IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74364-COA

FILED

MAY 28 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Christopher Stewart appeals from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery, two counts of robbery, one count of burglary, one count of first-degree kidnapping resulting in substantial bodily harm, two counts of first-degree kidnapping, two counts of battery with intent to commit robbery, one count of battery with intent to commit sexual assault resulting in substantial bodily harm, one count of battery with intent to commit sexual assault, and three counts of sexual assault. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Christopher Stewart and an accomplice accosted a couple in a convenience store parking lot, striking the male victim multiple times while demanding money.[1] The accomplice forced the male victim into the store to use his ATM card while Stewart remained outside with the female victim, striking her and demanding that she also hand over her ATM card. At some point, Jonathan Cowart walked towards the store, and Stewart asked him to assist in the robbery, and he agreed. After the female victim handed her ATM card to Stewart, he gave it to Cowart. Stewart threatened the female

[1]We do not recount the facts except as necessary to our disposition.

victim until she gave him the PIN number, which Stewart then shouted to Cowart, who took the ATM card into the store.

Stewart remained with the female victim and, while alone with her in her car, put his hand down her pants and stuck his fingers into her vagina. Stewart then took her behind a wall separating the store and an adjacent apartment complex, pulled her pants down, and stuck his fingers in her vagina. After slamming her head against the wall, Stewart then penetrated her with his penis.

The State charged Stewart with one count of conspiracy to commit robbery, two counts of robbery, one count of burglary, one count of first-degree kidnapping resulting in substantial bodily harm, two counts of first-degree kidnapping, two counts of battery with intent to commit robbery, one count of battery with intent to commit sexual assault resulting in substantial bodily harm, one count of battery with intent to commit sexual assault, and three counts of sexual assault. Stewart and Cowart were tried together in a joint trial. Ultimately, the jury found Stewart guilty on all counts. The district court imposed an aggregate sentence of life with eligibility for parole after 516 months.

On appeal, Stewart argues that the district court abused its discretion when it denied his (1) motion to sever the joint trial, (2) motion to dismiss the kidnapping charges, (3) motion in limine to exclude penile and buccal swabs, and (4) motion to dismiss the sexual assault charges.

First, we consider whether the district court abused its discretion when it denied Stewart's motion to sever. We review a district court's decision denying a motion to sever for an abuse of discretion. *Chartier v. State*, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008). Any error in such a decision is subject to harmless-error review. *Id.* at 764-65, 191

P.3d at 1185. For reversal, the defendant must show that he was prejudiced because "the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence." *Marshall v. State*, 118 Nev. 642, 648, 56 P.3d 376, 380 (2002). Prejudice can arise when two defendants raise inconsistent or antagonistic defenses, but such defenses are not prejudicial per se. *Rodriguez v. State*, 117 Nev. 800, 810, 32 P.3d 773, 779 (2001). Moreover, for defenses to be truly inconsistent, they "must be antagonistic to the point that they are mutually exclusive." *Id.* at 810, 32 P.3d at 779-80 (internal quotation marks omitted).

Here, Stewart fails to show that his and Cowart's defenses were actually inconsistent. Only Stewart was charged with sexual assault, not Cowart, and thus Stewart's defense that Cowart was actually the one who raped the female victim is not at all inconsistent with the defense Cowart asserted, which was that he only participated in the crimes out of necessity. Moreover, Stewart fails to argue that any specific trial right was compromised. The only statement that Stewart identifies as representing any sort of inconsistency was Cowart's statement to the police that that he did not commit the rape, but that statement occurs only in police reports and was never presented to the jury. Finally, Stewart fails to show that the jury was in any way prevented from making a reliable judgment regarding his guilt. To the contrary, the jury could have believed Cowart's defense while also believing Stewart's because Cowart was not charged with the crime of sexual assault and did not need to mount a defense to it. *See McDowell v. State*, 103 Nev. 527, 550, 746 P.2d 149, 151 (1987) (stating that "it was possible for the jury to believe [the co-defendant]'s defense while at the same time giving credence to McDowell's defense"). Therefore, the district court did not err when it denied Stewart's motion to sever.

Second, we consider whether the district court erred in denying Stewart's motion to dismiss the kidnapping counts because they allegedly merged with the sexual assault and robbery counts. This court reviews a district court's denial of a motion to dismiss for an abuse of discretion. *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). Generally, "movement or restraint incidental to an underlying offense where restraint or movement is inherent" will not expose a defendant to criminal liability for kidnapping. *Mendoza v. State*, 122 Nev. 267, 274, 130 P.3d 176, 180 (2006). But when the movement or restraint "substantially increase[s] the risk of harm to the victim over and above that necessarily present in an associated offense . . . or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged," a kidnapping charge can stand. *Id.* at 274-75, 130 P.3d at 180. Whether the movement was incidental or substantially increased the risk of harm are questions generally left for a jury "in all but the clearest of cases." *Guerrina v. State*, 134 Nev. ___, ___, 419 P.3d 705, 710 (2018) (internal quotation marks omitted).

Here, Stewart and his accomplice forced the male victim to move in and out of the store and across the darkened parking lot to assist in getting money. Further, after initially sexually assaulting the female victim inside her car, Stewart then forced her out of the car and moved her behind a secluded wall in order to continue the assault where he could not be seen. These acts were not necessary to complete either the crime of robbery or sexual assault, they increased the time it took the complete the crimes, and made the crimes more dangerous to the victims. *See Gonzales v. State*, 131 Nev. 481, 498, 354 P.3d 654, 665 (Ct. App. 2015) (noting that the jury could have found that moving the victim "from a public place into

a private one . . . substantially increased the risk of harm"). Thus, the district court did not abuse its discretion when it denied Stewart's motion to dismiss the kidnapping counts.

Third, we consider whether the district court abused its discretion when it denied Stewart's motion in limine to exclude penile and buccal swabs that he claims were illegally seized without a warrant. This court reviews a district court's denial of a motion in limine for an abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). The district court has broad discretion when deciding to admit or exclude evidence and this court will not reverse its decision absent manifest error. *Vega v. State*, 126 Nev. 332, 341, 236 P.3d 632, 638 (2010). Here, the record clearly reveals that State did obtain a warrant for those specific swabs, and therefore, we conclude that Stewart's argument is without merit.[2]

Fourth, we consider whether the district court abused its discretion when it denied Stewart's motion to dismiss the sexual assault charges against him. This court reviews a district court's denial of a motion to dismiss for an abuse of discretion. *Hill*, 124 Nev. at 550, 188 P.3d at 54. In sexual assault cases, the victim's uncorroborated testimony by itself is sufficient to uphold a conviction, so long as the victim testified with some particularity. *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). Here, when Stewart brought his pretrial motion to dismiss, the district

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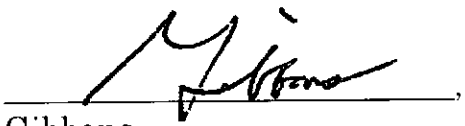
[2]Stewart also challenges the constitutionality of NRS 176.09123 as it relates to warrantless collections of biological specimens from individuals arrested for a felony. However, because Stewart was searched pursuant to a warrant, we conclude that he does not have standing to make such a challenge. *See Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988) (noting that "a requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional statute and which would be redressed by invalidating the statute").

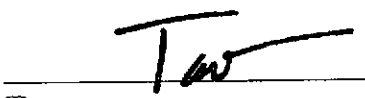
court was aware that the victim would testify about the incident at trial. Because her testimony alone was sufficient to support the sexual assault charges, the district court did not abuse its discretion when it denied Stewart's motion to dismiss them.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Morton Law, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk