

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAFAYETTE D. HOLMES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66755

**FILED**

JUN 30 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT

*[Signature]*  
BY TRACIE K. LINDEMAN  
CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of robbery, conspiracy to commit robbery, and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

The primary issue on this appeal is whether the evidence was sufficient to support the jury verdicts of guilt. Appellant Lafayette Holmes argues the evidence presented at trial was insufficient to support the jury's finding of guilt as to all counts except one count of robbery. The convictions stem from three separate incidents; only two of which are at issue here. The first incident resulted in one robbery conviction; the second incident resulted in convictions for conspiracy to commit robbery, battery with intent to commit a crime, and robbery. Holmes also challenges the amount of restitution the district court awarded the battery victim. On appeal, we review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." See *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

*A. The first robbery conviction*

Holmes argues there was insufficient evidence to support the jury's finding of an essential element of one of the robbery charges. Specifically, Holmes maintains there was insufficient evidence that he used force against someone "in the company" of the victim from whom he took money. NRS 200.380 provides:

Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: (a) obtain or retain possession of the property; (b) prevent or overcome resistance to the taking; or (c) facilitate escape.

The statutory language was amended in 1993 to include force used to facilitate escape. The previous iteration specifically excluded that type of force. Therefore, the legislature expanded the scope of the statute to ensure victims would be protected from any use of force or fear of injury during a continuous sequence of events in the theft of property.

Holmes used force or fear against two people ("Prado" and "Nava"). Both testified they were working at kiosks next to each other at the time Holmes committed the crime. Prado testified that he approached Holmes as Holmes was taking money from Nava's cash register. Prado said, while he was in close proximity to Nava, Holmes shouted at him and punched him in the jaw before fleeing. Based on this evidence, we conclude the jury could find beyond a reasonable doubt that Holmes used force against someone in a victim's company to prevent or overcome

resistance to the taking or to facilitate escape. See NRS 200.380(1)(b), (1)(c).

B. *The conspiracy to commit robbery conviction, the battery with intent to commit a crime conviction and the second robbery conviction*

Holmes also argues the evidence presented at trial was insufficient to support the jury's finding of guilt for conspiracy to commit robbery, battery with intent to commit a crime, and for the second robbery. A conspiracy is "an agreement between two or more persons for an unlawful purpose." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) *overruled on separate grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004). "A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator." *Doyle* at 894, 921 P.2d at 911.

Alleged coconspirator Mournique Johnson testified regarding the second robbery that she told detectives she and Holmes planned the robbery together; but at trial she recanted stating only she planned the robbery. The State then impeached Johnson with her prior statement to police. Further, the victim testified that while Johnson was hitting her, Holmes threatened her with a gun. We conclude the jury could find beyond a reasonable doubt that Holmes conspired with the Johnson to commit robbery. See NRS 199.480; NRS 200.380(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports its verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Next, the State charged Holmes with battery with intent to commit a crime and the robbery counts using three different theories: (1) that Holmes directly committed the crimes; (2) that Holmes was liable as

an accomplice; and (3) that Holmes conspired to commit the robbery. *See* NRS 195.020. In addition to her earlier statement to detectives that she and Holmes planned the attack together, Johnson also testified she intended to take the victim's purse. The victim testified that she saw Holmes and Johnson walking together just before the incident and Holmes threatened her with a gun while Johnson hit her.

Based upon the statements and testimony of Johnson and the victim, we conclude the jury could find beyond a reasonable doubt that Holmes committed battery with intent to commit a crime and robbery under one or more of the State's theories. *See Doyle*, 112 Nev. at 894, 921 P.2d at 911; NRS 195.020; NRS 200.400; NRS 200.380(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports its verdict. *See Bolden*, 97 Nev. at 73, 624 P.2d at 20.

### *C. Restitution challenge*

Holmes also contends the district court erred in determining the amount of restitution to award the battery victim. A sentencing judge has wide discretion when ordering restitution. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). In determining restitution, a district court should rely on reliable and accurate information and its determination will not be disturbed absent an abuse of discretion. *Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999); *Houk*, 103 Nev. at 664, 747 P.2d at 1379. An abuse of discretion occurs when a defendant's sentence is based upon "information or accusations founded on impalpable or highly suspect evidence." *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1006 (1982).

Here, Holmes objected to the \$1,700 restitution awarded to the battery victim. The district court did not conduct a restitution hearing. Our review of the record reveals that the presentence investigation report was the only information provided at sentencing – there was no additional testimony. The victim testified at trial regarding the items taken, however, the only quantification of value was the statement that \$200 was in her purse, and nothing about the value of anything else.

The victim informed the Division of Parole and Probation the total value of items stolen was \$1,700, but did not provide evidence to substantiate her claim, such as an itemized list or receipts. Nevertheless, the Division included a recommendation for restitution in its report pursuant to NRS 176.145(1)(c).

Accuracy is very important in restitution orders. The customary civil court process to determine the amount of a loss is bypassed because the amount set by the criminal court constitutes a judgment and a lien under NRS 176.275. A criminal judgment, unlike a civil judgment, never expires, pursuant to Assembly Bill 114, enacted by the Nevada Legislature in 2015. Moreover, a defendant who is delinquent in payment may be subject to significant sanctions, as described in NRS 176.064.

We conclude there is an insufficient factual basis to award \$1,700 in restitution since it was based solely upon the victim's oral statement to Parole and Probation. See NRS 176.033(1)(c); *Martinez v. State*, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999). Therefore, the district court abused its discretion in ordering \$1,700. We direct the district court to amend the judgment of conviction by replacing \$1,700 with \$200 in the restitution order. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



Gibbons

C.J.



Tao

J.



Silver

J.

cc: Hon. Susan Scann, District Judge  
Monique A. McNeill  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk