IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN MICHAEL BARNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61083

FILED

DEC 18 2013

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon and one count of robbery with the use of a deadly weapon.[1] Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On appeal, Barnett argues that (1) the district court erred by failing to grant his motion to suppress in its entirety, (2) there was insufficient evidence to sustain his robbery conviction, and (3) the district court abused its discretion by giving inaccurate and inconsistent jury instructions. We disagree.[2]

[1]Barnett was also convicted of one count of possessing a controlled substance, but he does not appeal that conviction.

[2]The parties are familiar with the facts and procedural history of this case and we do not recount them further except as is necessary for our disposition.

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Motion to suppress

Barnett moved to suppress his statements made to Detective Curtis Lampert before and after he was Mirandized because he alleges Detective Lampert did not honor his right to remain silent. The district court denied the motion because it found that Detective Lampert "scrupulously honored Barnett's right to remain silent when it was invoked."

It is well established that both custody *and* interrogation must be present in order for a defendant to effectively invoke the Fifth Amendment rights protected by *Miranda v. Arizona,* 384 U.S. 436 (1966). *See McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991) (stating that the Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"). An interrogation invokes *Miranda* protections when it includes "'express questioning [or] any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1022 (2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). An officer's request to search a defendant's home generally does not qualify as an interrogation as contemplated in *Miranda* because a consent to search is typically not testimonial. *See United States v. Knope*, 655 F.3d 647, 654 (7th Cir. 2011); *People v. Brewer*, 96 Cal. Rptr. 2d 786, 798 (Ct. App. 2000).

Here, while at the police station, Detective Lampert initially informed Barnett that he did not have to talk to the police and that he was free to leave. Barnett said that he wanted to leave and did not want to talk. At this point, Barnett was not in custody, so his decision to remain

silent was not yet *Miranda* protected. Detective Lampert left the room, returned a few minutes later, and informed Barnett that he was no longer free to leave. At this point, Barnett was now in custody, such that *Miranda* would have protected him had there been an interrogation. Detective Lampert then left again, returned approximately 20 minutes later, and simply asked Barnett for consent to search his apartment. Barnett gave his consent and Detective Lampert departed. Detective Lampert returned almost two hours later and read Barnett his *Miranda* rights. Thereafter, Barnett voluntarily made a number of incriminating statements.

Barnett's rights were not violated for two reasons: (1) Barnett's initial invocation of his right to remain silent occurred before *Miranda* circumstances even existed, and (2) Detective Lampert's request for consent to search Barnett's apartment did not violate *Miranda*. Detective Lampert properly Mirandized Barnett before he incriminated himself; therefore, the district court did not err when it denied Barnett's motion to suppress.

Sufficiency of the evidence

Barnett next argues that there was insufficient evidence to convict him of robbery because the taking, which occurred after the victim was already dead, was not forceful and he did not intend to permanently deprive the victim of the money. A conviction is supported by sufficient evidence if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." *Brass v. State*, 128 Nev. ___, ___, 291 P.3d 145, 149-50 (2012).

"Robbery is the unlawful taking of personal property from the person . . . against his or her will, by means of force or violence or fear of injury." NRS 200.380(1). Generally, the mere presence of a gun is enough to find a threat of force sufficient to sustain a conviction for robbery. *See, e.g., Dick v. State,* 677 So. 2d 1267, 1269 (Ala. Crim. App. 1996) (holding that "[w]ielding a gun . . . constitutes both the use of force and the threat of force as a matter of law." (internal quotations omitted)). The fact finder may infer the intent to commit a crime "from conduct and circumstantial evidence." *Grant v. State,* 117 Nev. 427, 435, 24 P.3d 761, 766 (2001).

Here, it is undisputed that Barnett wore a visible, holstered gun in the presence of the victim while he instructed the victim to leave his watch and his money on a coffee table and then exit Barnett's apartment. Barnett also testified that after he told the victim to leave the watch and the money on the table, Barnett stood up, removed the gun from the holster, cocked it and held it behind him. Viewing this evidence in favor of the prosecution, we conclude that it was sufficient for the jury to find beyond a reasonable doubt that Barnett was guilty of robbery with use of a deadly weapon.

Jury instructions

Barnett argues that jury instruction no. 24 and no. 26 conflict with each other because instruction no. 24 does not require that the intent to rob the victim be formed prior to death, while instruction no. 26 does. Thus, Barnett claims jury instruction no. 24 inaccurately characterizes robbery as a general intent crime. We disagree.

It is well established in Nevada that robbery is a general intent crime. *See Chappell v. State,* 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998) (holding that NRS 200.380 "does not require that the force or

violence be committed with the specific intent to commit robbery"). Jury instruction no. 24 correctly instructed the jury that "[t]he taking required for robbery may occur after a victim is deceased so long as the force or coercion by the defendant—for whatever purpose—occurred while the victim was alive and the defendant took advantage of the terrifying situation he created to take the victim's property." *See* NRS 200.380(1); *Norman v. Sheriff, Clark Cnty.*, 92 Nev. 695, 697, 558 P.2d 541, 542-43 (1976) (upholding a robbery conviction despite the fact that "the acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose" because the defendants "[took] advantage of the terrifying situation they created" to rob the victim).

Furthermore, under the felony murder rule, a defendant may be convicted of first-degree murder for any killing that occurs during the perpetration of a statutorily enumerated felony. NRS 200.030(1)(b); *Sheriff, Clark Cnty. v. Morris,* 99 Nev. 109, 113, 659 P.2d 852, 856 (1983). However, afterthought robbery cannot form the basis of a felony murder conviction. *Nay v. State,* 123 Nev. 326, 332-33, 167 P.3d 430, 434-35 (2007) (stating that permitting afterthought robbery to form the basis of a felony murder conviction would be inconsistent with the deterrence rationale of the felony murder rule and would impermissibly expand the application of a rule that is meant to be narrowly applied). Here, jury instruction no. 26 correctly instructed the jury that "[a] killing that occurs during the perpetration or attempted perpetration of a robbery is a felony murder . . .; however, afterthought robbery may not serve as a predicate for felony murder," and that "afterthought robbery occurs where the

evidence shows that the defendant killed a person and only later formed the intent to rob that person."

Jury instruction no. 26 simply recognizes that if the defendant did not intend to rob the victim at the time of the killing, then the killing did not occur in the perpetration of robbery so as to support conviction under the felony murder rule. *See* NRS 200.030(1)(b). And jury instruction no. 24 recognizes that while the defendant cannot be convicted of felony murder under these facts, he or she may still be convicted of robbery if the defendant then decides to rob the victim. *See* NRS 200.380(1). Therefore, we conclude that jury instructions nos. 24 and 26 are not inconsistent or inaccurate statements of the law, and thus the district court did not abuse its discretion in giving these instructions.

Lastly, Barnett argues that jury instruction no. 25 was inaccurate because a defendant's good faith belief that he has a claim of right to the property in question negates the intent necessary for robbery. However, Nevada's criminal code does not provide for a good-faith claim-of-right defense to robbery. All that NRS 200.380 requires is the intent to take property by fear or force; a good faith belief that the property at issue is one's own does not nullify the intent to take property from another by force. Accordingly, we conclude that Barnett's argument is without merit.

Having considered Barnett's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Connie J. Steinheimer, District Judge
Benjamin D. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk