IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY LEE SANDERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56404

FILED

NOV 18 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, conspiracy to commit kidnapping, conspiracy to commit sexual assault, burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, coercion with the use of a deadly weapon, possession of a credit or debit card without the cardholder's consent, and obtaining or using personal identifying information of another. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Timothy Lee Sanders appeals his conviction, arguing that there was insufficient evidence to support his convictions for sexual assault, conspiracy to commit sexual assault, kidnapping, and the deadly weapon enhancements. Sanders also argues that his conviction for possession of a credit or debit card without the cardholder's consent (credit card offense) cannot stand because it is a lesser-included offense of his robbery conviction. Because we conclude that no error occurred in this case, we affirm the judgment of conviction. The parties are familiar with the facts and we do not recount here them except as necessary for our disposition.

Sufficiency of the evidence

"The standard of review in a criminal case 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.'" 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 adduced at trial demonstrated that two men broke into the victim's apartment, where they bound and blindfolded her. During the incident, the men moved the victim from her living room to her bedroom, where one of the men sexually assaulted her, and then moved her again into her closet. The victim testified that the men repeatedly threatened to shoot her, and she felt like they were poking her at various times with a gun and with a knife. A knife was later found on the floor of the victim's apartment after the police arrived.

Sufficient evidence supports the sexual assault and the conspiracy to commit sexual assault convictions

Sanders argues that the victim's testimony clearly indicated that only one man sexually assaulted her, but Sanders was one of two men who participated in the incident. Thus, he argues, there is not sufficient evidence to support either the sexual assault or the conspiracy to commit sexual assault charges. The State argues that the jury was instructed on three theories of sexual assault—direct commission, aiding and abetting, and/or conspiracy—and that sufficient evidence supports a conviction under an aiding and abetting theory.

This court faced a similar issue regarding a sexual assault conviction in Ducksworth v. State, 113 Nev. 780, 942 P.2d 157 (1997). In that case, the evidence presented at trial demonstrated that the defendant knew that the victim was being sexually assaulted, but the defendant

repeatedly claimed that he was not the one who did the assaulting. Id. at 792-93, 942 P.2d at 165-66. This court concluded that the defendant's admission that he was present during the assault and some physical evidence associating him with the crime was sufficient evidence to support the conviction. Id. at 793, 942 P.2d at 165-66. "Furthermore, the jury was instructed on the law regarding aiding and abetting a crime and could have concluded that [the defendant] had aided and abetted in the commission of the sexual assault." Id. at 793, 942 P.2d at 166. This court has defined a person who "aids and abets the commission of a crime" as someone who "aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed." Bolden v. State, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005), receded from on other grounds by Cortinas v. State, 124 Nev. 1013, 1016, 195 P.3d 315, 317 (2008).

Similar to Ducksworth, sufficient evidence supports Sanders's conviction for sexual assault. The record demonstrates that both men moved the victim from her living room to the bedroom where she was sexually assaulted, both men were present during the sexual assault, the man assaulting the victim said "[w]e don't care," when she begged to be left alone, and there was surveillance video of both men together at the time they used the cell phone they stole from the victim during the incident.

These same facts also provide sufficient evidence for the conspiracy to commit sexual assault charge. A conspiracy is when two or more parties make an agreement with an unlawful purpose. Nunnery v. Dist. Ct., 124 Nev. 477, 480, 186 P.3d 886, 888 (2008). "[C]onspiracy is usually established by inference from the conduct of the parties." Rowland

v. State, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002). Even if Sanders was not the man that directly committed the sexual assault, there was sufficient evidence to support his conviction of conspiracy to commit sexual assault because the man who did not directly sexually assault the victim assisted in moving her from her living room to her bedroom and did nothing to stop the assault as it was occurring. Therefore, we conclude that a rational jury could have found the essential elements of the crimes beyond a reasonable doubt.

Sufficient evidence supports the kidnapping conviction

Sanders argues that there was insufficient evidence to support the kidnapping charge because the act of moving the victim was merely incidental to the crimes of sexual assault and robbery. Sanders implies that moving a victim during a robbery would always be incidental to the robbery because the assailant wants to avoid detection. Finally, Sanders argues generally that juries are confused by the instructions on the elements to be satisfied for the crime of kidnapping incident to robbery. The State argues that because the men could have sexually assaulted the victim in the living room, moving her increased her risk of harm. We agree.

> Kidnapping occurs when
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> > [a] person . . . 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, or . . . holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person . . . .
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> NRS 200.310(1).

Both parties argue the application of Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006). Sanders argues that Mendoza confuses the correct application of NRS 200.310 such that, in this case, Sanders has been prejudiced by its application. Sanders asserts that Mendoza should be overturned. The State contends that Mendoza clarified the application of NRS 200.310 and properly governs this matter. In Mendoza, this court held 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.

Id. at 275, 130 P.3d at 181. The Mendoza court suggested a jury instruction for use in situations where kidnapping is charged with an associated offense, which is the instruction the district court gave to the jury in the instant case.[1] Id. at 275-76, 130 P.3d at 181. The court upheld Mendoza's dual convictions for robbery and kidnapping because Mendoza had seized the victim and pulled him inside the house before robbing him. Id. at 270, 275, 130 P.3d at 178, 181.

In Pascua v. State, 122 Nev. 1001, 1004, 145 P.3d 1031, 1032-33 (2006), the defendant moved the victim from the kitchen to the bedroom while attempting to rob the victim. This court upheld the

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[1]The only difference in the instruction given to the jury in this case is that it referred to sexual assault as well as robbery as the associated offenses.

defendant's dual robbery and kidnapping convictions, after applying the standard in Mendoza, because "[t]he movement of [the victim] from the kitchen to his bed could have been determined by the jury to have had independent significance apart from the underlying robbery." Id. at 1005, 145 P.3d at 1033. The court also noted that the jury was correctly instructed on dual convictions. Id.

Here, Sanders and his coconspirator broke into the victim's apartment, bound and blindfolded her, robbed her, and then moved the victim from the living room to her bedroom, where she was sexually assaulted. We conclude that a rational jury could have found beyond a reasonable doubt that moving the victim "create[d] a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve[d] movement, seizure or restraint substantially in excess of that necessary to [complete the associated crime]." Mendoza, 122 Nev. at 275, 130 P.3d at 181. Additionally, a rational jury could have also found beyond a reasonable doubt that Sanders could have committed the robbery or the sexual assault without moving the victim, and he likely could have completed the crimes without restraining her because one of the men threatened her immediately and repeatedly upon entering her apartment. Therefore, we conclude that sufficient evidence supports Sanders's dual conviction of robbery and kidnapping.

Sufficient evidence supports the deadly weapon enhancements

Sanders argues that because the victim never actually saw a gun or a knife, there was not sufficient evidence to support the jury's conclusion that a deadly weapon was used during the commission of the charged crimes. The State argues that there was sufficient evidence in the form of the victim's testimony that the object she felt on floor in her living room felt like a gun, and that one of the men kept telling her that he was

going to shoot her. In addition, the State argues that the deadly weapon enhancements could also be based on a knife that was found on the floor of the victim's apartment after the incident. The jury "'determine[s] what weight and credibility to give various testimony.'" Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (quoting Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994)).

The victim testified at trial that she awoke to what felt like a .9 millimeter gun in her back;[2] she was repeatedly told by the two men that they would shoot her; she felt a knife poking her in her ribs; while lying on her living room floor, she felt an object on the floor next to her that she believed was shaped like a gun; and there was a knife on the floor after the incident that was not on the floor before the incident. Although this evidence is mostly circumstantial, "[c]ircumstantial evidence alone can certainly sustain a criminal conviction." Buchanan, 119 Nev. at 217, 69 P.3d at 705. Further, it is for the jury to decide the weight of the evidence of the credibility of the witnesses. See id.

Based on the evidence in the record, and viewing that evidence in the light most favorable to the prosecution, we conclude that there is sufficient evidence from which a rational jury could find Sanders guilty beyond a reasonable doubt of using a deadly weapon during the commission of the charged crimes.

The credit card offense is not a lesser-included offense of robbery

Sanders's final argument is that his conviction of the credit card offense cannot stand because it is a lesser-included offense of his

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[2]The victim became familiar with weapons through her job with the military.

robbery conviction. The State argues that because, under the test enunciated in Blockburger v. United States, 284 U.S. 299, 304 (1932), a person could commit robbery without committing the credit card offense, the latter crime is a not a lesser-included offense of the former crime. We agree.

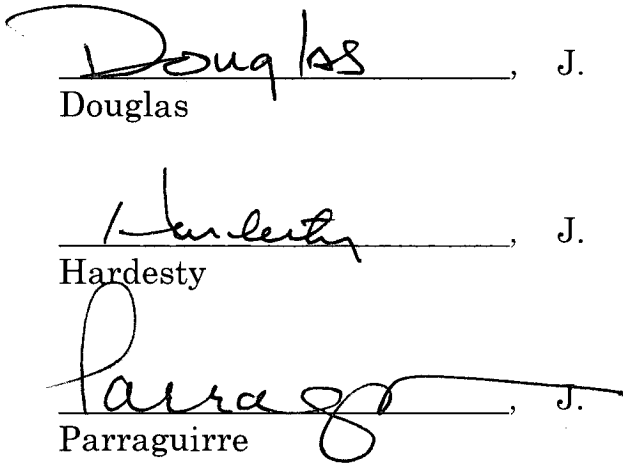
This court has stated that "[u]nder Blockburger, it is impermissible for a defendant to suffer conviction for both greater- and lesser-included offenses. To determine the existence of a lesser-included offense, this court looks to 'whether the offense in question cannot be committed without committing the lesser offense.'" Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) (quoting McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) (internal footnote omitted).

"Robbery is 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 . . . ." NRS 200.380(1). The statute governing credit card and debit card offenses provides, in pertinent part, that "[a] person who steals, takes or removes a credit card or debit card from the person, possession, custody or control of another without the cardholder's consent . . . with the intent to circulate, use or sell it . . . is guilty of a . . . felony . . . ." NRS 205.690(1). Under Estes, the pertinent question becomes whether a person could commit robbery without committing the credit card offense. Because a person could be convicted of robbery without a finding of the requisite intent for the credit card offense—that the crime be committed "with the intent to circulate, use or sell" the stolen credit card—the credit card offense is not a lesser-included offense of

robbery. Therefore, we conclude that Sanders's argument is without merit.

Having considered Sanders's claims and concluded they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Stefany Miley, District Judge
Sandra L. Stewart
Attorney General/Carson City
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Eighth District Court Clerk