

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATHEW ANDREW SMITH,

No. 36144

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

DEC 04 2001

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of second-degree kidnapping with the use of a deadly weapon, one count of burglary while in the possession of a firearm, one count of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, one count of possession of a stolen vehicle, one count of possession of stolen property and one count of possession of a firearm by an ex-felon. Appellant Mathew Andrew Smith's sole argument is that his conviction of two counts of second-degree kidnapping must be reversed. We agree.

On December 2, 1998, two Las Vegas residents returned home from dining at a local restaurant to find Smith and another man burglarizing their home. The men moved the victims at gunpoint from two separate points within the house to the living room, a distance of approximately twenty-five to thirty-five feet. Smith held a gun on the victims for approximately ten minutes while the other man finished collecting items from throughout the house. The men left without physically harming or restraining the victims.

Several days later, Smith was apprehended. He was charged with, among other offenses, two counts of first-degree kidnapping with the use of a deadly weapon and two counts of robbery with the use of a deadly weapon. The jury convicted Smith of two counts of robbery as well as several other offenses. The jury, however, convicted Smith, not of first-

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degree kidnapping with the use of a deadly weapon, but of two counts of second-degree kidnapping with the use of a deadly weapon.

The jury was properly instructed on the first-degree kidnapping charge in accordance with this court's decision in Wright v. State.¹ In Wright we held that when a defendant is convicted of first-degree kidnapping and robbery, the kidnapping conviction will not lie where the movement of the victim is incidental to the robbery and did not increase the risk of harm to the victim.

For the charge of second-degree kidnapping, however, the jury was not properly instructed in accordance with our decision in Jefferson v. State.² In Jefferson, we determined that when the accused is charged and convicted of second-degree kidnapping and an associated offense, the second-degree kidnapping conviction can only stand when the movement of the victim is over and above that required to complete the associate crime charged.³ By convicting Smith of second-degree kidnapping instead of first-degree kidnapping, the jury apparently found: (1) that the movement of the victim was incidental to the robbery; or (2) that the movement of the victims did not substantially increase the risk of harm beyond that necessarily present in the robbery; or (3) that both occurred. Since the jury was never instructed properly in accordance with Jefferson, it is impossible to determine the element for which the jury found insufficient proof on the first-degree kidnapping charge.

Under the rule announced in Jefferson, Smith's conviction of two counts of second-degree kidnapping with the use of a deadly weapon must be reversed. In this case, Smith's movement of the victims at gunpoint from one point in the house to another was not over and above that required to complete the robbery. This case is very similar to Jefferson, where we concluded that moving the victim from the front counter at a hotel to the back room during the course of a robbery did not constitute movement beyond that required in the robbery.

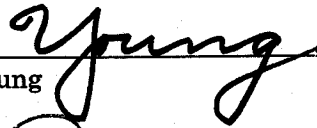
¹94 Nev. 415, 581 P.2d 442 (1978).

²95 Nev. 577, 599 P.2d 1043 (1979).

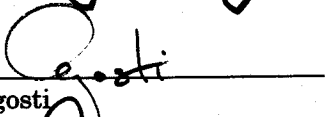
³Id. at 579-80, 599 P.2d at 1044.

Accordingly, we


ORDER the judgment of conviction REVERSED with respect to the two counts of second-degree kidnapping and further ORDER that this matter is REMANDED to the district court to enter a corrected judgment of conviction.



Young J.



Agosti J.



Leavitt J.

cc: Hon. Sally L. Loehrer, District Judge
Attorney General
Clark County Public Defender
Clark County District Attorney
Clark County Clerk