IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK WELDON BOWMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34925

FILED

NOV 21 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon and first degree kidnapping with the use of a deadly weapon. Appellant Jack Bowman was sentenced to two consecutive terms of seventy-two to one hundred eighty months to be served concurrent to two terms of fifteen years with minimum parole eligibility in five years.

Bowman, testifying on his own behalf, adamantly denied committing the robbery of Gator Lounge. Bowman asserted that he had been at Gator Lounge on the date of the robbery but that he had been assaulted in the parking lot of the bar while outside retrieving cigarettes from his car. Bowman contended that two assailants stole his outer clothing, committed the robbery at Gator Lounge and, thereafter, forced him to drive them to a drop point several blocks from the bar. Bowman contended that he had been pistol whipped by the two men but had no demonstrable physical injuries. Bowman was unable to give a concise description of the alleged assailants or their car. A search of the area by police officers did not reveal any further information.

In contrast, bartender Ceci Rodenhauser identified Bowman as a regular patron who robbed the Gator Lounge while kidnapping and

attempting to sexually assault her. The jury acquitted Bowman of the attempted sexual assault charge.

First, Bowman argues that insufficient evidence was adduced at trial to support his convictions for robbery and kidnapping. Pertaining to the robbery, Bowman contends that: (1) no weapon matching the description of the one used in the robbery was recovered; (2) no criminal proceeds from the robbery were found following a consensual search of Bowman's home; and (3) Rodenhauser's description of Bowman's clothing at the time of the alleged crimes did not match what Bowman was wearing at the time of his arrest at Gator's Lounge. Also, because the jury acquitted Bowman of attempted sexual assault, he argues there can be no kidnapping – only movement incidental to the alleged robbery. As such, Bowman asserts that any movement of Rodenhauser during the robbery was incidental and involved no increase in danger to Rodenhauser. Bowman contends that this argument should not be construed as an admission of guilt on the charge of robbery.

"When the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this court 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[s] beyond a reasonable doubt."'"[1] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness

[1]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

testimony and other trial evidence.[2] Finally, circumstantial evidence alone may sustain a conviction.[3]

Sufficient evidence was adduced at trial, which would lead any rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, to have found the essential elements of robbery beyond a reasonable doubt.[4] In the present case, the jury heard testimony from Rodenhauser and Bowman and found Rodenhauser's story more credible despite some discrepancies regarding Bowman's attire on the morning of the robbery. Furthermore, it is undisputed that currency and coin were taken by force from the Gator Lounge, and it is irrelevant that neither the money nor the weapon used during the commission of the crime were later recovered. A conviction may be sustained on circumstantial evidence alone.[5]

Similarly, sufficient evidence was adduced at trial to lead a rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, to have found the essential elements of kidnapping beyond a reasonable doubt.[6] This court requires "proof of asportation when the kidnapping is incidental to another offense where

---

[2]Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

[3]McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

[4]Hutchins, 110 Nev. at 107-08, 867 P.2d at 1139; see also NRS 200.380 (defining robbery).

[5]McNair, 108 Nev. at 61, 825 P.2d at 576.

[6]Hutchins, 110 Nev. at 107-08, 867 P.2d at 1139; see also NRS 200.310 (defining kidnapping).

restraint of the victim is inherent with the primary offense."[7] However, asportation is not required where the victim is physically restrained.[8] Additionally, "kidnapping is not incidental to the underlying offense if the restraint increased the risk of harm to the victim or had an independent purpose and significance."[9] Careful review of the record indicates that the jury could conclude that Bowman transported Rodenhauser from the bar area into the restroom for the purpose of sexually assaulting her and then changed his mind and decided not to proceed with the assault.

Thus, we conclude that sufficient evidence was adduced at trial to support Bowman's convictions for robbery and kidnapping.

Second, Bowman argues that the jury's verdict was inconsistent where he was acquitted of attempted sexual assault but convicted of robbery and kidnapping with the use of a deadly weapon. Conversely, the State argues that the consistency of a jury's verdict, standing alone, is not an appealable issue. We agree.

Questions of law are reviewed de novo.[10] Whether a defendant may upset a verdict because it is inconsistent with an acquittal has been held to be a question of law.[11]

---

[7]Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 910-11 (1996).

[8]Id. at 893, 921 P.2d at 911 (emphasis in original).

[9]Id. at 893, 921 P.2d at 911; see also Woods v. State, 95 Nev. 29, 31-32, 588 P.2d 1030, 1032 (1979) (citing Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978)).

[10]See Windham v. State, 118 Nev. ___, ___, 43 P.3d 993, 995 (2002); Daniels v. State, 114 Nev. 261, 270, 956 P.2d 111, 117 (1998).

[11]See, e.g., U.S. v. Hart, 963 F.2d 1278, 1280 (9th Cir. 1992). But cf. United States v. Powell, 469 U.S. 57 (1984); U.S. v. Bracy, 67 F.3d 1421

continued on next page . . .

The United States Supreme Court has held that no relief in federal cases is available on appeal based on inconsistent verdicts.[12] In Powell the respondent argued that the jury could not properly have acquitted her of conspiracy to possess cocaine and possession of cocaine,

---

. . . *continued*
(9th Cir. 1995); Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995). These cases addressed the inconsistent verdict issue from the perspective of whether or not substantial evidence was adduced at trial to support the verdict.

[12]See Powell, 469 U.S. at 66-67. The Powell decision refused to apply exceptions to the long-standing rule enunciated in Dunn v. United States, 284 U.S. 390 (1932), which prohibited either the government or a criminal defendant convicted by a jury on one count from attacking conviction on another count on the grounds that the jury's verdict of acquittal was inconsistent with the conviction. The Court concluded that a rule allowing criminal defendants to challenge inconsistent verdicts on the grounds that the verdict in their case was not the product of lenity but of some error that worked against them would be imprudent and unworkable. See Powell, 469 U.S. at 66. The Court concluded that such an individualized assessment for the reason for the inconsistency would be based "on either pure speculation or would require inquiries into the jury's deliberations that courts generally will not undertake." Id. at 66-67. Moreover, the Court concluded that criminal defendants are afforded protection against jury irrationality or error by independent review of the sufficiency of the evidence. Id. at 67. The Court also found that acquittal on a predicate offense does not necessitate a finding of insufficient evidence on a compound felony where it could either be argued that the jury's acquittal was the "correct finding" (i.e., as could be argued by the criminal defendant) or, that the jury's conviction was the "correct finding" (i.e., as could be argued by the government). Id. at 68. The Court stated that, in such a situation, an impasse is reached and the basic assumption that the jury acted rationally and found certain facts in making its finding – coupled with the desire to insulate jury verdicts from review on these grounds – militates against such creating exceptions to the rule enunciated in Dunn. Id. at 68-69.

and still found her guilty of using a telephone to facilitate the offenses.[13] The court rejected the argument, noting, "there is no reason to vacate respondent's conviction merely because the verdicts cannot rationally be reconciled." In Bollinger v. State,[14] applying the rationale of Powell, this court concluded that "respondent was given the benefit of her acquittal on the counts on which she was acquitted, and that it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted."[15] This reasoning also supported this court's conclusion in Brinkman v. State.[16] There, the defendant was convicted of robbery without the use of a deadly weapon, although uncontroverted evidence existed to convict him of armed robbery.[17] This court determined that the jury could have properly concluded as it did to extend a form of clemency.[18]

In the present case, we conclude the consistency of the jury's verdict is not an appealable issue.[19] Jury verdicts are generally insulated from review on these grounds and a criminal defendant is afforded protection against jury irrationality or error by independent review of the

---

[13]Id. at 60, 69.

[14]111 Nev. 1110, 901 P.2d 671 (1995).

[15]Powell, 469 U.S. at 69.

[16]95 Nev. 220, 592 P.2d 163 (1979).

[17]Id. at 223, 592 P.2d at 165.

[18]Id. at 224, 592 P.2d at 165.

[19]Powell, 469 U.S. at 66-67.

sufficiency of the evidence.[20] Moreover, the verdicts are not inconsistent. As noted above, the jury could have found asportation with intent to commit a sexual assault and then that Bowman changed his mind and did nothing further that would constitute an attempted sexual assault.

Having considered Bowman's contentions and found them to be without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Thomas J. Fitzpatrick
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

---

[20]Id. at 68-69.