


IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON DEMARLO MONGHUR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51056

FILED

JUN 03 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of battery constituting domestic violence with the use of a deadly weapon, trespass, and first-degree kidnapping, two counts of coercion without physical force, and six counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated appellant Brandon Monghur a large habitual criminal and sentenced him to concurrent prison terms of ten years to life for each of the battery, first-degree kidnapping, and child abuse and neglect convictions, and six months for each of the trespass and coercion convictions.

Monghur contends that the trial court erred in denying his motion to set aside the verdict for his convictions for (1) first-degree kidnapping, (2) battery constituting domestic violence with the use of a deadly weapon, and (3) child abuse and neglect, on the ground that the State presented insufficient evidence.

If insufficient evidence exists to warrant a conviction, the trial court may give the jury an advisory instruction to acquit or set aside a guilty verdict. See NRS 175.381(1)-(2). “[I]nsufficiency of the evidence

occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury.” State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994). The granting of either an advisory instruction or a motion to set aside the verdict rests within the sound discretion of the trial court. See NRS 175.381(1)-(2); Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995).

For a sufficiency of the evidence claim, “[t]he relevant inquiry 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.’” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). Therefore, “[w]here there is sufficient evidence in the record to support the verdict, it will not be overturned on appeal.” Chappell v. State, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998).

Kidnapping

First, Monghur contends that the trial court erred in denying his motion to set aside the verdict for first-degree kidnapping. Particularly, Monghur claims that there was insufficient evidence presented to demonstrate asportation of the victim.

As applied to the present case, NRS 200.310(1) states:

A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain . . . for the purpose of . . . inflicting substantial bodily harm upon [her] . . . is guilty of kidnapping in the first degree which is a category A felony.

Asportation is not required because Monghur seized and confined the victim in order to inflict substantial bodily harm upon her, and the State did not charge him with an associated offense based on any substantial bodily harm inflicted upon the victim during the kidnapping.¹ The cases that Monghur cites are therefore inapposite as they addressed convictions for kidnapping and the associated offense, such as robbery or sexual assault. See, e.g., Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994), holding modified by Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). Those cases thus address when the State may obtain dual convictions arising from a single incident. See Mendoza, 122 Nev. at 273, 130 P.3d at 180. The State did not seek dual convictions in this case and the jury was presented with such evidence that it could have rationally been convinced of the defendant's guilt beyond a reasonable doubt. Thus, the district court did not err in refusing to set aside the jury verdict for first-degree kidnapping.

Battery with the use of a deadly weapon

Second, Monghur contends that trial court erred in denying his motion to set aside the verdict for battery constituting domestic violence with the use of a deadly weapon. Particularly, Monghur contends that insufficient evidence was presented to support the deadly weapon element because the metal bed frame that he pressed the victim's neck against did not constitute a deadly weapon.

¹The kidnapping charge was based on an incident that occurred on June 2, 2007. The battery domestic violence charge was based on an incident that occurred on April 16, 2007.

Monghur was charged with battery constituting domestic violence with the use of a deadly weapon, thus the deadly weapon was an element of the crime pursuant to NRS 200.481. Therefore, the functional test applies. Zgombic v. State, 106 Nev. 571, 574, 798 P.2d 548, 550 (1990), superseded by statute on other grounds, Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). Under the functional test, an instrumentality, even though not normally dangerous, is a deadly weapon whenever it is used in a deadly manner. Clem v. State, 104 Nev. 351, 357, 760 P.2d 103, 106-07 (1988), overruled on other grounds by Zgomic, 106 Nev. 571, 798 P.2d 548.

This court has not previously decided whether a stationary object may be used as a deadly weapon under the functional test. Other jurisdictions, however, have found that a stationary object can be classified as a deadly weapon. See State v. Montano, 973 P.2d 861, 862 (N.M. Ct. App. 1998) (holding that brick wall is deadly weapon where defendant slammed victim's head against it because definition hinges on the character of the object and the manner of its use); Taylor v. State, 679 A.2d 449, 454 (Del. 1996) (holding that heavy floor fan base is deadly weapon when defendant beat victim's head against it and "used" and controlled weapon even though defendant never touched weapon); State v. Reed, 790 P.2d 551, 551 (Or. Ct. App. 1990) (holding that concrete can be defined as deadly weapon when defendant slammed victim's head into concrete sidewalk and thus used concrete in a manner which renders it readily capable of causing serious physical injury).

Here, Monghur, while choking the victim, pressed her neck against the metal bed frame hard enough that the bed frame broke and the victim lost consciousness. A burn impression was left on the victim

where the bed frame came in contact with her neck. Although Monghur did not wield the weapon in his hands in order to press it against the victim's neck, we see little difference in Monghur taking part of the bed frame and pressing it to the victim's neck, or taking the victim's neck and pressing it to the bed frame—the damage to the victim remains the same. Taylor, 679 A.2d at 454. (“One may use an item . . . without ever actually touching it and still be deemed to have exercised control over it.”). Because Monghur exercised control of the victim by pressing her neck against the bed frame, we conclude that sufficient evidence was presented demonstrating that Monghur used the bed frame as a deadly weapon. Therefore, the district court did not err in refusing to set aside the verdict as to the enhancement.

Child abuse and neglect

Third, Monghur contends that the trial court erred in denying his motion to set aside the verdict because there was insufficient evidence presented for child abuse and neglect for two reasons: (1) the State did not prove that Monghur was responsible for the safety or welfare of the children and permitted or allowed them to suffer unjustifiable physical pain or mental suffering; and (2) the State presented no evidence that Monghur willfully caused any of the children pain or mental suffering.

Monghur's first contention confuses two different offenses in NRS 200.508.

NRS 200.508(1) provides that child abuse occurs when a person

willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer

physical pain or mental suffering as the result of abuse or neglect:

...

In contrast, NRS 200.508(2) provides that child neglect or endangerment occurs when “[a] person who is responsible for the safety or welfare of a child . . . permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer.”

Thus, although NRS 200.508(2) requires the person to be responsible for the safety or welfare of the child, NRS 200.508(1) does not. Although the information did not specify which section Monghur was being charged with, the language in the information made it clear that NRS 200.508(1) applied. Thus, the State was not required to present evidence demonstrating that Monghur was responsible for the safety or welfare of any of the children present.²

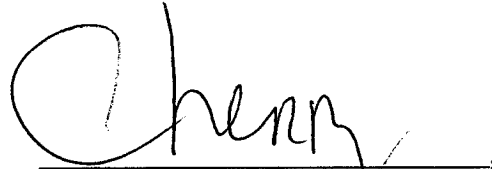
Monghur’s second contention lacks merit because evidence was presented to the jury demonstrating that Monghur willfully caused several children to suffer unjustifiable physical pain or mental suffering. “Willful” describes actions that are “[v]oluntary and intentional, but not necessarily malicious.” Black’s Law Dictionary, 1292 (7th ed. 2000). Twice, Monghur attacked the victim while she was holding one of the children. Monghur slammed another one of the children’s arms in the door to prevent him from leaving, and he kicked two of the children while

²There were six children present: three of the children belonged to the victim, two were the victim’s niece and nephew, and one was a neighbor.

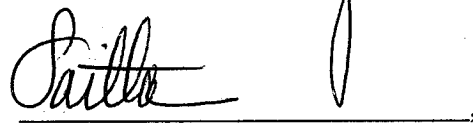
attempting to kick the victim. The victim tried to crawl between the legs of one of the children in an attempt to escape the beating that Monghur was inflicting on her. Blood was pouring from the victim's head to various areas of the house as she attempted to flee. The prosecution presented sufficient evidence that Monghur voluntarily and intentionally exposed the children to physical pain or mental suffering beyond a reasonable doubt. Thus, the district court did not err in denying Monghur's motion to set aside the verdict on the child abuse and neglect charges.

Having considered Monghur's contentions and concluded they are without merit, we

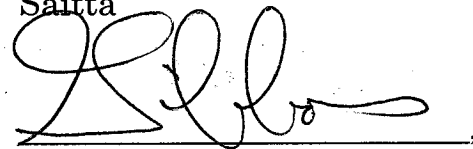
ORDER the judgment of conviction AFFIRMED.



Cherry J.



Saitta J.



Gibbons J.

cc: Eighth Judicial District Court Dept. 7, District Judge
Draskovich & Oronoz, P.C.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk