IN THE SUPREME COURT OF THE STATE OF NEVADA

ORENTHAL JAMES SIMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53080

FILED

OCT 22 2010

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit a crime, one count of conspiracy to commit kidnapping, one count of conspiracy to commit robbery, one count of burglary while in possession of a deadly weapon, two counts of first-degree kidnapping with the use of a deadly weapon, two counts of robbery with the use of a deadly weapon, and two counts of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Orenthal James Simpson was found guilty in connection with an armed confrontation in a Las Vegas hotel room during which Simpson and five other men attempted to regain what Simpson believed was his personal property. The district court sentenced Simpson to a maximum of 33 years in prison with the possibility of parole after 9 years.

On appeal, Simpson raises the following issues: (1) the district court erroneously denied his Batson challenge after the State exercised a peremptory challenge against two potential jurors who were African-American; (2) the district court committed judicial misconduct throughout the trial, prejudicing Simpson's right to due process; (3) the prosecution engaged in misconduct by eliciting testimony of witness intimidation; (4)

the district court abused its discretion when settling jury instructions; (5) the district court violated Simpson's Sixth Amendment right to confrontation by limiting the cross-examination of a key witness; (6) the district court abused its discretion by admitting hearsay statements; (7) the district court erred when it sentenced Simpson for both robbery and aggravated assault with a deadly weapon because the convictions were redundant; and (8) there was insufficient evidence to support Simpson's conviction for kidnapping—specifically, that there was no demonstration that the kidnapping was not incidental to the robbery.

For the reasons set forth below, we conclude that all of Simpson's arguments on appeal are without merit and we therefore affirm the judgment of conviction. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Jury selection

Simpson argues that the district court erred when it denied his objection, pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), to the State's use of peremptory challenges to remove two African-American panelists from the jury. Couched within his Batson argument, Simpson also asserts that, during voir dire, the district court improperly restricted him from questioning potential jurors with regard to his highly publicized prior legal proceedings in California, specifically, a criminal prosecution for murder and a civil wrongful death suit that were brought in response to accusations that Simpson caused the deaths of his ex-wife and her friend. We first address the issues raised as to the Batson challenges and then turn to Simpson's arguments with respect to the scope of voir dire.

Batson

A Batson challenge requires the following three-step analysis: (1) the party making the Batson objection must make out a prima facie case of discrimination, (2) the proponent of the preemptory challenge then has the burden to assert a neutral explanation for the challenge, and (3) the trial court then decides whether the party raising the Batson challenge "has proved purposeful discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). "Under step two, the State's neutral reasons for its peremptory challenges need not be persuasive or even plausible." Id. at 403, 132 P.3d at 577-78. The persuasiveness of the State's proffered reason becomes relevant in step three, when "[t]he district court must determine whether the opponent of the peremptory challenge has met the burden of proving purposeful discrimination." Id. at 404, 132 P.3d at 578. On appeal, the district court's findings regarding discriminatory intent are accorded great deference. Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008).

Prospective juror no. 209

Simpson argues that the State's reasons for rejecting prospective juror no. 209 were disingenuous and not race-neutral. We disagree.

Upon his Batson objection, Simpson offered no evidence of purposeful discrimination by the State. Taking the objection at face value, the district court asked the State for a race-neutral explanation for its peremptory challenge of the prospective juror. The State gave the following reasons: (1) she was a minister with a forgiving nature who had worked at a women's prison; (2) she stated that she chose to see the good in every person; (3) other jurors who might be inclined to convict and punish could be swayed by someone with a ministerial position; (4) she

wrote extensively about redemption on her website; (5) she believed that her daughter had been wrongfully accused by police in a criminal case; (6) she had conflicting feelings about serving as a juror because it would result in time away from her students and, therefore, deprive her of bonding with them; and (7) her chiropractor wrote a letter stating that she could not serve on the jury because of a back condition.

The district court found that all of these reasons, along with the suspicious timing of the prospective juror's doctor's note, raised legitimate concerns regarding her suitability as a juror. Accordingly, it determined that Simpson failed to demonstrate purposeful discrimination. Because this court affords great deference to the district court's findings with regard to discriminatory intent and the State proffered several race-neutral reasons for rejecting prospective juror no. 209, we determine that the district court did not err when it denied Simpson's Batson challenge as to prospective juror no. 209.

Prospective juror No. 177

Next, Simpson assigns error to the district court's denial of his Batson objection to the State's peremptory challenge of prospective juror no. 177. Other than stating that prospective juror no. 177 was a female African-American, Simpson offered no evidence of discrimination based upon race. Despite the lack of a prima facie case, the district court asked the State for a race-neutral reason for rejecting prospective juror no. 177.

The State gave the following reasons for its peremptory challenge of prospective juror no. 177: (1) she admitted that her deeply rooted religious convictions made it difficult to sit in judgment of another; (2) on her questionnaire she stated that she would not send someone to jail; (3) she was still emotional about the fact that her brother had been, in her opinion, wrongfully accused of a crime; (4) she stated that the

prosecution should work at a "higher standard[ ]" all of the time; and (5) she disagreed with the judgment against Simpson in one of the California cases. After hearing the State's reasoning, the district court determined that Simpson failed to make a showing of purposeful discrimination.

We agree with the district court's determination as to prospective juror no. 177. The facts show that the State met its burden pursuant to Batson and provided several race-neutral reasons for its peremptory challenge. In contrast, Simpson failed to meet his ultimate burden of demonstrating purposeful discrimination, as the definitive burden to prove discriminatory intent always remains on the party objecting to the peremptory challenge.

In sum, as it did with prospective juror no. 209, the district court gave Simpson the benefit of the doubt on his Batson objection to prospective juror no. 177. In both instances, Simpson did no more than protest the fact that the challenged jurors were African-American, offering no proof of discriminatory intent by the State. Because this court affords great deference to the district court's findings with regard to discriminatory intent, we determine that the district court's decision should not be disturbed.

Voir dire

Simpson argues that the district court improperly restricted him from asking prospective jurors in-depth questions regarding their opinions of Simpson's prior cases in California.

We have stated that the goal of juror voir dire is to determine whether a potential juror has the ability to apply the law in an impartial and conscientious manner. Johnson v. State, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006). Furthermore, we have determined that the scope of juror voir dire "rests within the sound discretion of the district court,

whose decision will be given considerable deference." Id. at 1354-55, 148 P.3d at 774.

In the present matter, the district court allowed the parties to ask general questions about prospective jurors' opinions and thoughts on Simpson's California cases. It further allowed questioning as to whether potential jurors could put aside their feelings about the outcome of the California cases and consider the facts and evidence in a fair and impartial manner. The district court did not want defense counsel to question jurors about why and how they disagreed or agreed with the California cases, because it did not want to relitigate those cases. Because the goal of voir dire is to determine juror fairness and impartiality, we conclude that the district court did not err when it determined that the scope of voir dire as to unrelated cases should be limited. While general questions and follow-ups were necessary due to the notorious media coverage of Simpson's California cases, a thorough analysis of each juror's thoughts and feelings about the California verdicts would not provide additional securities that the prospective juror could apply the law fairly and impartially. As the district court noted, during voir dire the prospective jurors would be under oath and obligated by law to tell the truth. Further, the district court reminded potential jurors that even after they were discharged they would have to answer to the court should it be revealed that they were dishonest. Thus, given our tradition of according the district court considerable deference as to the scope of juror voir dire, we conclude that the district court acted within its discretion when it restricted the scope of voir dire to focus on the Nevada case, rather than the California verdicts.

Judicial misconduct

Simpson asserts that the district court committed judicial misconduct throughout the trial. He argues that the judge's behavior prejudiced the defense.

We note that this court has considered the arguments presented in Simpson's and the State's briefs, and at oral argument, and viewed relevant portions of the claimed misconduct on the video recordings of the trial. We further observe that Simpson did not make any contemporaneous objection to the alleged misconduct. After carefully reviewing all of the evidence, we conclude that Simpson's arguments are meritless.

"Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court." Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). This court, however, has discretion to consider issues not preserved for appeal where there is plain error that affects the defendant's substantial rights. See id. at 622, 960 P.2d at 338; see also Ramirez v. State, 126 Nev. ___, ___, 235 P.3d 619, 623 (2010).

Simpson alleges approximately 34 separate instances of misconduct. We have considered each of them. Most of Simpson's assigned errors consist of warnings by the district court directing his counsel to "stop" and "sit down." Our review of the record reveals that the district court's admonishment was generally made to both counsel for the defense and the prosecution. The district court had, at any given moment, multiple attorneys speaking over one another. Of the 23 volumes of appendices, covering over four weeks of trial, there is hardly a moment of

the trial where numerous attorneys were not trying to speak over one another.

After reading and viewing relevant portions of the trial transcript and video, we determine that the district court was careful to make sure that only one attorney was speaking at a time, and that the speaking attorney was standing. Both defense counsel and the prosecutor repeatedly broke this rule. The record is peppered with instances of the district court attempting to maintain control of the courtroom by saying, "stop" or "sit down," or ordering the parties to behave in a professional manner. We do not today, nor have we ever, determined that such directives by a district court rise to the level of judicial misconduct.

Moreover, Simpson fails to state in his brief that almost every "stop" or "sit" directive was followed by a "thank you." During one such incident, when the attorneys were speaking over each other, the district court admonished them (by saying, "Stop") and then stated:

> Now we've got all the people who actually should be objecting to be able to object. And I really truly appreciate that because otherwise this case and this particular examination isn't going [to] become the free for all that it could be but for the Judge controlling what's happening here in the courtroom.

The district court's admonishments were made in order to maintain order in the courtroom. See Oade, 114 Nev. at 621, 960 P.2d at 338 ("A trial judge has a responsibility to maintain order and decorum in trial proceedings."). We are not persuaded that the district court's behavior throughout the course of the trial prejudiced Simpson and/or tainted the verdict. Our review of the record shows that the district court dealt with aggressive counsel on both sides as effectively as possible while retaining the integrity of the proceedings. Simpson has failed to demonstrate how

any of the alleged instances of misconduct, either independently or cumulatively, affected his substantial rights. On the record, we are not convinced that admonishments from the bench rise to the level of plain error. We also conclude that the other instances of misconduct alleged by Simpson did not constitute judicial misconduct.

Prosecutorial misconduct

Simpson assigns error to the State's questioning of Detective Stephen Caldwell about Alfred Beardsley, one of the victims of the robbery. He argues that the questioning resulted in prosecutorial misconduct because it suggested that Simpson affected Beardsley's testimony by intimidation. We disagree.

In Valdez v. State, this court set forth the relevant inquiry when considering allegations of prosecutorial misconduct:

> When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal.

124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (citations omitted).

For the following reasons, we conclude that the State's actions were not improper. The exchange to which Simpson assigns error occurred when the State recalled Detective Caldwell to question him about phone calls Simpson made from the detention center following his arrest. The jury listened to audio tapes of the phone calls in which Simpson can be heard asking his daughter to find Beardsley's phone number. The State asked Detective Caldwell what his concerns were upon hearing these calls. Detective Caldwell testified that the police were worried that Simpson would be able to talk to codefendants and victims before the

police contacted them. There was no discussion about intimidation. Rather, it had already been established that Beardsley was an admirer of Simpson's before and after the robbery; Beardsley testified that he did not want Simpson prosecuted because the whole thing was Thomas Riccio's[1] fault. Moreover, Riccio and Beardsley testified that there was tremendous animosity between them. Beardsley made it clear that he did not blame Simpson. He refused to authenticate Riccio's recordings. The State's reasoning for recalling Detective Caldwell and asking him about Simpson's attempts to reach Beardsley was to shed light on the relationship between the two men—not to prove that Simpson intimidated Beardsley. The State had the burden of proof; as such, it had to explain to the jury why one of the victims refused to blame the defendant despite the fact that he was robbed at gunpoint. Accordingly, having reviewed the challenged portion of the exchange in context, we determine that the State's questioning of Detective Caldwell was proper.

Jury instructions

Simpson assigns error to three jury instructions. After addressing the standard of review, we address each in turn.

Standard of review

In general, this court "reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error." Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1091 (2009). However,

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[1]Thomas Riccio was a State witness, who received total immunity. He set up the supposed sale of Simpson's memorabilia and recorded conversations leading up to, during, and after the robbery.

when this court must consider the legal accuracy of a jury instruction it applies de novo review. Id.

Defense theory

Simpson argues that the district court erred by not giving his proposed jury instruction regarding the robbery charges. Simpson's proposed jury instruction was as follows:

> In order to find the Defendant guilty of Robbery, the State must Prove that the Defendant intended to do that which the law prohibits by taking property from the Person of another by physical force or threats of Physical force. If you believe that a Defendant made a reasonable mistake or was ignorant of a material fact when committing an act that constitutes a crime of General Intent, then he lacks the necessary criminal intent to convict and you must find him not guilty. Consequently, if you find the Defendant was under the mistaken impression that he was recovering his own property, then you must find that he lacks the General Intent to commit a prohibited act and render a not guilty verdict.

In Nevada, robbery is "the unlawful taking of personal property from the person of another . . . against his . . . will, by means of force or violence or fear of injury, immediate or future, to his . . . person or property" to obtain the property, overcome resistance to the taking, or to facilitate escape. NRS 200.380(1). It is a general intent crime. See Hickson v. State, 98 Nev. 78, 79, 640 P.2d 921, 921 (1982). Jury instruction no. 20, the jury instruction actually given, tracks the language of NRS 200.380. It additionally explains that the value of the property taken is not an element of the crime and that "[a] good faith belief of a right or claim to the property taken is not a defense."

The law in Nevada as to robbery is clear: it is the unlawful taking of property from another by force or fear or violence. All that NRS 200.380 requires is the intent to take property by fear or force; a good faith belief that the property at issue is one's own does not nullify the intent to take property from another by force.

Simpson's proposed instruction was an incorrect statement of the law, because it stated that if the jury found that Simpson was under the "mistaken impression that he was recovering his own property," then he was not guilty of the crime of robbery. However, if the jury believed that Simpson thought he was recovering his own memorabilia, then, under Nevada law, Simpson was still not relieved of criminal liability. While a defendant has a right to a jury instruction on his theory of the case, the instruction "must correctly state the law." Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989). Because Simpson's proffered instruction misstated the law, the district court properly rejected it.

Lesser included offenses

Simpson argues that he was entitled to jury instructions on the lesser included offenses of larceny and second-degree kidnapping.

NRAP 10(b)(1) requires the parties to submit all "portions of the trial record to be used on appeal." This court has also explained that the "[a]ppellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) (quoting NRAP 30(b)(3)).

In Simpson's opening brief, he asserts that he requested jury instructions on the lesser included offenses of larceny and second-degree

kidnapping. However, the record cite that Simpson provides for this assertion was intentionally omitted from his appendix.[2] Therefore, we are unable to reach the issue of whether Simpson was entitled to the jury instructions on the lesser included offenses of larceny and second-degree kidnapping because we cannot determine from the record what was raised at the district court.

Coconspirator liability

In his next assignment of error, Simpson argues that the district court erred by giving jury instruction no. 6 because it misstates the law of vicarious coconspirator liability. He asserts that the language of jury instruction no. 6 is inapposite to this court's holding in Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 1021, 195 P.3d 315, 320 (2008).

Jury instruction no. 6 stated, in pertinent part, "[e]ach member of a conspiracy to commit robbery is liable for each act and bound by each declaration of every other member of the conspiracy to commit robbery if the act or the declaration is in furtherance of the object of the conspiracy." (Emphases added).

We hold that the instruction is a correct statement of the law as it defines coconspirator liability as to robbery—a general intent crime.

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[2]We also note that the only portion of the record dealing with jury instructions—a brief discussion between Simpson and the district court regarding the district court's proposed jury instructions—is ambiguous, at best. During the discussion between Simpson and the district court, Simpson references a "packet" of his requested jury instructions, but it is not evident that Simpson requested the lesser included offenses of larceny and second-degree kidnapping because he has intentionally omitted his requested jury instructions from the appendix.

Bolden clarified this state's jurisprudence on vicarious coconspirator liability and rejected the natural-and-probable-consequences doctrine referred to in jury instruction no. 6 for specific intent crimes—not general intent crimes, such as robbery. 121 Nev. at 923, 124 P.3d at 201. Accordingly, we conclude that the instruction was a correct statement of the law and the district court acted within its discretion when it approved the instruction.

Sixth amendment right to confrontation

Simpson contends that the district court improperly limited cross-examination of Walter Alexander and thereby violated his Sixth Amendment right to confront a witness. The assertion is meritless.

This court applies de novo review when considering whether a defendant's Confrontation Clause rights have been violated. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. In its seminal case, Crawford v. Washington, the United States Supreme Court stated that the Confrontation Clause was a

> procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

541 U.S. 36, 61 (2004). We have adopted the rationale delineated in Crawford. See Chavez, 125 Nev. at ___, 213 P.3d at 483. Further, we have clarified that "'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (quoting Delaware v.

Van Arsdall, 475 U.S. 673, 679 (1986) (internal quotations omitted)). When attempting to impeach a witness on cross-examination, this court has set forth some guideposts as to the scope of the inquiry—namely, the collateral-fact rule. Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004). In Lobato, this court stated that "[i]mpeachment by use of extrinsic evidence is prohibited when collateral to the proceedings." Id.

In the present matter, Simpson wanted to impeach Alexander with extrinsic evidence, namely the fact that he was a pimp. Simpson argued that Alexander lied under oath when he stated both in his voluntary statement to police and at the preliminary hearing that he was a realtor. The district court ruled that Simpson could not question Alexander about other ways he earned money, such as being a pimp, pursuant to Lobato.

We determine that the district court properly limited Simpson's cross-examination of Alexander because the "use of extrinsic evidence is prohibited when collateral to the proceedings." Id. A review of Alexander's prior statements reveals that he never stated that he was not a pimp or that he worked exclusively as a real estate agent. At the preliminary hearing, Alexander stated that there were things that he had done that he preferred not to talk about. As such, there was no prior inconsistent statement at issue. Moreover, Simpson raises the issue that during the preliminary hearing Alexander admitted to taking pictures of naked women, but fails to demonstrate how that statement or others similar to that were material, or in any way related, to the case at hand, as required by Lobato. Id. at 519, 96 P.3d at 770.

More importantly, Simpson was allowed to vigorously cross-examine Alexander as to his motives for cooperating with the police.

Simpson questioned Alexander at length about the voicemail messages he left Tom Scotto, a mutual friend in Las Vegas, insinuating his testimony was up for sale. In addition, the jury heard testimony and audio recordings of Alexander helping to commit an armed robbery; Alexander admitted he carried a handgun into room 1203, pointed it at the two victims, and then unplugged the hotel room phone before leaving. We determine that given the above-stated facts, the jury was not misled into believing that Alexander was a trustworthy individual simply because he came to court with a Bible (an incident for which the district court quickly admonished him); rather, the evidence shows that Alexander's testimony on direct and cross-examination, as well as other evidence at trial, portrayed a clear picture of the witness. Accordingly, we determine that Simpson's Sixth Amendment right to confrontation was not violated by the district court's decision to limit Simpson's cross-examination of Alexander as to this one collateral issue.

Hearsay

Simpson argues that the district court abused its discretion when it allowed Riccio to testify as to what Simpson's sister said at the Palm's Hotel pool because it was hearsay and in violation of Simpson's Confrontation Clause rights. We disagree.

This court will not disturb a district court's determination that a statement fits an exception to the hearsay rule absent an abuse of discretion. See Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006). Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted in the statement. NRS 51.035. However, when a statement is offered solely for the purpose of showing its effect on

the listener, this court has determined that the statement is not hearsay. Byford v. State, 116 Nev. 215, 232, 994 P.2d 700, 712 (2000).

Simpson objected to the State questioning Riccio about what Simpson's sister said when she heard about the plan to retrieve the memorabilia. The district court overruled the objection. Riccio stated that he could not remember Simpson's sister's name, but that he was certain it was Simpson's sister because that is how she was introduced to him. He testified that Simpson's sister told Simpson, "I don't like it," when she heard about the plan to retrieve the memorabilia. Riccio also testified that Simpson's sister appeared concerned for her brother.

We conclude that the district court acted within its discretion when it allowed Riccio to testify about what Simpson's sister had said, because the statement was not offered for the truth of the matter asserted. Rather, it was offered to show the effect on Simpson—being that someone had expressed concern regarding the plan that resulted in robbery. It was relevant because Simpson's defense was that he did not think he was doing anything wrong by attempting to retrieve long-lost personal items. Simpson's sister's reaction showed that, at least on some level, the defendant knew or was told that this plan was not a good idea. Furthermore, because the statement was not hearsay, Simpson's contention that it violated his right to confrontation because Riccio could not remember the sister's name, is meritless. There is no law in Nevada, or elsewhere, that stands for such a proposition.

Redundancy

Simpson argues that the district court erred when it sentenced him for assault with a deadly weapon and robbery with the use of a deadly weapon because the convictions are redundant since they resulted from a

single course of conduct and are contrary to the legislative intent underlying Nevada's assault and robbery statutes.[3] The argument is without merit.

We have declared that convictions are redundant "when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292-93 (2005) (citations omitted).

First, we consider the facts forming the basis for Simpson's convictions for assault and robbery. The evidence shows that a crime of fear and a crime of unlawful taking occurred on the night of September 13, 2007. Simpson and his coconspirators held Fromong and Beardsley at gunpoint and, concurrently, removed almost $100,000 worth of sports

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[3]Simpson also intertwines a double jeopardy argument with his redundancy argument. We note that redundancy and double jeopardy are separate concepts. See Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005) ("While often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct."). Generally, when determining whether two separate offenses can stand without implicating double jeopardy, this court employs the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932). See Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006). In essence, if the elements of one offense are wholly included within the elements of the other offense, then the defendant's double jeopardy rights are implicated. Id. Here, the elements of assault, NRS 200.471, are clearly not wholly included in the elements of robbery, NRS 200.380. We therefore conclude that the convictions for assault and robbery did not violate Simpson's double jeopardy rights.

memorabilia from the room. The testimony was clear and consistent: Simpson was furious at Mike Gilbert, believed Gilbert betrayed him by selling his personal items, hoped Gilbert would be in room 1203, and repeatedly asked for Gilbert's phone number during the robbery. He asked Michael McClinton and Alexander to help him by coming to the hotel armed and to look menacing. Simpson blamed Fromong and Beardsley for betraying him and thinking they could get away with it. Once the robbery was over and all of the items were removed from the room, Simpson remained in the middle of the room yelling at the victims, while McClinton held the victims at gunpoint. Accordingly, the evidence establishes that Simpson intentionally placed Fromong and Beardsley in reasonable apprehension of immediate bodily harm and that he took the personal property of the victims by means of force and fear. The fact that one weapon was used during the commission of the crimes does not make the separate crimes redundant.

Next, we look at the language of each statute. In Nevada, assault with a deadly weapon occurs when the defendant uses a deadly weapon to intentionally place the victim "in reasonable apprehension of immediate bodily harm." See NRS 200.471(1)(a). Robbery is defined as the

> unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property . . . or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property;

(b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

NRS 200.380(1).

The text of the respective statutes is not ambiguous and states clearly that each statute is intended to punish different behavior. Assault criminalizes placing a person in apprehension of imminent bodily harm. See NRS 200.471. In contrast, robbery criminalizes taking property from a person or in his presence. See NRS 200.380. Thus, robbery is a crime relating to theft, whereas assault is a crime relating to fear. The statutory language of NRS 200.471 and NRS 200.380 clearly demonstrates that the Legislature intended to separately punish both assault and robbery when they occur during a single course of criminal conduct. Because the language of each statute criminalizes different behavior, it follows that multiple criminal violations were contemplated.

The inquiry as to redundancy does not end there. This court also looks at legislative intent when considering whether two convictions are redundant. The legislative history indicates that Nevada's assault statute, NRS 200.471, was amended to close a legal loophole where offenders were able to escape prosecution for pointing weapons at individuals. Hearing on A.B. 344 Before the Senate Judiciary Comm., 71st Leg. (Nev., May 3, 2001). Before NRS 200.471 was amended, such conduct was not a felony. The goal of the amendment was to stop patterns of violent behavior. See id. Therefore, the legislative intent of NRS 200.471 was to criminalize pointing a weapon at an individual—the amendment had nothing to do with punishing those who commit robbery. The clear import of this statutory amendment is to punish a crime of fear and not the unlawful taking of personal property.

Accordingly, the multiple convictions for assault with the use of a deadly weapon and robbery with the use of a deadly weapon are not redundant. Therefore, we conclude that the district court did not err when it sentenced Simpson for both crimes.

