IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS STEWART A/K/A LEWIS WILLIAM VELAZQUEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35545

FILED

DEC 18 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to jury verdicts on separate counts of: conspiracy to commit robbery; burglary; first-degree kidnapping of a person over the age of sixty-five with the use of a deadly weapon; battery causing substantial bodily harm of a person over the age of sixty-five; and robbery of a person over the age of sixty-five. The district court sentenced appellant to serve 72 months with parole eligibility after 28 months on count I (conspiracy); 120 months with parole eligibility after 48 months on count II (burglary); consecutive sentences of life with parole eligibility after 60 months on count three (kidnapping); consecutive sentences of 60 months with parole eligibility after 24 months on count IV (battery); and consecutive sentences of 60 months with parole eligibility after 24 months on count V (robbery). The sentences for counts III and V were imposed on a consecutive basis. With the exceptions noted above, the remaining sentences were imposed concurrently.

Stewart contends: (1) the convictions of battery and robbery violate his Fifth Amendment right against double jeopardy; (2) the kidnapping was incidental to the robbery; and (3) the State adduced insufficient evidence to support the jury's implied findings that he inflicted substantial bodily

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harm upon the victim. Each of these contentions will be addressed below.

1. Whether Stewart's battery conviction violates his Fifth Amendment right to not be twice placed in jeopardy.

Stewart contends he was twice placed in jeopardy in violation of the Fifth Amendment of the United States Constitution because, under the facts of this case, the battery was a lesser-included offense of robbery.[1]

The Fifth Amendment provides that a person shall not "be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Thus, the Fifth Amendment protects persons from multiple trials and/or punishment for the same offense. See Missouri v. Hunter, 459 U.S. 359, 365-66 (1983).

The test to determine whether separate offenses have been committed for double jeopardy purposes is set forth in Blockburger v. United States, 284 U.S. 299, 304 (1932). In Blockburger, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not."

In Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966), this court held that the general test to determine whether there is a lesser-included offense is whether the offense in question "cannot be committed without committing the lesser offense." Although this test may be applied directly to the elements of the crime, this court also looks

[1]The State argues that Stewart's claim is not entitled to appellate review because he did not object at his sentencing. There is dispute as to whether this specific argument was made in the pre-trial writ of habeas corpus. Even so, this court may address constitutional error sua sponte. See Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) (citing Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991)).

to the facts of the individual case to determine whether one crime is a lesser-included offense of another crime. See McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) (citing Owens v. State, 100 Nev. 286, 288, 680 P.2d 593, 595 (1984)).

Stewart contends that the facts of the instant case are indistinguishable from Owens, in which this court held that battery was a lesser-included offense of attempted robbery. In that case, the defendant assisted an accomplice in gaining entry to the victim's residence. Owens, 100 Nev. at 287, 680 P.2d at 594. Immediately thereafter, the accomplice pointed his gun at the victim's face and began beating him with it. Id. The victim was able to retrieve his own gun, and shot the accomplice to death. Owens was convicted of burglary, attempted robbery with the use of a deadly weapon upon a victim sixty-five years of age or older, battery with the use of a deadly weapon upon a victim sixty-five years of age or older, and conspiracy to commit robbery. Id. The theory that an attempted robbery had been committed was that Owens and her accomplice were trying to steal money from the victim. Id.

In Owens, the State argued the attempted robbery was complete when the accomplice pointed the gun in the victim's face. Id. at 289, 680 P.2d at 595. According to the State, the battery was a separate act that occurred after the "attempt" to commit robbery. Therefore, the State reasoned, because it was unnecessary to prove the battery to convict Owens of attempted robbery, there was no double jeopardy violation. Id. This court rejected the State's argument, holding under the facts presented that the battery was a lesser-included offense of the attempted robbery. We noted in Owens that the State sought to prove the attempted robbery by

relying on the fact that the victim was beaten during the attempt. Id. at 289, 680 P.2d at 595. The theory was evidenced by references made to the beating by the prosecutor and to the information filed by the State in which the force alleged to effect the attempted robbery was the act of battery alleged in the separate battery charge. Id. We concluded that "it was necessary to prove the battery in order to prove the attempted robbery charge, thereby rendering the battery a lesser included offense of the attempted robbery." Id.

As in Owens, the offenses in the instant case involve a home invasion, for the purpose of theft, of a person over sixty-five years of age. The victim in the instant matter retrieved her own weapon and Stewart's accomplice seized the weapon and administered a severe beating with it to this victim. Here, however, the theory of robbery was that the forceful taking of the victim's weapon constituted a robbery. As in Owens, the defendant in the instant matter was charged via information alleging identical facts in support of the robbery and battery counts, i.e., that the battery was the mechanism by which the victim was forced to disgorge personal property in her possession.[2]

This case, however, is distinct from Owens because the State clearly proceeded under separate factual theories of robbery and battery at trial. Rather than argue that the same conduct constituted the five offenses, the State addressed each charge separately in its closing argument. As noted, the State urged a conviction of robbery based upon the forceful taking of the firearm from the possession of the victim.[3] In

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[2]We note that neither party provided a copy of the information that charged Stewart; however, both agree that the same language was used in each count.

[3]NRS 200.380(1) defines robbery as:

continued on next page . . .

this, the State argued that Stewart was guilty of battery under either of two theories: (1) that he punched the victim after his accomplice took the gun from her; or (2) that a co-conspirator used physical force upon her.[4] Therefore, the State did not need to prove the battery (the beating with the weapon) in order to convict Stewart of robbery.[5] See McIntosh, 113 Nev. at 226, 932 P.2d at 1073; Owens, 100 Nev. at 288, 680 P.2d at 595; Lisby, 82 Nev. at 187, 414 P.2d at 594.

We further conclude that the offenses are separate under an application of Blockburger to the facts of the case because each offense required the proof of a fact that the other did not. See Blockburger, 284 U.S. at 304. The State had to prove that the victim's gun was taken by force to convict Stewart of robbery, and separately had to prove other instances of force to convict him of battery. Therefore, this case does not present a double jeopardy violation.[6]

. . . *continued*

> [T]he unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery.

[4]Battery is defined by NRS 200.481(1)(a) as "any willful and unlawful use of force or violence upon the person of another."

[5]Although the State's closing argument indicates its change in theory, it is not clear on which theory the jury was instructed.

[6]Because we conclude that there are two offenses under Lisby and Blockburger, we do not reach the question of whether the legislature intended separate, consecutive punishments when the battery and robbery are one offense under a double jeopardy analysis.

2. Whether the kidnapping was incidental to the robbery.

A person is guilty of first-degree kidnapping when that person "willfully seizes, [or] confines . . . a person by any means whatsoever with the intent to hold or detain or who holds or detains, the person for . . . the purpose of committing sexual assault, extortion or robbery upon or from the person[.]" NRS 200.310(1).

In determining whether the legislature intended a separate punishment for kidnapping when there was a contemporaneous robbery, this court has noted that

> under a literal reading of NRS 200.310, it is difficult to conceive how any robbery could be accomplished without committing the crime of kidnapping: the "forcible taking" necessary to commit robbery under NRS 200.380 necessarily involves some form of "confinement" under NRS 200.310. The penalty for robbery, however, is significantly less severe than that imposed for kidnapping.

Wright v. State, 94 Nev. 415, 417, 581 P.2d 442, 443-44 (1978). We have held that the legislature did not intend kidnapping as a separate punishment when "the movement of the victim [was] incidental to the robbery and [did] not substantially increase the risk of harm over and above that necessarily present in the crime of robbery[.]" Id. In Wright, this court held that the victims' movement from the lobby to a back office was incidental to the robbery and did not increase their risk of harm. Id.; see also Hampton v. Sheriff, 95 Nev. 213, 591 P.2d 1146 (1979) (holding that the placing of a paraplegic victim into his wheelchair and moving him about for the purpose of coercing him to relinquish more money was incidental to the robbery and did not substantially increase his risk of harm).

We addressed the issue of whether the legislature intended separate punishments for kidnapping and the underlying offense of extortion in Clem v. State, 104 Nev.

351, 760 P.2d 103 (1988), overruled on other grounds by Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990). In Clem, the defendant was convicted of three counts: first-degree kidnapping, based upon his restraint of the victim for the purpose of committing extortion; extortion; and mayhem. Id. In affirming the conviction, this court noted that "[w]hile the plain language of NRS 200.310(1) does not require asportation, the court has required it when the kidnapping is incidental to another offense, such as robbery, where restraint of the victim is inherent in the primary offense." Id. at 354, 760 P.2d at 105 (emphasis added). Stewart argues that because there was no asportation in this case, the kidnapping conviction must be set aside.

Kidnapping is not incidental to the underlying offense if the use of restraints increased the risk of harm to the victim or had an independent purpose and significance. Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1140 (1994). Therefore, if Stewart increased the risk of harm to the victim by restraining her or if there was an independent purpose for the restraints, it is unimportant whether there was asportation. See Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 910-11 (1996) (stating that asportation is not required when the victim is physically restrained).

"'Whether the movement of the victim is incidental to the associated offense and whether the risk of harm is increased thereby are questions of fact to be determined by the trier of fact in all but the clearest of cases.'" Wright v. State, 106 Nev. 647, 649, 799 P.2d 548, 549 (1990) (quoting Curtis v. State, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982)). This court will not disturb a jury's verdict if it is supported by substantial evidence. See Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996) (citing Kazalyn v.

State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992)). The standard of review for substantial evidence is whether enough evidence was presented such that the jury could have found the defendant guilty beyond a reasonable doubt. Id.

Our review of the record reveals that evidence was presented that the defendants beat the victim, an elderly woman, about the head with a gun, rendering her unconscious. Evidence was further presented that they left her unconscious with her hands and ankles bound. We conclude that this is sufficient evidence to support the jury's verdict that the defendant substantially increased the risk of harm to this victim. In addition, Stewart's restraint of the victim had the independent significance of facilitating his escape as the gun was already in the possession of an accomplice. Therefore, we conclude that it is consistent with the legislature's intent to convict and punish Stewart for robbery and kidnapping because the kidnapping was not incidental to the robbery.[7]

3. Whether the State adduced sufficient evidence to support the jury's verdict of guilty on the substantial bodily harm enhancement.

Stewart contends that the State failed to present sufficient evidence to support the jury's verdict that the victim sustained substantial bodily harm.

NRS 200.481 and 200.310 provide enhanced penalties when the crime results in substantial bodily harm to the victim. NRS 0.060 defines substantial bodily harm as: "1.

[7]We note that in addition to the evidence presented, the jury's verdict is also supported by the fact that this court has consistently determined that the use of restraints increases the risk of harm to a victim. See Hutchins, 110 Nev. at 108, 867 P.2d at 1140; Beets v. State, 107 Nev. 957, 962, 821 P.2d 1044, 1048 (1991); Clem, 104 Nev. at 354, 760 P.2d at 105. In Wright, although physical restraints were used, we did not reach the question of whether binding a victim increases the risk of harm for these purposes. 94 Nev. 415, 581 P.2d 442.

Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or 2. Prolonged physical pain."

Whether a victim suffered substantial bodily injury under NRS 0.060 is a question of fact determined by the jury. Gibson v. State, 95 Nev. 99, 100, 590 P.2d 158, 159 (1979). The trier of fact determines the weight and credibility of evidence, and its verdict will not be disturbed on appeal when supported by sufficient evidence. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981). The standard of review for sufficiency of the evidence is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

Stewart contends that the State must present medical evidence to support the sentence enhancement, but fails to cite any authority for the proposition. Indeed, this is not an accurate statement of the law in Nevada. In most cases, a combination of medical and lay testimony is submitted in support of this type of enhancement. See Hardaway v. State, 112 Nev. 1208, 926 P.2d 288 (1996); Childers v. State, 100 Nev. 280, 680 P.2d 598 (1984); Gibson, 95 Nev. 99, 590 P.2d 158.

Several parties testified below that the victim was severely bruised and that her eye was swollen shut. The victim testified that she was knocked unconscious from the beating. The victim also testified that she currently suffers from the knots on her head, has residual vision problems including a blind spot, experiences residual crepitus in her jaw and pain in her elbow, and suffers from tinnitus of the right ear.

The victim's attending physician also testified regarding the victim's condition after the attack. Although no fractures were detected, a CAT scan revealed a subdural hematoma. He also testified that pain is subjective and different for each individual. He also made the following statement: "[K]nowing that she had the bleed in her brain and knowing that there was tremendous pressure to cause that pain, . . . one can assume that there is a bruising of the bone. And at times, bruised bone pain causes pain that lasts as long as a broken bone."

It is the prerogative of the trier of fact to weigh the credibility of evidence. Sufficient evidence was submitted to the jury below supporting a finding, beyond a reasonable doubt, that the victim suffered "protracted impairment" of her eyes, jaw, and elbow, and "prolonged pain" as required by NRS 0.060.[8]

Having reviewed all of the contentions raised in this appeal, we hereby affirm the judgment of the district court.

It is so ORDERED.

Young, J.

Rose, J.

Becker, J.

[8]We note that although Gibson is an example of a case where sufficient evidence was presented to establish substantial bodily harm, it by no means establishes a standard. In Gibson, this court applied the sufficient evidence test in affirming the judgment of conviction. Gibson, 95 Nev. at 100, 590 P.2d at 159.

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
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Clark County Clerk