IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. MURPHY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50757

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree kidnapping. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Michael A. Murphy appeals a judgment of conviction of second-degree kidnapping following a jury verdict. Murphy contends that his conviction must be reversed for the following reasons: (1) the State failed to prove beyond a reasonable doubt that Murphy committed second-degree kidnapping, (2) the district court abused its discretion when it allowed Patricia Ernst's in-court identification because the identification was based on impermissibly suggestive circumstances, (3) the district court abused its discretion when it admitted Murphy's confession because the police failed to obtain a valid Miranda waiver, (4) the district court abused its discretion when it admitted Murphy's confession because the police ignored Murphy's invocation of his right to counsel, and (5) the district court abused its discretion when it admitted evidence of an alleged prior bad act by Murphy.[1]

[1]In addition, Murphy uses the appeal process to ask this court to exercise its supervisory responsibility and rule that a blanket order from a chief judge allowing press access to all arraignments is unlawful.

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For the reasons set forth below, we conclude that all of Murphy's arguments fail. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Sufficiency of evidence as to second-degree kidnapping charge

Murphy argues that based solely on the operable facts, the evidence is insufficient to support his conviction for second-degree kidnapping. He asserts that the evidence that he picked up A.B., a minor, took her a short distance, and then released her is insufficient to demonstrate that he had the intent to keep the child imprisoned within or out of the state against her will. Additionally, Murphy contends that there was no positive identification of him as the alleged kidnapper because A.B. testified that she could not remember the man who grabbed her. As to Ernst's identification of Murphy as the man she saw grab A.B., Murphy asserts that Ernst's identification is flawed because she was only able to identify Murphy as the kidnapper at the preliminary hearing, where Murphy was the only African-American man in the room and was seated with the defense attorney. We conclude that Murphy's arguments lack merit.

Our standard of review in determining the sufficiency of the evidence is "'whether, after viewing the evidence 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.'" Rose v.

. . . continued

However, Murphy acknowledges that this issue does not rise to the level of reversible prejudice. We conclude that this is not the proper venue to raise this grievance.

State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). NRS 200.310(2) defines second-degree kidnapping as follows:

> A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against his will, is guilty of kidnapping in the second degree which is a category B felony.

(Emphases added.) Moreover, this court has stated that when a kidnapping charge stands alone, the distance of the removal is unimportant; instead, the fact of the forcible removal is sufficient to demonstrate the kidnapping. Langford v. State, 95 Nev. 631, 638, 600 P.2d 231, 236 (1979).

We conclude that the State presented sufficient evidence to allow the jury to find Murphy guilty of second-degree kidnapping beyond a reasonable doubt. Here, A.B. testified that she was grabbed off the street, lifted off the ground, and pushed inside a car. Ernst testified to seeing a man forcefully grab A.B., lift her up several feet, throw her into the back seat of the car, and slam the car door shut. Ernst corroborated A.B.'s testimony regarding Murphy's seizure and taking of A.B., and both testimonies showed that Murphy carried away A.B., because both A.B. and Ernst testified that Murphy drove away from the scene with the young girl in his back seat. Moreover, Ernst followed Murphy until he stopped the car and pushed A.B. out of the car and into the middle of the street. Ernst helped A.B. by ushering her to safety and staying with her until her father and the police arrived at the scene. Ernst's and A.B.'s testimonies regarding the chronology of events are consistent and specific.

Further, we reject the notion that Murphy lacked the intent to secretly imprison A.B or to detain A.B. against her will. Murphy told police he grabbed A.B. to teach her parents a lesson for letting her out alone. While there is no evidence expressly pointing to his intent to take A.B. out of state, there is evidence that tends to prove his intent to imprison or detain her against her will. First, according to A.B., Murphy tried to punch her in the stomach several times when he grabbed her off the street. A.B. testified, and Ernst and A.B.'s parents confirmed, that she was terrified and shaken by the incident. Ernst testified that before Murphy drove away, he told her that he was the girl's father. We conclude that by punching a young girl, essentially knocking the wind out of her, and taking her without her parents' consent, Murphy took A.B. with the intent to secretly imprison her without the authority of law or to detain her against her will. Additionally, all of the above facts support the conclusion that A.B. was seized against her will because she did not know Murphy, was grabbed forcefully, and punched. Therefore, we conclude that the State presented sufficient evidence for the jury to have found the essential elements of the crime beyond a reasonable doubt.

In-court identification

Murphy argues that his conviction violates the due process guarantees of the United States Constitution because Ernst's identification of him at the pretrial hearing was so impermissibly suggestive and conducive to a substantial likelihood of irreparable misidentification that it denied him due process of law.

The applicable standard for pretrial identification is whether, considering the totality of the circumstances, "'the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.'"

Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967), overruled on other grounds by Griffith v. Kentucky, 479 U.S. 314 (1987)). The reliability of identification is determined by the totality of the circumstances. See id. The United States Supreme Court in Neil v. Biggers stated that:

> the factors to be considered in evaluating the likelihood of misidentification include [(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation.

409 U.S. 188, 199-200 (1972). This court has held that a witness's inability to identify a defendant during a pretrial photographic line-up is a factor to be considered but does not render an in-court identification inadmissible. Browning v. State, 104 Nev. 269, 274, 757 P.2d 351, 354 (1988). For the following reasons, we conclude that the pretrial identification did not rise to the level of "unnecessarily suggestive."

The eyewitness, Ernst, had ample opportunity to observe Murphy during the crime. Ernst watched Murphy grab A.B. and then had a conversation with Murphy—during which she was able to closely observe him—before he drove off. Ernst testified that because she was suspicious, she was paying close attention to Murphy and A.B. Moreover, her testimony regarding Murphy's abduction of A.B. was consistent with A.B.'s version of the events. Ernst's description of the suspect and the vehicle were accurate enough for police to rely on to issue a press release. The press release led to a phone call that, in turn, led to Murphy's arrest. In addition, Ernst testified that she was very confident that she chose the right person and explained that she had initially chosen the wrong person

from a photo line-up because of the perspective of the photograph. She stated that when he rolled his window down halfway, Murphy was looking down at her, so she remembered him having a longer nose. Finally, we note that the length of time between the crime and the confrontation at the pretrial identification was roughly two months, so memory loss due to a long period between the crime and the confrontation was not an issue in this case.

We therefore conclude that even if Ernst was influenced by the fact that Murphy was the only African-American man at the pretrial hearing and seated next to defense counsel, the totality of the circumstances did not make Ernst's pretrial identification "unnecessarily suggestive," such that it would result in a substantial likelihood of irreparable misidentification. Accordingly, Murphy's constitutional rights were not violated as a result of Ernst's in-court identification.

Miranda waiver

Murphy argues that Detective Don Cullison's Miranda warning was insufficient and that he never waived his rights pursuant to Miranda. He contends that the insufficiency of the warning stems from the fact that Detective Cullison never made it clear to Murphy that he had the right to have an attorney present during questioning.

A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent. Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also Floyd v. State, 118 Nev. 156, 171, 42 P.3d 249, 259-60 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 160 (2008). Whether a suspect has validly waived these rights depends on the totality of the facts and circumstances of the case, including the "'background, conduct and experience of the defendant.'" Floyd, 118 Nev. at 171, 42 P.3d at 259 (quoting Falcon v. State, 110 Nev.

530, 534, 874 P.2d 772, 775 (1994)). There is a presumption against the waiver, thus, the State must prove by a preponderance of the evidence that the waiver was knowing and intelligent. Harte v. State, 116 Nev. 1054, 1062, 13 P.3d 420, 426 (2000). A valid waiver need not be oral or written. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 182 (2006). Instead, this court has adopted the view that "a waiver may be inferred from the actions and words of the person interrogated." Id. "The inquiry as to whether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error." Id. at 276, 130 P.3d at 181. "[T]he question of whether a waiver is voluntary is a mixed question of fact and law [which] is . . . reviewed de novo." Id.

We conclude that Murphy's background, conduct, and experience show that his Miranda waiver was valid. First, as observed by Detective Cullison and the district court, Murphy did not appear to be under the influence of any substance during the interview. Rather, he appeared competent and articulate throughout the entire interview. As to his experience, Murphy was 26 years old at the time and had been previously arrested, suffered a conviction, and eventually placed on probation. As the district court correctly noted, Murphy's experience with law enforcement and his answers showed that he had some understanding of the police process and the justice system.

Further, our review of the transcript of Murphy's interview with Detective Cullison shows that Murphy's actions and words during the two-hour interview support the inference that he voluntarily, knowingly, and intelligently waived his Miranda rights. Detective Cullison testified, and the district court later verified after viewing the interview tape, that after he administered the Miranda warning, Murphy shook his head up and down, saying, "uh-huh, yeah," as to his understanding of his rights.

Moreover, Murphy continued to talk to Detective Cullison throughout the entire two hours, conversing freely, even after Detective Cullison reminded Murphy that he did not have to continue talking. For those reasons, we conclude that the district court properly determined that Murphy's Miranda waiver was valid.

Sixth Amendment right to counsel

Murphy argues that a component of the Miranda protections is that a defendant has a Sixth Amendment right to counsel. He contends that when he told Detective Cullison, ". . . lawyer, man. I can't even afford one . . . I need a lawyer," the interview should have stopped. Murphy alleges that the district court abused its discretion when it denied his motion to suppress his statements to Detective Cullison.

At the outset, we note that while Murphy raises this argument pursuant to the Sixth Amendment, the applicable law in this instance is the Fifth Amendment, because the statements at issue were made before adversarial proceedings were initiated and during custodial interrogation. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (explaining that "[t]he Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning"); cf. Estelle v. Smith, 451 U.S. 454, 469-70 (1981) (explaining that the Sixth Amendment right to counsel only attaches once adversarial proceedings have been initiated).

This court reviews a district court's decision whether to admit a confession for substantial evidence because it is "primarily a factual question." Floyd, 118 Nev. at 171-72, 42 P.3d at 260, abrogated on other grounds by Grey v. State, 124 Nev. ____, ____, 178 P.3d 154, 160 (2008).

Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." McNeil v. Wisconsin, 501 U.S. 171, 178 (1991); see Kaczmarek v. State, 120 Nev. 314, 329, 91 P.3d 16, 27 (2004). But, if a suspect makes an ambiguous or equivocal reference regarding an attorney so that a reasonable officer, in light of the circumstances, would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. Davis v. United States, 512 U.S. 452, 459 (1994); Kaczmarek, 120 Nev. at 329, 91 P.3d at 27.

We determine that Murphy's behavior, as well as his words, indicates that he did not unequivocally invoke his Fifth Amendment right to counsel. During his interview with Detective Cullison, Murphy stated that he needed a lawyer but could not afford one, yet he continued to talk to Detective Cullison. Even after Detective Cullison said that he would stop the questioning if Murphy expressly stated that he wanted an attorney, Murphy continued to talk. Under the unambiguous and unequivocal standard, Murphy did not invoke his Fifth Amendment right to counsel. Therefore, we conclude that the district court did not abuse its discretion when it denied Murphy's motion to suppress his confession.

Prior bad act evidence

Murphy argues that the introduction of his alleged misconduct in Missouri with a child of similar age guaranteed that he would not receive a fair trial. He rejects the State's notion that the misconduct was introduced to establish intent and motive. Rather, he contends it was propensity evidence that has been condemned by this court in Braunstein v. State, 118 Nev. 68, 74-75, 40 P.3d 413, 418 (2002). Murphy further contends that the probative value of an alleged rape in Missouri was

limited, since there was no evidence that Murphy attempted any sexual assault upon A.B. and no charges related to sexual assault were ever filed.

In general, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." NRS 48.045(1). In addition,

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045(2).

In determining whether a person's prior bad acts are admissible, the district court must conduct a hearing and determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error. Braunstein, 118 Nev. at 72, 40 P.3d at 416.

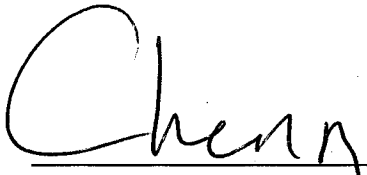
We determine that the district court properly concluded that the alleged Missouri conduct was admissible to prove motive. The district court held a Petrocelli hearing on this issue and considered the evidence presented by both sides before making its determination.

The evidence demonstrates that the district court did not commit error when it admitted the prior bad act evidence. Instead, the

evidence is probative on the issue of motive to rebut Murphy's contention that he grabbed A.B. to teach her parents a lesson not to leave their child unattended. The evidence was probative because it explained to the jury why a man would randomly grab a young girl off the street. The Missouri evidence helped to bolster the State's theory of the case that Murphy's intent was to abduct A.B., rather than simply teach her parents a lesson. Moreover, the district court gave a limiting jury instruction likely mitigating any unfair prejudice that may have resulted from the presentation of the evidence. Finally, the State presented clear and convincing evidence of the alleged acts, particularly the testimony of the alleged victim in Missouri. The record demonstrates that the alleged victim's testimony was consistent and specific. The victim even corrected counsel during the direct examination. Accordingly, we conclude that the district court did not commit manifest error when it admitted evidence of alleged prior misconduct.

Based on the above, we reject all of Murphy's challenges to his conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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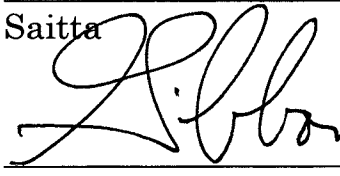

_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, 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