Sufficiency of evidence

Simpson argues that there was insufficient evidence adduced at trial to sustain his kidnapping convictions. He asserts that the kidnapping convictions cannot stand because any movement of the victims was incidental to the crime of robbery.

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 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)). ""[I]t is the jury's function . . . to assess the weight of the evidence and . . . credibility of witnesses."" Id. at 202-03, 163 P.3d at 414 (alteration in original) (quoting Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992))).

In Nevada, a person is guilty of first-degree kidnapping if he "willfully seizes, confines, inveigles, entices, decoys . . . or carries away a person by any means whatsoever with the intent to hold or detain . . . or for the purpose of committing . . . robbery." NRS 200.310(1). In Mendoza v. State, this court clarified its jurisprudence on dual convictions for kidnapping and robbery, holding that

> to sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand

> alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

The evidence at trial showed that the coconspirators, particularly Simpson and Riccio, devised a plan to lure the victims, Beardsley and Fromong, to room 1203 of the Palace Station Hotel—an end room in a remote part of the hotel grounds. If it had not been for Simpson's plan to get both Beardsley and Fromong to room 1203 under the false pretense of orchestrating a memorabilia sale, neither victim would have been in that room on the evening of September 13, 2007. Also, by all accounts, room 1203 was a very small hotel room. When Simpson, Clarence Stewart, and the rest of the men came through the door, McClinton had his gun out and both victims were directed to stop talking on the phone, get their backs to the wall, and not move. Simpson yelled, "[d]on't let anybody leave this room . . . you stole my stuff"; Stewart pushed Fromong into a corner, forcing Fromong to stumble. Fromong's phone was taken from him and the hotel room's phone was unplugged. In sum, Fromong and Beardsley were lured to a small hotel room in a secluded part of the Palace Station on false pretenses; scared by the surprise entry of six men, one yelling and cursing at them and two armed; moved to corners of the hotel room; possibly pushed; frisked; and held at gunpoint.

We determine that evidence at trial established facts showing an independent purpose for this conduct, including substantially lessening the risk of detection by hotel employees, guests, and law enforcement. See

Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 911 (1996) (explaining that the "confinement and movement of the victim to a secluded, untravelled desert area was not merely incidental to the sexual assault . . . it had the independent purpose and significance of substantially lessening the risk of detection," and thus, a conviction of first-degree kidnapping was warranted), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). Moreover, by bursting into a small room with two gunmen, one with a gun pointing at the occupants and the other with a gun in plain sight, knowing that the two victims were not armed (Riccio had spent at least an hour with each victim and, in a telephone call, had confirmed they were unarmed), created a risk of danger to Fromong and Beardsley that substantially exceeded that necessarily present for the crime of robbery. The testimony was consistent—neither man put up a fight, they both told Simpson he could take his memorabilia, and they both agreed with Simpson that Gilbert, Simpson's former sports agent, had possession of the items in issue at one point. Yet, despite the apologetic nature of the victims, both were moved and restrained because Simpson, by all accounts and evidence, was extremely angry. In fact, once he had entered the room, Simpson was more focused on the victims than the memorabilia. Once the six men entered the room and surprised Fromong and Beardsley, they could have easily just taken the items on the bed and left. But Simpson yelled for his coconspirators not to let anyone out of the room—he intentionally restrained the victims in order to yell at them about betraying him and to get Gilbert's phone number. In fact, Simpson was so enraged that McClinton testified that he had to squeeze Simpson's hand to get his attention that the robbery was over and that they needed to leave.

While there is conflicting testimony as to whether Fromong was pushed, hit, or merely touched by Stewart—and with regard to who frisked whom—"[i]t is not this court's function to reweigh conflicting testimony." Davis v. State, 110 Nev. 1107, 1116, 881 P.2d 657, 663 (1994). Therefore, we conclude that the State presented sufficient testimony to uphold counts two, four, and five as to kidnapping. Moreover, the State presented sufficient evidence to demonstrate that the kidnapping was not incidental, but, rather, stood alone to the robbery pursuant to this court's holding in Mendoza. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Malcolm LaVergne
The Law Offices of Yale L. Galanter, P.A.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk