

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE DMETRE LARK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**FILED**

No. 35171

FEB 12 2002

BY *J. M. Elcom*  
JANETTE M. ELCOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

HOWARD TYRONE BENJAMIN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 35194

TARZ DEMONE MITCHELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 35204

ORDER OF AFFIRMANCE

These are consolidated appeals from judgments of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, five counts of first degree kidnapping with the use of a deadly weapon, one count of conspiracy to commit robbery, three counts of robbery with the use of a deadly weapon, and one count of resisting a

public officer. On appeal, appellants Tarz Mitchell, Stephanie Lark, and Howard Benjamin make several arguments.<sup>1</sup>

Mitchell's arguments

Mitchell argues the following: (1) the district court's decision to allow admission of the 9-1-1 tape was prejudicial and cumulative; (2) the district court erred in allowing testimony by Latreese Boyd, a Super Pawn employee, about a conversation she had in a phone call she received at the Super Pawn the night before the robbery; (3) the jury verdict convicting him of five counts of first degree kidnapping with use of a deadly weapon was not supported by the evidence; (4) the jury erroneously found that he committed a "taking" pursuant to the definition of robbery; and (5) the district court erred in allowing a victim to testify regarding her subsequent counseling sessions as a result of the robbery. We disagree.

We conclude that the district court did not err in admitting the 9-1-1 tape because the tape was not cumulative as it depicted the robbery as it occurred and was relevant to rebut Mitchell's argument that the kidnapping was incidental to the robbery.<sup>2</sup> Additionally, at trial, Boyd testified that the unidentified person asked her "[h]ow many people were in the store?" This question does not assert or allege any facts because it was merely an inquiry about the number of people in the store. Thus, we

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<sup>1</sup>Appellants were each tried and convicted of identical charges in a single trial and raised overlapping issues on appeal. This court determined that consolidation of these appeals will assist in their disposition. NRAP 3(b).

<sup>2</sup>People v. Buie, 86 N.Y.2d 501, 513 (1995); People v. Siler, 429 N.W.2d 865, 869 (Mich. App. 1988).

conclude that Boyd's testimony about the question was properly admitted because it was not an assertion of fact and therefore not hearsay.<sup>3</sup>

Furthermore, we conclude that the kidnapping was not incidental to the robbery because the restraint of the victims increased the risk of harm.<sup>4</sup> At trial, evidence was presented that after the police arrived, the victims were held hostage. While detained, the victims were forced to move about the store while 120 armed police and SWAT officers surrounded the building with guns pointed at the store. Moreover, while the victims were forced to move around the store, armed officers had virtually no way of distinguishing between the victims and the perpetrators and viewed everyone, including the victims, as a potential threat. Thus, the risk of harm to the victims increased when they were placed in the line of fire and the kidnapping was not incidental to the robbery.<sup>5</sup> Accordingly, there exists sufficient evidence to support the kidnapping conviction because in viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have been convinced of Mitchell's guilt beyond a reasonable doubt.<sup>6</sup>

Finally, after careful consideration, we conclude that Mitchell's remaining arguments concerning the "taking" issue and the

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<sup>3</sup>State v. Rawlings, 402 N.W.2d 406, 409 (Iowa 1987).

<sup>4</sup>Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1140 (1994).

<sup>5</sup>Sheriff v. Medberry, 96 Nev. 202, 606 P.2d 181 (1980).

<sup>6</sup>Chappell v. State, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998).

victim's testimony about counseling sessions lack merit. Hence, we conclude that Mitchell's convictions should not be reversed.

Lark's arguments

Lark argues the following: (1) the evidence is insufficient to sustain her convictions; (2) severance was necessary to prevent substantial unfair prejudice; and (3) the jury instructions on kidnapping were misleading and erroneous. We disagree.

At trial, evidence showed that at the time of the robbery, Lark and Mitchell had a relationship and they had a child together. Additionally, Mitchell and Benjamin gained access to the pawnshop when a Super Pawn employee was opening the door for Lark. The evidence further showed that Lark was with Mitchell the night before the robbery. That same night, Lark told a co-worker that she would quit working for Super Pawn and that she would get them good before she left. Moreover, during a police investigation, Lark admitted that she had brought into the store the duffle bag and the wigs used in the robbery. During the robbery, Lark appeared to direct Mitchell and Benjamin around the store and she gave them the keys to the safes. Lark calmly answered phones and did not attempt to call the police. After she left the store, Lark refused to provide the police with information about the situation inside the store. She left the store with thousands of dollars in money and valuables on her person.

In viewing this plethora of evidence in a light most favorable to the prosecution, a rational jury could have found Lark guilty beyond a

reasonable doubt on all charges under an aiding and abetting and/or a conspiracy theory.<sup>7</sup>

Further, we find that the district court properly denied Lark's request for severance since the evidence against her was not disproportionate to her co-defendants and thus she was not prejudiced.<sup>8</sup> Finally, after careful consideration, we conclude that Lark's argument that the jury instructions on kidnapping were misleading and erroneous is without merit.<sup>9</sup> Hence, we conclude that Lark's convictions should not be reversed.

#### Benjamin's arguments

Benjamin argues the following: (1) his constitutional rights were violated by the presence of a biased juror on the panel that convicted him; and (2) his kidnapping convictions must merge, as a matter of law, with the underlying robbery conviction. We disagree.

This court has held that not every instance of contact between a juror and a witness warrants a new trial.<sup>10</sup> It follows that a "new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted."<sup>11</sup> Lastly, the trial court determines whether the

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<sup>7</sup>Id.

<sup>8</sup>Amen v. State, 106 Nev. 749, 755, 801 P.2d 1354, 1358 (1990).

<sup>9</sup>This issue was not preserved for appeal as Lark failed to object at trial to the alleged error in the instruction. Nonetheless, Lark is essentially proffering the same arguments advanced by Mitchell regarding the sufficiency of the evidence as to the kidnapping charge. Hence, Lark's argument similarly lacks merit.

<sup>10</sup>Roever v. State, 111 Nev. 1052, 1055, 901 P.2d 145, 147 (1995).

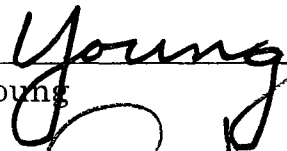
<sup>11</sup>Id.


defendant has been prejudiced, and that determination will not be overturned absent a manifest abuse of discretion.<sup>12</sup>

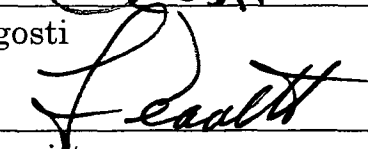
In reviewing the record, we find that juror Wallace would have been biased only if Smith, Wallace's friend, testified. However, the district court cured any potential bias by having the parties stipulate to the authenticity of the 9-1-1 tape and thus making it unnecessary for Smith to testify. Finally, we find that Smith's testimony was not crucial to the proceedings as she was to testify as a custodian of records and not as a percipient witness. Hence, in light of the circumstances, we conclude that Benjamin was not prejudiced and his convictions should not be reversed.<sup>13</sup>

Accordingly, after carefully considering all arguments advanced by Mitchell, Lark, and Benjamin, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

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<sup>12</sup>Id.

<sup>13</sup>Benjamin also argues that his kidnapping convictions must merge, as a matter of law, with the underlying robbery conviction. Although framed differently, Benjamin's argument regarding the kidnapping convictions is essentially a sufficiency of the evidence argument. Hence, similar to Mitchell's and Lark's, we conclude that Benjamin's argument lacks merit.

cc: Hon. Joseph T. Bonaventure, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Public Defender  
Amesbury & Schutt  
Patti & Sgro  
Clark County Clerk