IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN LIMA-MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56488

FILED

APR 07 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal pursuant to NRAP 4(c) from a judgment of conviction of conspiracy to commit robbery, conspiracy to commit burglary, conspiracy to commit first-degree kidnapping, attempted robbery with the use of a deadly weapon, burglary while in possession of a firearm, and first-degree kidnapping with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge. Appellant Marvin Lima-Martinez raises three issues.

First, Lima-Martinez challenges his dual convictions for kidnapping and robbery and argues that the kidnapping conviction should be reversed because it was incidental to the attempted robbery. We agree. Dual convictions for robbery and kidnapping arising from the same course of conduct will not be sustained unless the restraint or movement of the victim "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). Here, neither the movement of the victim nor her short detention in the bedroom had independent significance, increased her risk of harm, or exceeded that required to attempt the robbery. We further conclude that there is insufficient evidence supporting the existence of an agreement to commit first-degree kidnapping and therefore the associated conspiracy charge must also be reversed.

Second, Lima-Martinez claims that the jury instruction on vicarious coconspirator liability lessened the State's burden of proof in violation of Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005). We agree; however, Lima-Martinez has not demonstrated that any relief is warranted because the State presented strong evidence that he directly participated in the burglary and was armed with a firearm. See Green, 119 Nev. at 545, 80 P.3d at 95 (in plain error review, the defendant has the burden to show actual prejudice or a miscarriage of justice).

Third, Lima-Martinez claims that the district court erred in denying his objection pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), which alleged that the State used two of its eight peremptory challenges in a discriminatory manner. The State offered the following explanations for striking the two allegedly-minority panel members:[1] (1) juror Rayford because he had been charged with attempted robbery, convicted of misdemeanor larceny, and his wife worked in the district attorney's office,

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[1]The parties and the trial court accepted that Rayford appeared to be African-American, but Johnson's race or ethnicity was not agreed upon. However, because the State did not wait for the district court to rule on Lima-Martinez's prima facie case of discrimination before offering a race-neutral explanation for each peremptory challenge, the issue is moot. See Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

and (2) juror Johnson because he was unemployed, had an unclear source of income, and seemed disinterested. Lima-Martinez asserts that the State's proffered explanations are pretextual, arguing that none of these reasons impair the potential jurors' ability to be fair and impartial. "[H]owever, an explanation for the removal of a juror need not amount to a challenge for cause" in order to be race neutral. People v. Harris, 647 N.E.2d 893, 899 (Ill. 1994); cf. Miller-El v. Dretke, 545 U.S. 231, 252, 255 (2005) (holding that race-neutral explanation was pretextual where the prosecutor did not dismiss similarly situated non-minority jurors and posed different questions to minority jurors to elicit disqualifying responses). We therefore conclude that, because "discriminatory intent is not inherent in the State's explanation[s]," and those explanations are "not implausible or fantastic," the district court did not clearly err in rejecting Lima-Martinez's Batson challenge. Ford v. State, 122 Nev. 398, 403, 404, 132 P.3d 574, 578 (2006).

Having considered Lima-Martinez's contentions and concluded that relief is warranted only on the kidnapping and conspiracy to commit kidnapping convictions, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the kidnapping and conspiracy to commit kidnapping convictions and enter a corrected judgment of conviction.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Joel M. Mann, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk