IN THE SUPREME COURT OF THE STATE OF NEVADA

HENRY LEE BIAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35982

FILED

OCT 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon and three counts of first degree kidnapping with the use of a deadly weapon. The district court sentenced appellant, Henry Lee Bias, to various prison terms, including two consecutive terms of life in prison.

We conclude that Bias' conviction on three counts of first degree kidnapping cannot stand because the kidnapping was incidental to the robbery and did not increase the risk of harm to the victims. However, we affirm Bias' conviction on the remaining counts.

In the early morning hours of May 7, 1998, Bias attempted unsuccessfully to enter the Stateside Lounge, located at 931 Las Vegas Boulevard North, but was refused entry (the bar security system required that patrons be "buzzed in") by the bartender, Kathleen Presher.

At approximately 6:15 a.m. David White, one of the victims, entered the bar. As White entered, Bias approached him from behind and placed a cold object to the back of his neck and yelled, "Get in there, motherfucker, or I'll blow your head off." Bias then forced White into the bar and onto the floor where he patted White down for money.

Bias next pointed his weapon at Presher and ordered her to come around the bar and lie on the floor next to White. A few moments later, Bias ordered Presher to stand, pushed his weapon into her side, and then ordered her to open the cash register. After Presher opened the drawer, Bias removed all the money in the register.

At this point in time, William Dick, a vending machine vendor, entered the bar. Bias put his gun to the back of Dick's head and ordered him to lie on the floor. Bias then removed money from Dick's pockets.

01-16900

After taking Dick's money, Bias ordered all three individuals into the back office of the bar. Bias continued to threaten his victims and forced all three to enter the office and lie down on the floor. Once in the office, Bias put a gun to the back of White's head and ordered him to get down on the floor. As Bias was leaving, he told the three individuals not to move for ten minutes or he would shoot them.

The individuals immediately called 9-1-1, after which police were dispatched to the scene. After interviewing the victims and Thomas Jones, a bystander, the police went to the Fantasy Arms Apartments to look for Bias. Approximately five to ten minutes after the robbery, the police knocked at Room 235, and Bias let the police enter.

According to the police, Bias was sweating, breathing hard, and acting nervous when they entered the apartment. The police also stated that Bias' attire and physical appearance matched the descriptions given by the victims of the robbery. Tracy Bailey, the apartment lessee, was also present in the apartment.

While inside the apartment, Bailey motioned for Officer Perry to look toward the bottom of a bed. Officer Perry lifted the bed mattress and found a blue bag full of coins and a Marksman B.B. pistol. Both items fit descriptions given by the victims.

The police informed Bailey that she was going to be detained for the investigation of a robbery, at which point she told the police that Bias gave her $100.00 to hide out in her apartment.

The victims were then driven to the apartment where each identified Bias as the robber. The amounts of money that were reported stolen were recovered from Bias' pockets. Back at the bar, officers located a gun barrel that matched the Marksman B.B. gun recovered at the apartment.

DISCUSSION

Bias argues that his movement of the victims was incidental to the robbery, that it did not substantially increase the risk of harm over and above that necessary to commit the robbery, that it was necessary only to facilitate his escape, and therefore his conviction for kidnapping was duplicative and unsupported by the evidence.

Respondent the State of Nevada contends that whether the defendant increased the victims' risk of harm beyond that necessary to commit robbery is a question of fact determined by a jury. Therefore, the

State contends that the verdict should not be overturned unless it is not supported by sufficient evidence. According to the State, sufficient evidence exists to support the jury's verdict. We disagree.

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."[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 kidnap: 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.[2]

This court concluded 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."[3] In Wright, this court held that the victims' movement from the lobby to a back office and the subsequent binding of their hands and feet was incidental to the robbery and did not increase their risk of harm.[4]

This court addressed the issue of whether the legislature intended separate punishments for kidnapping and the underlying offense

---

[1]NRS 200.310(1).

[2]Wright v. State, 94 Nev. 415, 417, 581 P.2d 442, 443-44 (1978).

[3]Id.

[4]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).

of extortion in Clem v. State.[5] 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.[6] 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 with the primary offense."[7] Bias argues that because there was no asportation in this case, the kidnapping conviction must be set aside.

This court clarified the meaning of "incidental to another offense" in Hutchins v. State.[8] There, the court held that kidnapping is not incidental to the underlying offense if the restraint increased the risk of harm to the victim or had an independent purpose and significance.[9] Therefore, if Bias increased the risk of harm to the victims by restraining them or if there was an independent purpose for the restraints, it is unimportant whether there was asportation.[10]

"'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.'"[11] This court will not disturb a jury's verdict if it is supported by substantial evidence.[12] The standard of review for substantial evidence is whether enough evidence was presented such that the jury, acting

---

[5]104 Nev. 351, 760 P.2d 103 (1988), overruled on other grounds by Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990).

[6]Id.

[7]Clem, 104 Nev. at 354, 760 P.2d at 105.

[8]110 Nev. 103, 867 P.2d 1136 (1994).

[9]Id. at 108, 867 P.2d at 1140.

[10]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).

[11]Wright v. State, 106 Nev. 647, 649, 799 P.2d 548, 549 (1990) (quoting Curtis D. v. State, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982)).

[12]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)).

reasonably, could have found the defendant guilty beyond a reasonable doubt.[13]

In the instant case, evidence was presented that Bias robbed his three victims and then simply moved them to the back room to facilitate his escape. Evidence was further presented that although the victims were scared, no additional crimes were committed against them when they were moved to the back room. We conclude that this is insufficient evidence to support the jury's factual finding that Bias substantially increased the risk of harm to the victims. Therefore, we conclude that Bias' conviction for both robbery and kidnapping is inconsistent with the legislature's intent to make each a separate offense, and Bias' conviction on the kidnapping counts cannot stand.

Bias next argues that the district court abused its discretion by allowing Officer Perry to testify regarding statements made by Tracy Bailey, the lessee of the apartment in which Bias was apprehended. Specifically, Bias argues that the statements were hearsay not subject to an exception.

The State argues that Bailey's testimony was properly admitted as an excited utterance, a statement against interest, or under the general exception.

We conclude that Bias' argument lacks merit and the statement was admissible as an excited utterance. In addition, we conclude that error, if any, was harmless.

Rulings on admissibility of evidence are left to the sound discretion of the district court and will not be disturbed on appeal absent a showing of manifest error.[14]

A statement offered in evidence to prove the truth of the matter asserted is hearsay.[15] If hearsay evidence does not fall within a firmly rooted exception, it is inadmissible unless the statement possesses particularized guarantees of trustworthiness.[16]

---

[13]Id.

[14]See Keeney v. State, 109 Nev. 220, 228, 850 P.2d 311, 316 (1993); Kazalyn v. State, 108 Nev. 67, 71-72, 825 P. 2d 578, 581 (1992).

[15]See NRS 51.035.

[16]See Ramirez v. State, 114 Nev. 550, 557, 958 P.2d 724, 729 (1998).

The excited utterance exception to the hearsay rule provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." NRS 51.095. Timing is an essential factor in determining the applicability of the excited utterance exception.[17]

Here, the record indicates that the State laid a proper foundation for the admission of the testimony as an excited utterance made under the stress of the police inquiry at Bailey's apartment. The State specifically inquired as to Bailey's emotional state at the time of the interview at the apartment immediately following the incident which Officer Perry described as "very nervous, scared, didn't say much. She just kind of sat there very rigidly. Didn't move much." We, therefore, conclude that the district court did not err in allowing Officer Perry to testify regarding Bailey's statements to him on the morning of the incident in question.

Bias next argues that the prosecutor committed misconduct by impermissibly raising issues regarding Bias' character. First, Bias argues that the prosecutor improperly cross-examined him regarding his previous conviction for kidnapping. Second, Bias argues that it was improper for the prosecutor to demand that he look the jury in the eye to "tell them that you did not commit a robbery." Third, Bias argues that the prosecutor's statement in closing arguments that Bias was an "ex-con" out to "con" the jury was improper.

The State argues that all the instances of alleged prosecutorial misconduct were proper and that in the event they were improper, the errors were harmless. Specifically, the State argues that they properly raised issues relevant to Bias' character as a method of impeachment and that the other instances of alleged improper conduct were not improper. We agree.

NRS 48.045(2) states the general rule for admitting evidence of prior bad acts:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity

---

[17]See Browne v. State, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997).

> therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, a district court, determining whether such acts are admissible under NRS 48.045(2), must conduct a hearing and determine whether (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[18]

Regarding the relevance of evidence, NRS 48.015 states that "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" is "relevant evidence."

With regard to the use of impeachment testimony as relating to character, NRS 48.045(1), in combination with NRS 48.055, allows for character evidence in the form of reputation or opinion evidence to be admitted only if the defendant puts his or the victim's character in issue.[19] Further, where character evidence is admissible, evidence of specific acts is admissible only upon cross-examination or whenever the defendant's character is an essential element of the charge or defense.[20]

We conclude that evidence of Bias' prior conviction was admissible for the purposes contemplated by NRS 48.045(2) or NRS 48.055. Accordingly, the district court did not abuse its discretion in admitting the evidence. Moreover, given the overwhelming evidence of Bias' guilt, error, if any, was harmless.

The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'"[21] The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness

---

[18]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[19]See Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505-06 (1998).

[20]See id.

[21]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

as to make the result a denial of due process.[22] The defendant must show that, but for the challenged remarks, the prosecutor would not have been able to prove his case beyond a reasonable doubt.[23]

Prosecutors must be free to express their perceptions of the record, evidence, and inferences properly drawn therefrom.[24] A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone.[25] Relevant statements or conduct must be viewed in context to determine whether the prosecutor's conduct affected the fairness of the trial.[26] If the error is harmless beyond a reasonable doubt, the conviction will stand.[27]

With regard to the prosecutor's statement in closing arguments that Bias was an "ex-con" out to "con" the jury, this evidence standing alone did not affect the fairness of the trial.

With regard to the prosecutor's demand that Bias look the jury in the eye and deny committing the crime, while the comment was marginally inappropriate, it was harmless because it did not taint the fairness of the proceeding either.

We conclude that Bias' conviction on the kidnapping charges should be reversed because they were incidental to the robbery. We further conclude that the district court did not abuse its discretion in admitting Bailey's testimony because it was properly admitted under the excited utterance exception. Finally, we conclude that the prosecutor did not improperly raise arguments with respect to Bias' character which

---

[22]See Darden v. Wainwright, 477 U.S. 168, 181 (1986).

[23]See McCraney v. State, 110 Nev. 250, 256, 871 P.2d 922, 926 (1994).

[24]See Jimenez v. State, 106 Nev. 769, 773, 801 P.2d 1366, 1368 (1990).

[25]See United States v. Young, 470 U.S. 1, 11 (1985).

[26]Id.

[27]See Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983).

warrant a reversal of Bias' conviction on the remaining counts. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

_____, J.
Young

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk