IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHAN WASHINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52095

FILED

SEP 25 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 conspiracy to commit robbery, burglary while in possession of a firearm, four counts of first-degree kidnapping with the use of a deadly weapon, and four counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On July 28, 2008, the district court sentenced appellant Nathan Washington to serve a term of 4 years in the Nevada State Prison for conspiracy, 8 years for burglary, four terms of life with parole eligibility after 5 years for first-degree kidnapping with four consecutive terms of 20 years each for the deadly weapon enhancements, and four terms of 13 years for robbery with four consecutive terms of 8 years each for the deadly weapon enhancements; all counts were ordered to run concurrently. This appeal follows.

Washington's convictions stem from the armed robbery of a family of six. On the afternoon of March 2, 2008, Steven Folmar was home with his family when Washington and two other men entered their apartment and at gunpoint forced Folmar, his wife, and his wife's two sons into the bathroom while two younger children were left sleeping in

another room. After about 10 to 15 minutes, Folmar exited the bathroom to discover that the men had taken various electronic items, his wallet, and his wife's purse and car keys. Folmar contacted police and identified Washington, whom he had met previously, as one of the perpetrators.

Washington raises two claims on appeal: (1) the district court erred in precluding two potential alibi witnesses who were not timely noticed and (2) his kidnapping convictions should be reversed because the movement of the victims was incidental to the robbery and did not increase their risk of harm.

Alibi witnesses

Washington claims that the district court abused its discretion when it failed to permit him to present two potential alibi witnesses at trial. Washington's claim is without merit.

NRS 174.233(1) requires a defendant who intends to offer alibi evidence to file written notice including the names and last known addresses of any witnesses by which he intends to establish an alibi. NRS 174.233(4) gives the district court discretion to exclude evidence offered by a defendant (other than his own testimony) to prove an alibi if the defendant fails to comply with the notice requirements. However, if a defendant can demonstrate good cause for non-compliance, a trial court should exercise its discretion to allow the presentation of the alibi evidence. Williams v. State, 97 Nev. 1, 3, 620 P.2d 1263, 1265 (1981).

Not only did Washington fail to identify the two witnesses at issue until the morning of trial, he failed to identify them as alibi witnesses until the final day of trial. Moreover, because the witnesses in question were his father and his father's girlfriend with whom he was living when he was arrested, he cannot show good cause for failing to identify these witnesses earlier. Therefore, we conclude that the district

court did not abuse its discretion in precluding these witnesses from testifying at trial.

Kidnapping convictions

Washington claims that his convictions for first-degree kidnapping should be reversed because any movement of the victims was incidental to the robbery and it did not increase their risk of harm. We disagree.

Dual convictions for kidnapping and robbery arising from the same course of conduct will only be upheld if the movement underlying the kidnapping charge "stand[s] alone with independent significance from the act of robbery itself, create[s] a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve[s] movement, seizure, or restraint substantially in excess of that necessary to its completion." Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). Whether the movement at issue satisfies one of these requirements presented a question of fact for the jury. See Curtis D. v. State, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982). The jury in this case was properly instructed on the law as set forth in Mendoza, and therefore we review Washington's kidnapping convictions for the sufficiency of the evidence. The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

The evidence at trial showed that the victims were ordered at gunpoint to move from the living room area into a more confined space, a bathroom, where they were denied any contact with the two small

children, ages two years and six months, sleeping in the bedroom. We conclude that the jury could find that the separation of the victims from the younger children elevated the anxiety level associated with the robbery to such a degree as to increase the risk of danger to the victims beyond that necessary to effectuate the robbery. Therefore, a rational jury could find that this circumstance "create[d] a risk of danger to the victim[s] substantially exceeding that necessarily present in the crime of robbery," establishing Washington's guilt of first-degree kidnapping beyond a reasonable doubt. As sufficient evidence supported Washington's convictions for first-degree kidnapping, we

ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge
Andrew S. Wentworth
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk