and an associated offense would be appropriate:

> [W]here the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, i.e., robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper. Also . . . dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge.[3]

Here, Morales and Luna were directed from the auto shop where they were working into a break room, where they were bound with duct tape and their wallets were taken. The robbers also brought in a third victim and began binding him with duct tape, but they ran out of tape. The robbers then left the three men in the break room, took property from the shop, and left. The third victim freed himself within minutes and then

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[2]He also argues the charge for kidnapping Rosa Nunez's son Junior should merge, but it appears he was either not charged with or not convicted of robbery of Junior, so merger would not be possible.

[3]122 Nev. ___, ___, 130 P.3d 176, 180-81 (2006).

freed Morales and Luna. The movement and restraint of Morales and Luna did not "substantially increase the risk of harm to [them] over and above that necessarily present in" the robberies. Morales sustained a blow to the head from one of the robbers, but the blow was delivered before he was moved or restrained when he attempted to take one robber's gun, not as a result of the movement and restraint. Nor did the movement and restraint "substantially exceed that required to complete" the robbery or "stand alone with independent significance from" the robbery. Rather, Morales and Luna were moved and restrained to effectuate the robberies by enabling the robbers to take their wallets and by keeping them out of the way while other property was taken from the shop. Further, though Morales and Luna were bound, the robbers had already taken their property, did not return to them, and had left the third victim able to free himself when they ran out of tape while binding him.

In a separate incident, Rosa Nunez was ordered to walk at gunpoint from her cash register to a back room, which the robbers did not enter or lock. Instead, they sent Nunez and others inside and instructed them to stay there. Neither she nor any of the other victims was injured or bound in any way. The robbers took Nunez back to the cash register at gunpoint so she could open it, and after she did they returned her to the back room again and left her inside with none of the robbers present. The movement and restraint of Nunez were incidental to the robbery itself. They did not "substantially increase the risk of harm to [her] over and above that necessarily present in" the robbery, "substantially exceed that required to complete" the robbery, or "stand alone with independent significance from" the robbery.

Accordingly, Garcia's convictions for first-degree kidnapping of Morales, Luna, and Nunez must be vacated.

Second, Garcia argues that there was insufficient evidence supporting his conviction of conspiracy to commit robbery at the Silver Dollar Store. We agree and conclude that that conviction must also be vacated. "In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence."[4] Evidence is sufficient to sustain a conviction if, viewed 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.'"[5]

> [C]onspiracy is "an agreement between two or more persons for an unlawful purpose." Conspiracy is seldom demonstrated by direct proof and is usually established by inference from the parties' conduct. Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction. However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of,

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[4]Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (citing Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980)).

[5]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

> acquiescence in, or approval of that purpose does not make one a party to conspiracy.[6]

Garcia and his brother Ramon were tried together for a series of robberies, including at the Silver Dollar Store. No evidence placed Garcia at the Silver Dollar Store. Ramon, but not Garcia, was identified as one the robbers there. Ramon's car was seen in the parking lot before the robbery, and property from the Silver Dollar Store was found in the home that Ramon and Garcia shared. Ramon was not convicted of participating or conspiring in any of the robberies Garcia was convicted of, and vice versa. The evidence only established that Ramon and Garcia, who lived together and shared a vehicle, were separately robbing business establishments. While the evidence may have suggested that Garcia knew of, acquiesced in, or approved of Ramon's robbery at the Silver Dollar Store, it was not sufficient to convince a reasonable juror beyond a reasonable doubt that he agreed to cooperate in achieving that robbery. Thus, this conviction must be vacated.

Finally, Garcia argues that his convictions should be reversed because pretrial identifications of him by victims Rosa Nunez, Gregorio Morales, and Wenifreda Hansen were the product of unduly suggestive photo line-ups. We disagree.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so

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[6]Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (citations and internal quotation markets omitted), overruled in part on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[7]

Rosa Nunez testified that the officer who showed her the photo line-up asked her "if she could recognize some of the people that were in there." On cross-examination, she said the officer told her that "if she recognized somebody" she should indicate that. Nothing in the record indicates that the photo line-up was unduly suggestive.

Wenifreda Hansen testified on cross-examination that although she did not get a good look at Garcia during the crime, she picked him out of the photo line-up because she had seen him earlier that day at her shop with several other men and assumed he was part of the robbery. The jury was capable of assessing Hansen's credibility on this point. Further, Morales and Luna also identified Garcia as one of the robbers.

On cross-examination, Morales was asked if the police officer who showed him the line-up told him that the suspects who robbed him had been found. Morales, testifying through an interpreter, said, "No, I was told if I could recognize somebody from the photographs." Nothing in the record indicates that Morales was subjected to an unduly suggestive procedure. Morales's inability to identify Garcia in court at trial is not significant given the time that had elapsed since the robbery and the fact that he identified Garcia from a photo that was admittedly of Garcia shortly after the robbery.

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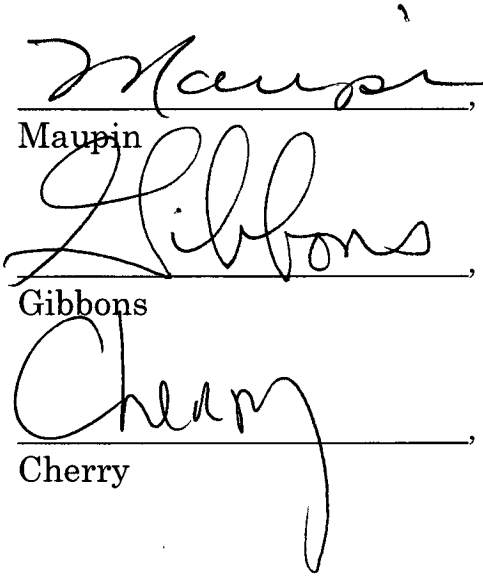
[7]Simmons v. U.S., 390 U.S. 377, 384 (1968); Coats v. State, 98 Nev. 179, 180-181, 643 P.2d 1225, 1226 (1982).

Nothing in the record indicates that the photo line-up procedures in which Nunez, Morales, and Hansen identified Garcia were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The district court did not err in denying this claim.

Having reviewed Garcia's contentions and concluded he is entitled only to the relief described above, we

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



_____, C.J.
Maupin

_____, J.
Gibbons

_____, J.
Cherry

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk