

IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL SALAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51385

FILED

JUN 23 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a stolen vehicle, burglary, unlawful taking of a vehicle, conspiracy to commit robbery, robbery, failure to stop on the signal of a police officer, reckless driving, and escape. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant Miguel Salas and Alberto Spindola broke into John Koenig's Ford Mustang while he was asleep. After awaking to the sound of his vehicle's exhaust, Koenig attempted to prevent Salas and Spindola from leaving his apartment complex in possession of the Mustang. Koenig was unsuccessful and Salas and Spindola drove away. Shortly thereafter, as Koenig was returning to his apartment, he again heard the sound of his vehicle. Koenig watched as Salas and Spindola drove the Mustang down a street near the complex, pulled it over, and parked it. Koenig confronted the two and both exited the vehicle with hammers in their hands. A short exchange took place, after which Salas and Spindola walked away from the Mustang and entered a separate vehicle (a blue Mitsubishi Eclipse). After Salas and Spindola exited the apartment complex in the Mitsubishi, they engaged a police officer in a high-speed pursuit that ultimately ended in a collision with another car. Salas was 15 years old at the time. Salas

was certified by the juvenile court for adult criminal proceedings. At a subsequent preliminary hearing, the justice court dismissed counts of robbery with the use of a deadly weapon and conspiracy to commit robbery, for lack of probable cause, but bound Salas over to the district court on all remaining charges. The State subsequently convened a grand jury, and Salas was ultimately indicted on the two previously dismissed charges. Salas' cases were consolidated, and he proceeded to trial as an adult in district court, where he was found guilty on all but three counts. This appeal followed.

On appeal, Salas argues that: (1) the district court did not have jurisdiction to proceed on the grand jury indictment, (2) the State presented insufficient evidence to convict him of robbery and conspiracy to commit robbery, and (3) the State engaged in prosecutorial misconduct.¹

For the reasons set forth below, we conclude that while the district court did have jurisdiction to proceed on the grand jury indictment, the State did not present sufficient evidence to convict Salas of robbery and conspiracy to commit robbery. Further, while the prosecutor

¹We note that Salas also asserts that (1) the State presented insufficient evidence to convict him of possession of a stolen vehicle, failure to stop on the signal of a police officer, and reckless driving; (2) the State did not provide him with reasonable notice of the August 9, 2007, grand jury proceedings; (3) he demonstrated "exceptional circumstances" such that his case should have been remanded to the juvenile court; (4) the State improperly withheld inconsistent statements; (5) Koenig's in-court identification of him should have been suppressed because it was unreliable; (6) the district court erred in denying his Batson challenge; (7) he was stripped of the presumption of innocence; and (8) the district court based his sentence on erroneous information. We have thoroughly considered these issues and conclude that they are without merit.

did make improper statements during closing argument, we conclude that the error was harmless. Accordingly, we reverse Salas' convictions for robbery and conspiracy to commit robbery, affirm Salas' convictions on all other counts, and remand this matter for entry of an amended judgment of conviction consistent with this order. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

District court's jurisdiction to proceed on the grand jury indictment

Salas argues that he was improperly indicted by the grand jury for robbery and conspiracy to commit robbery. He asserts that the district court lacked jurisdiction over the robbery and conspiracy counts because those counts were added by indictment after the juvenile court had certified him as an adult and that the Legislature has not authorized grand jury indictment of a minor.

"[T]he juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act." NRS 62B.330(1) (emphasis added). However, "the juvenile court may certify a child for proper criminal proceedings as an adult to any court that would have jurisdiction to try the offense if committed by an adult." NRS 62B.390(1) (emphasis added). Moreover, certification to adult court terminates the juvenile court's jurisdiction as to the specific offenses alleged and considered at the certification hearing. Robert E. v. Justice Court, 99 Nev. 443, 444, 664 P.2d 957, 958 (1983). Once certified as an adult, the subject is put through "proper criminal proceedings" pursuant to Nevada's rules of criminal procedure, Faessel v. District Court, 106 Nev. 106, 107, 787 P.2d 767, 768 (1990), and "[t]he court to which the case has been transferred

has original jurisdiction over the child.” NRS 62B.390(5)(a) (emphasis added).

Pursuant to Nevada’s rules of criminal procedure, “[e]very public offense must be prosecuted by indictment or information.” NRS 172.015. “[A] grand jury may inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled.” NRS 172.105. Thus, a “primary role of the grand jury [is] investigative and accusatory.” Schuster v. Dist. Ct., 123 Nev. 187, 192, 160 P.3d 873, 877 (2007). “That is to say, the primary function of the grand jury in Nevada is to investigate, obtain, and review evidence, and based on that evidence, to determine whether there is probable cause to believe that a crime has been committed and that a particular person or persons committed it.” Id.

Salas was certified by the juvenile court for adult criminal proceedings for robbery and conspiracy to commit robbery. Pursuant to Robert E., Salas’ certification then terminated the juvenile court’s jurisdiction as to the specific offenses alleged and considered at the certification hearing. Although the justice court dismissed the robbery and conspiracy counts for lack of probable cause, that determination had to do with the weight of the evidence, not a determination of Salas’ legal status as an adult. Therefore, Salas remained properly certified as an adult, at a minimum, on the specific offenses to which he was certified by the juvenile court. Because Salas was certified on the exact same counts subsequently charged in the grand jury indictment, the two counts contained in the indictment were not “new,” such that recertification was statutorily required. Accordingly, we conclude that the district court had jurisdiction to proceed on the grand jury indictment.

Moreover, Salas' argument that the Legislature has not authorized a grand jury to indict a minor is misplaced. When Salas was certified and transferred to the justice court, he was no longer legally a minor on the charges, but rather an adult subject to proper criminal proceedings pursuant to Nevada's rules of criminal procedure. Therefore, the general statutory provisions relating to the grand jury's authority to indict applied in the same manner that they would to any other adult so charged. Thus, to commence criminal proceedings, the State could file an information or obtain a grand jury indictment. Therefore, we conclude that the grand jury was statutorily authorized to indict Salas, and that the district court had jurisdiction to proceed on the grand jury indictment.

Sufficiency of the evidence

Salas contends that the State presented insufficient evidence to convict him of robbery and conspiracy to commit robbery. Specifically, he asserts that the taking of the Ford Mustang did not occur in Koenig's presence and that any force or threat of force by him was only to facilitate escape without the car.

In reviewing whether there is sufficient evidence to support the jury's verdict, we determine "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. 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)).

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury" NRS 200.380(1). A "taking" occurs when "force or fear if force or fear is used to: (a) [o]btain or retain possession of

the property; (b) [p]revent or overcome resistance to the taking; or (c) [f]acilitate escape.” NRS 200.380(1). However, “where force is used only to facilitate escape, the use of force must be subsequent to a taking by force or fear, or used to compel acquiescence to the escaping with the property in order to constitute the crime of robbery.” Martinez v. State, 114 Nev. 746, 748, 961 P.2d 752, 754 (1998). If force or threat of force is used to retain possession of the item or to escape with the item, then a robbery is committed. Barkley v. State, 114 Nev. 635, 637-38, 958 P.2d 1218, 1219 (1998).

The evidence at trial demonstrated that Salas and Spindola initially took the Mustang outside of Koenig’s presence, while he was asleep. Because Koenig was not present at the time of the initial taking, the elements for robbery could have only been completed when Koenig attempted to regain possession of his Mustang. Thus, whether sufficient evidence was presented to convict Salas of robbery turns on whether the evidence demonstrated that Salas used fear of force to retain possession of the Mustang when Koenig sought to recover it.

The evidence showed that after Salas and Spindola initially exited Koenig’s apartment complex, they returned in the vehicle and parked on a street near the complex. Koenig testified that upon seeing the two park the Mustang, he confronted them. The evidence demonstrated that Salas and Spindola exited the vehicle within seconds of Koenig’s arrival. At that point, Koenig noticed that both were holding hammers, which he perceived as a threat. Salas, however, did not verbally threaten Koenig or make any movement towards him, and there was no evidence presented which suggested that Salas and Spindola were attempting to

retain possession of the Mustang. Salas and Spindola then walked away from the vehicle.

The evidence elicited at trial did not establish that Salas used fear or force to retain possession of the Mustang when Koenig attempted to retake it. Rather, the evidence showed that the chain of events had already moved beyond a taking, because the attempted taking had been abandoned. Further, Salas' use of fear of force, if any, was to facilitate escape and not to compel acquiescence in escaping with the Mustang. Therefore, because there was no evidence that Salas used fear of force to retain possession of the Mustang, nor that he was attempting to escape with the Mustang, a rational trier of fact could not have found all of the essential elements for robbery beyond a reasonable doubt. Similarly, because the State presented insufficient evidence to convict Salas of robbery and there was no direct evidence of an agreement or circumstantial evidence from which to infer the existence of an agreement between Salas and Spindola to commit robbery, we conclude that there was insufficient evidence to convict Salas of conspiracy to commit robbery. See Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) ("A conspiracy is an agreement between two or more persons for an unlawful purpose," which may be established by direct or circumstantial evidence.), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). Accordingly, we reverse Salas' convictions for robbery and conspiracy to commit robbery.

Prosecutorial misconduct

Salas asserts that during closing arguments the State engaged in prosecutorial misconduct by vouching for Koenig's testimony.

"The prosecution may not vouch for a witness; such vouching occurs when the prosecution places 'the prestige of the government behind

the witness' by providing 'personal assurances of [the] witness's veracity.'" Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (alteration in original) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992)).

We look at two factors when considering a claim of prosecutorial misconduct. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008). First, we determine whether there was improper conduct. Id. If improper conduct existed, we then determine whether such conduct warrants reversal. Id. "With respect to the second step of this analysis, [we] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Id. In determining whether error of a nonconstitutional dimension is harmless, "we will reverse only if the error substantially affects the jury's verdict." Id.

In the present case, the State made the following statements during closing arguments:

And then he comes to court now and testifies now for at least three times, at the preliminary hearing, the grand jury, and here at trial. Sounds like kind of a big inconvenience, but yet he is willing to do it, why, because he has got some vested interest in convicting this guy?

He doesn't, absolutely.

Those facts show he has no interest in convicting him. He is just telling the truth.

(Emphasis added.) The State further stated:

And as to the driving issue again, I just finished talking about that, what is his motive to lie? Why would he put himself through this?


(Emphasis added.)

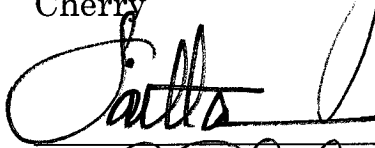
The statement, "He is just telling the truth," was improper as it provided personal assurances by the State of Koenig's veracity. Id.

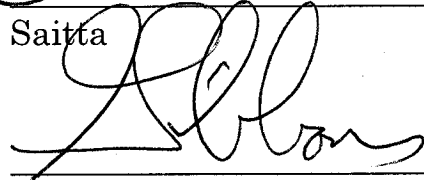
Further, the question, "Why would he put himself through this?" impliedly suggests an assurance of veracity to Koenig's testimony. Therefore, these two statements were improper. However, viewed in the entire context of the closing argument and based on the overwhelming evidence presented at trial with respect to Salas' remaining convictions, we determine that these errors did not substantially affect the jury's verdict and were therefore harmless. Accordingly, the State's remarks do not warrant reversal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for entry of an amended judgment of conviction consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk