IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER DOUGLAS REETER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36143

FILED

NOV 09 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree kidnapping, robbery, burglary, and aggravated stalking. The district court sentenced appellant to three concurrent terms of 60-180 months and one concurrent term of 48-120 months in prison. The court credited appellant with 148 days for time served.

Appellant contends that the district court erred in denying his motion to dismiss the robbery charge on double jeopardy grounds. Appellant argues that he could not have committed the kidnapping without committing the robbery and his conviction for both crimes constitutes an impermissible conviction of a greater offense and a lesser-included offense. We disagree.

The test articulated in Lisby v. State "to determine whether an offense is necessarily included in the offense charged, . . . is whether the offense charged cannot be committed without committing the lesser offense."[1] This test is met "where the elements of the greater offense include all of the elements of the lesser offense."[2] In other words, an offense is a lesser included offense if the greater offense "could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense, e.g., kidnapping involving false

[1]82 Nev. 183, 187, 414 P.2d 592, 594 (1966) (citations omitted); see also Blockburger v. United States, 284 U.S. 299, 304 (1932).

[2]Lisby, 82 Nev. at 188, 414 P.2d at 595.

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imprisonment, sale of narcotics involving possession, felonious assault involving simple assault."[3]

Applying this test to the facts of the present case, we conclude that no double jeopardy violation occurred since the elements of kidnapping do not include all of the elements of robbery. NRS 200.310(2) provides that second-degree kidnapping occurs when a person:

> willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the state, or for the purpose of conveying the person out of the state without authority of law, or in any manner held to service or detained against his will.

NRS 200.380(1) defines robbery as:

> the 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. A taking is by means of force or fear if force or fear is used to:
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> (a) Obtain or retain possession of the property;
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> (b) Prevent or overcome resistance to the taking; or
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> (c) Facilitate escape.

In Lovell v. State,[4] this court concluded that "the crimes of robbery and kidnapping are distinctly different" because the elements necessary to prove each are sufficiently distinct. "Kidnapping requires the seizure of a human being by force together with asportation, not the mere capture of his personal property. Robbery requires seizure of personal property by force, but not the holding or asportation of the victim."[5] As in Lovell, because "[d]ifferent acts are required to complete each of the crimes,"[6] no

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[3]Id.

[4]92 Nev. 128, 131, 546 P.2d 1301, 1303 (1976).

[5]Id. at 131-32, 546 P.2d at 1303.

[6]Id. at 132, 546 P.2d at 1303.

double jeopardy exists. Further, where, as in this case, "the movement of the victim is over and above that required to complete the associated crime charged," both a second-degree kidnapping charge and a robbery charge will lie.[7] This court has also held that conviction for first-degree kidnapping and robbery is proper if "the movement of the victim results in increased danger over and above that present in the crime of robbery."[8] Here, appellant drove the victim around for over five hours, during which time she was exposed to an increased danger of being injured. We are satisfied that this extended period of transportation constitutes sufficient movement over and above the mere taking of the car, and that the increased danger was such, that two separate crimes occurred. Accordingly, we conclude that the district court did not err in declining to dismiss the robbery count on double jeopardy grounds.

Next, appellant contends that the district court erred in denying his motion to sever the aggravated stalking charge from the other charges because there is "little doubt" that the stalking evidence necessarily and unfairly prejudiced him on the other charges. Appellant also contends that the negative inferences of "such multiplicitous charging" could not be cross-examined, and, hence, could not be defended against.

"The joinder of offenses is proper where the activity charged is part of the same transaction or comprises a common scheme or plan."[9] The district court's determination on a motion to sever offenses "will not be reversed on appeal absent an abuse of that discretion."[10] Misjoinder of offenses will be reversed only if the jury's verdict has been influenced or affected in a substantial and injurious way.[11] "A court 'must consider not

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[7]Jefferson v. State, 95 Nev. 577, 579-80, 599 P.2d 1043, 1044 (1979).

[8]Wright v. State, 94 Nev. 415, 418, 581 P.2d 442, 444 (1978)

[9]Brown v. State, 114 Nev. 1118, 1124, 967 P.2d 1126, 1130 (1998); see also NRS 173.115.

[10]Brown, 114 Nev. at 1124, 967 P.2d at 1130.

[11]Id.

only the possible prejudice to the defendant but also the possible prejudice to the [State] resulting from . . . expensive and duplicitous trials.'"[12]

We conclude that the stalking charge was properly joined because it constituted a part of appellant's common scheme or plan. Common to all the charges is appellant's obsession with the victim and with reconciling with her. The kidnapping, robbery, and burglary charges were simply escalated manifestations of the same obsession which inspired the stalking. As parts of a common plan or scheme, all the counts were properly joined under NRS 173.115(2). Moreover, appellant has failed to demonstrate how he was prejudiced by the joinder, particularly given the overwhelming evidence of guilt presented on each count.

Appellant next challenges the district court's denial of his motion in limine requesting the court to exclude from the trial any references to Dina Reeter as a "victim" and to appellant as a "stalker." Appellant argues that these designations decreased the State's burden of proof because they implied that the State had already met its burden of proof in establishing that appellant was in fact a stalker and Dina a victim. Appellant contends that these terms, whether used implicitly or explicitly by the prosecutors and the State's witnesses, were not relevant and were more prejudicial than probative.

Appellant's argument lacks merit. The Hawaii case he cites in support for his position is inapplicable because it only addresses the use of the word "victim" in jury instructions, not in the context of witness testimony or closing argument.[13] Appellant cites no Nevada authority that a witness's use of these terms deprives a jury of its fact-finding role or otherwise diminishes the State's burden of proof. Nor has appellant demonstrated that the prosecutor's use of the terms in closing argument constitutes anything other than the permissible act of arguing inferences from the evidence in the record.[14] Because exclusion of these terms was

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[12]Lisle v. State, 113 Nev. 679, 688-89, 941 P.2d 459, 466 (1997) (citations omitted) (quoting United States v. Andreadis, 238 F. Supp. 809, 802 (E.D.N.Y. 1965)).

[13]See State v. Nomura, 903 P.2d 718, 722-23 (Haw. App. 1995).

[14]See Jimenez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1367-68 (1990).

not necessary to prevent prejudice to appellant, we conclude that the district court did not err in denying the motion in limine to exclude the terms from trial. In any event, given the overwhelming evidence of guilt, any error in the use of these terms at trial was harmless.[15]

Next, appellant contends that the district court erred in admitting evidence that Dina had sought and obtained temporary protective orders against appellant. Appellant contends that this prior bad act evidence was introduced by the State solely to disparage appellant's character. Appellant argues that the evidence was improper because it was irrelevant, was not proven by clear and convincing evidence, and was more prejudicial than probative.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless "manifestly wrong."[16] Prior bad acts are admissible when three conditions are met: "(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."[17] After reviewing the record, we conclude that all three prongs of this test were met with respect to the evidence at issue and that the district court was not manifestly wrong in admitting the evidence. The evidence was relevant to the stalking charge because it showed how the victim felt frightened, terrorized or harassed -- particularly since appellant had confronted her and grabbed her arm shortly after being served with the temporary protective order and told her that he would give her "a reason to get a restraining order" against him. The evidence was also probative as to appellant's intent in that it showed he persisted in contacting Dina despite court action. Any danger of unfair prejudice was thus substantially outweighed by the probative

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[15]See Taylor v. State, 109 Nev. 849, 854-55, 858 P.2d 843, 847 (1993).

[16]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[17]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

value of the evidence. In addition, the existence of the temporary protective orders was proven by clear and convincing evidence.

Appellant next argues that the district court erred in denying his motion for a new trial. The motion was based on the jury's request for clarification of whether verbal notice of divorce proceedings constitutes actual notice. This was an issue incident to the aggravated stalking charge, which requires proof that the accused have actual or legal knowledge of marital dissolution proceedings.

A "trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation."[18] The trial court may refuse to answer a jury question if the court is "of the opinion the instructions already given are adequate, [and] correctly state the law."[19] The jury instructions regarding aggravated stalking were given in accordance with the stalking statute, NRS 200.575, which provides that stalking is aggravated if it occurs "while a proceeding for the dissolution of their marriage is pending for which he has actual or legal notice." As such, the instructions correctly stated the law and the district court acted within its discretion in refusing to give further instruction. Because no error occurred in the district court's refusal to answer the jury question, we conclude that the district court properly exercised its discretion in denying appellant's motion for a new trial.[20]

Next, appellant contends that the information was improperly amended just prior to trial to include the date of the kidnapping (November 16, 1999) within the time frame of the aggravated stalking charge. By including the date of the kidnapping within the time frame of the stalking allegations, appellant contends that the kidnapping incident was necessarily included within the aggravated stalking count. We disagree. In deciding when charges are redundant, the issue is "whether the gravamen of the charged offenses is the same such that it can be said

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[18]Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968).

[19]Id.

[20]See Rippo v. State, 113 Nev. 1239, 1250, 946 P.2d 1017, 1024 (1997) (stating that "[w]hether to grant or deny a motion for a new trial is within the trial court's discretion").

that the legislature did not intend multiple convictions."[21] We agree with the State's argument that the gravamen of the stalking charge was in fact the series of events leading up to the kidnapping. While the kidnapping arose from a single incident occurring on November 16, 1999, the evidence adduced at trial established that the aggravated stalking occurred over the course of several weeks prior to the kidnapping. Accordingly, the charges were not redundant.

Appellant next asserts that the prosecutor committed misconduct by eliciting prior bad act evidence, namely that appellant had been abusive to Dina during the marriage and that Dina had left the marriage to get away from that abuse. Appellant further argues that the prosecutor improperly commented in closing argument on the couple's abusive relationship. As this evidence concerned a time frame outside of that alleged in the indictment, appellant contends that he had no notice that the State would elicit this testimony. He contends that he was unfairly "blindsided" by this evidence because there was no evidence in discovery that the relationship was abusive prior to the separation. Further, appellant contends that this constitutes improper and prejudicial character evidence in violation of NRS 48.045.

We conclude that the references to the abusive nature of the relationship were properly admitted. One of the elements of stalking in NRS 200.575(1) is that the accused's course of conduct "actually causes the victim to feel terrorized, frightened, intimidated or harassed." Because the evidence was probative as to why Dina felt frightened, it was properly admitted.

Appellant also contends that misconduct occurred in closing argument when the prosecutor noted that appellant had been given all of his constitutional rights during the trial, but argued that appellant had taken away Dina's rights. Because appellant did not object to the alleged misconduct, he has not preserved the issue for appellate review.[22] When a defendant fails to preserve this type of issue for review, this court should

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[21]State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000).

[22]See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

review the alleged misconduct only if it is "plain error."[23] Here, because appellant has not demonstrated that the prosecutor's conduct was "patently prejudicial," we conclude that the issue does not constitute plain error.[24] In any event, we note that any purported prosecutorial misconduct -- either in comments made during closing argument or in eliciting testimony that appellant was abusive during the marriage -- was harmless, given the overwhelming evidence of appellant's guilt.[25]

Next, appellant contends that testimony from several witnesses impermissibly implied that he was in custodial status. The testimony consisted of witness statements that the harassing conduct stopped when appellant was arrested. Appellant contends that this "clearly" implied that appellant was in custody and therefore unable to continue harassing Dina and her family. We disagree. The testimony did not necessarily imply appellant's in-custody status because it could have just as likely implied that the arrest served as a much-needed "wakeup call" for appellant to discontinue the harassment. The testimony hardly amounts to a clear insinuation of appellant's in-custody status, and surely falls below the outright mention of custodial status condemned by this court in Haywood v. State.[26] Accordingly, this argument lacks merit.

Appellant next takes exception to the admission of testimony from the State's stalking expert regarding typical stalker profiles and attributes and how appellant matched many of the typical indicators of a stalker. Appellant also takes exception to the admission of a photograph of his home, and to the admission of the guns which were impounded by SWAT officers after a suicidal standoff. Appellant contends that all of this evidence was highly prejudicial and inflammatory. We disagree. The evidence was highly probative to the case, particularly to the stalking

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[23]Id.

[24]Id.

[25]See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (stating that even aggravated prosecutorial misconduct will not warrant reversal if a guilty verdict is free from doubt).

[26]107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991).

charge. Moreover, appellant has failed to convince us that the district court abused its discretion in admitting the evidence.[27]

Next, appellant contends that the district court erred in allowing the 9-1-1 recordings to be played at trial. He argues that the recordings were cumulative evidence and fraught with impermissible bad act evidence regarding an outstanding warrant for appellant's arrest. The State contends that the 9-1-1 tapes played for the jury did not contain any prior bad act evidence. Since appellant has not provided this court with a transcript of the 9-1-1 recordings, this court cannot verify appellant's claim of error. Accordingly, we conclude that it lacks merit.[28]

Finally, appellant contends that the district court erred in excluding the police department's 9-1-1 call register. Although a police officer testified that the call register was a record kept by police in the ordinary course of business, the officer testified that she was not the custodian of records. She further stated that she could not testify that the records contained a fair and accurate depiction of the 9-1-1 calls received that day. Because the record was thus not properly authenticated, the district court's decision to exclude the document was not "manifestly wrong."[29]

Having considered all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

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[27]See Petrocelli v. State, 101 Nev. at 52, 692 P.2d at 508.

[28]See Tobin v. Seaborn, 58 Nev. 432 437, 82 P.2d 746, 748 (1938) (stating that burden is upon appellant to demonstrate from the record his claim of error).

[29]See Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

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