IN THE SUPREME COURT OF THE STATE OF NEVADA

DEVELLE RURAL MERRITTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58910

FILED

NOV 14 2012

TRACIE K. LINDEMAN
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ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, robbery with the use of a deadly weapon, robbery with the use of a deadly weapon of a victim 60 years of age or older, first-degree kidnapping with the use of a deadly weapon of a victim 60 years of age or older, coercion with the use of a deadly weapon, possession of a credit card or debit card without the cardholder's consent, grand larceny, two counts of burglary while in possession of a deadly weapon, two counts of conspiracy to commit robbery, and three counts of assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

First, appellant Develle Rural Merritte contends that there was insufficient evidence to support his convictions for attempted murder with the use of a deadly weapon, burglary while in possession of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon of a victim 60 years of age or older, first-degree kidnapping with the use of a deadly weapon of a victim 60 years of age or older and three counts of assault with a deadly weapon. Specifically, Merritte argues that there was insufficient evidence to place him at the scene of the first

robbery, no evidence of specific intent to kill the victim of the second robbery, and no evidence that he aided and abetted or conspired with his codefendant, the driver, to assault an officer with a vehicle. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crimes beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, the jury heard testimony that a GPS device was placed on Merritte's codefendant's vehicle which tracked the vehicle's movements in 15-second intervals throughout the duration of the charged crimes. According to the GPS surveillance, the codefendant's vehicle was located at the Capistrano Pines Apartments from 11:46 a.m. until 1:25 p.m. It then stopped in a Wells Fargo parking lot from 1:53 p.m. until 2:00 p.m. At 2:04 p.m. a detective physically observed Merritte's codefendant and an unidentified male wearing a white tank top and tan shorts exit the vehicle at a nearby gas station. Between 6:04 p.m. and 6:27 p.m. the vehicle was located near the Sartini Plaza Apartments. Shortly after the vehicle exited the vicinity of the Sartini Plaza Apartments a call came into dispatch that there had been a shooting at those apartments. During a high speed police pursuit, the vehicle slowed down in a residential neighborhood and Merritte exited the vehicle wearing a white tank top and carrying a number of items. Merritte was later apprehended with a handgun, air pistol, and different forms of identification belonging to a man who was robbed earlier that day at the Capistrano Pines Apartments.

A 64-year-old resident of the Capistrano Pines Apartments testified that sometime between 10:00 a.m. and 12:15 p.m. he heard a knock on the door to his apartment. When he opened the door he saw two

men. The man closest to the door, later identified as Merritte's codefendant, brandished a handgun and ordered him back into the apartment. The two men placed a shirt over his head and tied him to a chair before taking his wallet, ATM card, pin number, and other items from his apartment. Later that day an unauthorized transaction was made on the victim's Wells Fargo account using his stolen ATM card and pin number. The victim made an in court identification of Merritte and his codefendant at trial but admitted that he was unable to identify Merritte from a photo-lineup several days after the robbery.

A second victim residing at the Sartini Plaza Apartments testified that Merritte and the codefendant robbed him at gunpoint and told him not to move or they would shoot him. When the victim got up from his chair and told the defendants to leave, Merritte shot him in the chest. A ballistics test confirmed that the handgun found next to Merritte in the residential neighborhood was the gun used to shoot the second victim.

A detective who was in an unmarked SUV during the high speed chase testified that Merritte's codefendant tried to ram him with his vehicle three separate times. No evidence was presented that Merritte, the passenger, agreed, aided, or encouraged the codefendant to ram the SUV.

We conclude that a rational juror could infer from these circumstances that Merritte was present at the Capistrano Pines Apartments and that he conspired to rob the first victim and committed burglary while in possession of a deadly weapon, robbery with the use of a deadly weapon of a victim 60 years of age or older, first-degree kidnapping with the use of a deadly weapon of a victim 60 years of age or older, and

that he attempted to murder the second victim at the Sartini Plaza Apartments. See NRS 193.165(6), 193.167(1), 193.330(1), 195.020, 199.480(1), 200.010, 200.310(1), 200.380(1), and 205.060(1), (4). The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the convictions. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction."); McNair, 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

However, we cannot conclude that a rational juror could have found the essential elements of assault as charged in counts six, seven, and eight of the superceding indictment beyond a reasonable doubt. The State alleged three alternative theories of criminal liability: (1) Merritte directly tried to ram the SUV with the vehicle, (2) Merritte aided and abetted the driver, or (3) Merritte conspired with the driver to commit the assaults.[1] In order to sustain a conviction for the assaults, there must be evidence that Merritte, the passenger, agreed with the driver to commit

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[1]We note that the superceding indictment did not allege that Merritte was vicariously responsible for the acts of his codefendant done in aid of the conspiracy to commit robbery. See Superceding Indictment at 4-5 (explaining that counts six, seven, and eight were "pursuant to a conspiracy to commit this crime" (emphasis added)). Even if the State had alleged vicarious liability pursuant to the conspiracy to commit robbery, "a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy." Bolden v. State, 121 Nev. 908, 922, 124 P.3d 191, 200 (2005), overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008).

the assaults, see Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (summarizing this court's case law on conspiracy), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), or aided, abetted, encouraged, or induced the driver into trying to ram the SUV, see NRS 195.020, with the specific intent to use physical force against the officer or place the officer in apprehension of immediate bodily harm, see NRS 200.471(1)(a); Sharma, 118 Nev. at 655, 56 P.3d at 872; Bolden, 121 Nev. at 922, 124 P.3d at 200-01. The State presented no evidence to support these elements of the crimes. See Labastida v. State, 115 Nev. 298, 304, 986 P.2d 443, 447 (1999) (mere presence, without more, is insufficient to support conviction as aider and abettor); Skinner v. Sheriff, 93 Nev. 340, 341, 566 P.2d 80, 81 (1977) (mere presence at the scene of a crime is insufficient to establish guilt). Therefore, we reverse Merritte's convictions for assault with the use of a deadly weapon.

Second, Merritte contends that the district court erred by granting the State's motion in limine to admit evidence of live and GPS surveillance of Merritte and his codefendant because it was inadmissible prior bad act evidence, see NRS 48.045(2), that was substantially more prejudicial than probative, see NRS 48.035(1), and cumulative, see NRS 48.035(2).[2] We disagree.

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[2]We note that Merritte's reply brief references the Supreme Court's recent opinion in United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012), and asserts in a footnote that the GPS surveillance in this case was conducted without a warrant. Nevada appellate rules, however, do not permit an appellant to raise new issues for the first time in a reply brief, NRAP 28(c); Talancon v. State, 102 Nev. 294, 302 n.4, 721 P.2d 764, 769 n.4 (1986), and Merritte did not file a motion to supplement his appellate brief, see NRAP 27; see also Daniels v. State, 100 Nev. 579, 581 n.2, 688 P.2d 315, 316 n.2 (1984), abrogated on other grounds by Varwig v. State,

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"Trial courts have considerable discretion in determining the relevance and admissibility of evidence. An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion." Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) (quotation marks omitted). Even if the surveillance of Merritte's codefendant's car was evidence of Merritte's "other crimes, wrongs or acts," it was admissible to prove opportunity, intent, preparation, plan, and identity. NRS 48.045(1)(c). The district court guarded against possible unfair prejudice by limiting evidence of the surveillance to the duration of the charged crimes and we conclude that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Finally, although extensive evidence of the surveillance was presented at trial, we conclude that it was not needlessly cumulative. See Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59, 63 (1988) ("State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime."). Merritte was charged with fifteen different crimes in four different locations and each police officer involved with the surveillance testified to a different part of Merritte's eight-hour crime spree. Therefore, we conclude that the district court did not abuse its discretion.

Third, Merritte contends that there was an improper spillover effect which irreparably prejudiced him when the State impeached his codefendant with evidence of other robberies that his codefendant committed. Specifically, Merritte contends that the district court allowed

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104 Nev. 40, 42, 752 P.2d 760, 761 (1988). Therefore, we decline to address this issue on appeal.

evidence to be presented which indicated that his codefendant committed the other robberies with an accomplice matching Merritte's description. Merritte argues that (1) this evidence was uncharged bad act evidence which required a mistrial, (2) the district court erred by denying his motion to sever after the evidence was presented, and (3) he was denied due process and equal protection because he was unable to prepare and defend himself against the impeachment evidence implicating him in the other robberies.

Our review of the evidence reveals that there was no testimony during rebuttal indicating that Merritte's codefendant had an accomplice when he committed the other robberies. Merritte contends that a photo of a man resembling him was introduced into evidence during rebuttal. However, Merritte has not provided us with this photo and we give deference to the district court's conclusion that it did not look like Merritte and was not unduly suggestive. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Furthermore, the jury was admonished four times that the impeachment evidence should only be considered for the limited purpose of assessing Merritte's codefendant's veracity and should not be considered as to any other party. Accordingly, we conclude that (1) there was no evidence of Merritte's uncharged bad acts, (2) the district court did not err by denying his motion to sever, see Rowland v. State, 118 Nev. 31, 45-46, 39 P.3d 114, 123 (2002), and (3) he was not denied due process or equal protection.

Fourth, Merritte contends that his convictions for attempted murder with the use of a deadly weapon and battery with the use of a deadly weapon resulting in substantial bodily harm violate the Double

Jeopardy Clause and are redundant because they punish the same illegal act. See Wilson v. State, 121 Nev. 345, 358–59, 114 P.3d 285, 294–95 (2005). Because the intent to kill is a necessary element of attempted murder but is not an element of battery with the use of a deadly weapon resulting in substantial bodily harm and the use of force or violence is a necessary element of battery with the use of a deadly weapon resulting in substantial bodily harm but is not an element of attempted murder, "[t]he two offenses are distinct for double jeopardy purposes." Colley v. Sumner, 784 F.2d 984, 989 (9th Cir. 1986). Both offenses are also not redundant because the gravamen of the charged offenses is different. See Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751-52 (2003); State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000). Merritte would have been guilty of attempted murder whether or not the bullet ever struck the second victim because this offense punishes an individual for forming the specific intent to kill a human being and acting on that intent. NRS 193.330(1); NRS 200.010(1). The offense of battery punishes an individual for using actual force or violence. NRS 200.481(1)(a). For these reasons we conclude that Merritte's convictions do not violate the Double Jeopardy Clause and are not redundant.

Fifth, Merritte contends that cumulative error warrants reversal. Because there was no error related to counts one to five and ten to sixteen, and thus no error to cumulate, we conclude that no relief is warranted on these counts.

Having considered Merritte's contentions we

ORDER the judgment of conviction REVERSED as to the three counts of assault with the use of a deadly weapon and AFFIRMED

in all other respects and REMAND this matter for the entry of an amended judgment of conviction consistent with this order.

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Parraguirre, J.
Parraguirre

cc: Hon. David B. Barker, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk