IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD RAY THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80106-COA

ORDER OF AFFIRMANCE

Donald Ray Thomas appeals from a judgment of conviction, pursuant to a jury verdict, of kidnapping in the second degree against an elderly victim and preventing or dissuading a victim or other person from reporting a crime, commencing prosecution or causing arrest. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Eva Gullatt, a 76-year-old woman, called 9-1-1 because Thomas, her 33-year-old husband, was behaving strangely.[1] Specifically, Thomas was pacing around the apartment and had unexpectedly locked all of the doors and barricaded the front door of the apartment with a sofa. During the 9-1-1 call, Gullatt sounded distressed and indicated that Thomas's behavior was "psychotic."

Reno Police Department officers were quickly dispatched, and Sergeant Terry West and two other officers knocked on the front door but were unable to make contact with either Gullatt or Thomas. At some point, Gullatt opened the front window, including the curtains and blinds, allowing officers to see inside the apartment. Through the open window, Sgt. West saw Thomas grab Gullatt and pull her toward the center of the

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

apartment. Thomas proceeded to close the window and pull the curtains shut.

More officers were dispatched, which permitted law enforcement to cover the apartment's front and rear exits. With the use of a ladder, Sgt. West was able to see into Gullatt and Thomas's bedroom through a sliding glass door that leads to an enclosed back patio. Sgt. West observed Gullatt attempting to escape through the sliding glass door, but before she could, Thomas, who was armed with a knife, grabbed her, pulled her away from the door, and shoved her to the floor. Thomas also appeared to be "striking and kicking" Gullatt while she was on the ground. Concerned that this was a hostage situation, Sgt. West requested assistance from the Critical Incident Negotiation Team (CINT).

Officer Brandon Cassinelli, a member of CINT, arrived at the scene and attempted to make contact with Thomas or Gullatt by calling Gullatt's cellphone. After several attempts, he successfully contacted Gullatt. During their conversation, Gullatt indicated that Thomas had been using either "amphetamines" or "methamphetamine," but the call was suddenly disconnected before Officer Cassinelli could obtain more details. Officer Cassinelli attempted to call Gullatt back; however, all subsequent attempts to make contact were unsuccessful. Eventually, Gullatt escaped out the sliding glass door and onto the patio, where officers assisted her over the fence and rendered aid. After a brief standoff, Thomas exited the apartment and was taken into custody by SWAT and canine officers.

The State charged Thomas with second degree kidnapping against an elderly victim and preventing or dissuading a victim from reporting a crime, commencing prosecution or causing arrest. Prior to trial, the State moved to admit certain statements from the phone conversation

between Gullatt and Officer Cassinelli. Specifically, the State sought admission of Gullatt's statements regarding Thomas's use of illicit drugs. After a hearing on the motion, the district court granted the State's request, concluding that the statements were admissible as res gestae.

At trial, the State elicited eyewitness testimony from, among others, Sgt. West, Gullatt, and Officer Cassinelli. Additionally, Gullatt's daughter, Tonia Warren, testified about the panicked phone call she received from her mother on the day of the incident, and the jury heard the recording of Gullatt's 9-1-1 call. After a four-day trial, the jury returned a guilty verdict on both counts, and the district court sentenced Thomas to serve an aggregate prison term of 48 to 240 months. This appeal followed.

On appeal, Thomas argues that (1) the district court abused its discretion when it admitted Gullatt's statements about Thomas's drug use as res gestae; (2) the State failed to present sufficient evidence to sustain his conviction for kidnapping in the second degree and preventing or dissuading a victim from reporting a crime, commencing prosecution or causing arrest; and (3) the district court abused its discretion when it permitted the State to elicit hearsay testimony from Gullatt's daughter, Tonia Warren.

The district court abused its discretion when it admitted Gullatt's statements as res gestae, but the error is harmless

Thomas argues that the district court abused its discretion when it admitted into evidence statements Gullatt made to Officer Cassinelli under the "complete story of the crime doctrine." *See* NRS 48.035(3) (res gestae). Specifically, the district court permitted Officer Cassinelli to testify that on the day of the incident, Gullatt told him that Thomas was under the influence of amphetamines or methamphetamine.

This court "review[s] a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The "complete story of the crime," or res gestae doctrine, is provided for in NRS 48.035(3).[2] Pursuant to that doctrine, a witness is permitted to testify regarding an uncharged act or crime only if the uncharged conduct "is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). Furthermore, "the 'complete story of the crime' doctrine must be construed narrowly." *Id.*

In this case, the drug evidence was closely tethered to the subject event, insofar as Thomas was apparently under the influence of amphetamines or methamphetamine when he committed the criminal acts for which he was charged and ultimately convicted. In other words, evidence of Thomas's drug use was closely connected to the controversy because it was directly related to his mental state and erratic behavior. But our jurisprudence demands more than a close connection between the charged and uncharged conduct when applying the res gestae doctrine. Instead, the defendant's uncharged act must be so intertwined with the

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[2]NRS 48.035(3) states the following:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

charged conduct that the witness cannot describe the event without reference to the uncharged act. *Bellon*, 121 Nev. at 444, 117 P.3d at 181.

Here, Officer Cassinelli was able to testify about the incident without referencing Thomas's drug use. Indeed, he made no mention of drugs or drug use until the prosecutor specifically elicited such testimony. Because the uncharged drug use was not so closely related to the act in controversy that Officer Cassinelli could not describe it without referring to Thomas's drug use, the district court abused its discretion in admitting such evidence as res gestae.[3] Nevertheless, we conclude that the error was harmless because, as discussed below, the State presented overwhelming evidence of Thomas's guilt. *Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002) (providing that failure to exclude evidence is harmless when evidence of guilt is overwhelming).

The State presented sufficient evidence to support Thomas's convictions

Next, Thomas avers that the State presented insufficient evidence to sustain his convictions for kidnapping in the second degree and preventing or dissuading a victim from reporting a crime, commencing prosecution or causing arrest.

Standard of review

When reviewing the sufficiency of the evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378,

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[3]Notably, our decision does not preclude the possibility that Gullatt's statements may have been admissible under a hearsay exception, such as present sense impression, had the exception been properly raised.

381, 956 P.2d 1378, 1380 (1998). It is the jury's role, not the reviewing court's, "to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, "a verdict supported by substantial evidence will not be disturbed by a reviewing court." *Id.* Furthermore, "circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Second-degree kidnapping

Thomas asserts that "there was no evidence that [he] seized Ms. Gullatt or carried her away with the intent to hide her . . . or detain her against her will." We conclude, however, that his assertion is belied by the record.

Under NRS 200.310(2), "[a] person who 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 . . . is guilty of kidnapping in the second degree." (Emphasis added.) The statute's scope is broad, and it "designates alternative circumstances which fall within its sweep." *Jacobson v. State*, 89 Nev. 197, 202-03, 510 P.2d 856, 859 (1973). "The crime is complete, for example, whenever it is shown that a person willfully and without lawful authority seizes another with the intent to keep him secretly imprisoned, or to *detain him against his will*." *Id.* at 203, 510 P.2d at 859 (emphasis added). Thus, "[m]ovement of the victim is only one of several methods by which the statutory offense may be committed." *Id.* at 203, 510 P.2d at 860.

Here, Gullatt testified that she initially called 9-1-1 because she was worried about Thomas's odd behavior and informed the operator that "[m]y husband is acting a little strange this morning and I'm afraid." Gullatt continued, stating that she did not attempt to leave the apartment

before police arrived "because . . . the sofa had the front door jammed [i.e., the door was blocked] and the patio sliding glass door was locked." Gullatt further testified that she told Officer Cassinelli that she was unable to leave the apartment "because the sliding door was locked and [she] couldn't get out."

Additionally, Gullatt indicated that she attempted to leave the apartment three or four times, and that each time she attempted to open the sliding glass door Thomas "would come and lock it" and then move her away from the door. Thus, Gullatt's testimony alone, if believed by the jury, was sufficient to establish that Thomas intended to unlawfully seize and detain Gullatt against her will—the minimum threshold needed to sustain a conviction for second-degree kidnapping. *See State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994) (providing that "insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury"); *see also Jacobson*, 89 Nev. at 202-03, 510 P.2d at 859.

The State, however, presented far more than just Gullatt's testimony in support of the kidnapping charge. For example, Gullatt's daughter, Tonia Warren, testified that on the day of the incident, her mother called her "crying hysterically," stating that Thomas would not let her go and that "[h]e [was] holding [her] hostage." Sergeant Terry West testified that, through an open window, he saw Thomas approach Gullatt from behind, grab her arm and clothing, and pull her toward the center of the apartment, which was about six to ten feet away from the window. Thomas then closed and locked the window, lowered the blinds, and pulled the curtains shut.

Sgt. West also testified that he used a ladder to see into Gullatt and Thomas's bedroom, which has a sliding glass door that leads to an enclosed back patio. From that elevated vantage point, he saw Gullatt attempt to escape two times, and that in each instance, Thomas grabbed her, pulled her away from the door, and shoved her to the floor. Sgt. West further stated that he observed Thomas "striking and kicking in that area where [Gullatt] had just been shoved" to the ground. Thus, the record indicates that the State presented sufficient evidence for a rational trier of fact to find the essential elements of second-degree kidnapping beyond a reasonable doubt. Specifically, that Thomas unlawfully and willfully seized Gullatt with the intent to keep her detained against her will.[4]

Preventing or dissuading a victim from reporting a crime, commencing prosecution or causing arrest

Thomas also contends that the State's evidence was insufficient to convict him of preventing or dissuading a victim from reporting a crime or possible crime to a police officer.

NRS 199.305(1)(a)(2) imposes criminal liability upon any "person who, by intimidating or threatening another person, prevents or dissuades a victim of a crime . . . from . . . [r]eporting a crime or possible crime to a . . . [p]eace officer . . . or who hinders or delays such a victim . . . in an effort to carry out any of those actions." In other words, criminal liability will attach if the State proves that a criminal defendant used intimidation or threats to prevent, discourage, or encumber a victim from reporting criminal activity.

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[4]The State also presented significant evidence of asportation. *Jensen v. Sheriff*, 89 Nev. 123, 125-26, 508 P.2d 4, 5 (1973) ("It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping.").

Here, Gullatt testified that while she was trapped in the apartment, she attempted to call 9-1-1 again, "[b]ut [Thomas] just ran up to me and grabbed [the phone] out of my hand, just snatched it out." Sgt. West testified that on multiple occasions he saw Gullatt use, or attempt to use, her cell phone when Thomas left her alone in a room, but once he returned, "he would take the phone from [her]." Officer Cassinelli testified that although he initially made contact with Gullatt via her cell phone, resulting in a brief conversation, he was ultimately disconnected without warning. After being disconnected, Officer Cassinelli attempted to call back "approximately 50 times," but his attempts were unavailing. Based on this, and the surrounding circumstances (i.e., Gullatt's unlawful detention), a rational jury could have inferred that Thomas was actively preventing or dissuading Gullatt from contacting law enforcement. *Hernandez*, 118 Nev. at 531, 50 P.3d at 1112.

Nevertheless, Thomas contends that "the evidence at trial demonstrated that Ms. Gullatt did place a 9-1-1 call unimpeded and asked for help . . . and later participated in a cell-phone conversation with officers on site." This argument is unpersuasive for two reasons. First, the statute is not as narrow as Thomas suggests. That Gullatt eventually contacted law enforcement successfully does not necessarily negate Thomas's liability under the statute. This is so because the statute also imposes liability where a person "hinders or delays" a victim from reporting criminal activity. *See* NRS 199.305(1). Here, as discussed above, the State presented evidence that would support such a finding by the jury. This is particularly true where there was ample evidence that Thomas prevented Gullatt from contacting law enforcement multiple times.

Second, Thomas's argument is based on his preferred interpretation of the evidence presented, which necessarily involves weighing the evidence and assessing the credibility of witnesses. But this court does not reweigh the evidence or determine the credibility of witnesses. *McNair*, 108 Nev. at 56, 825 P.2d at 573. Instead, this court reviews the record to determine whether the evidence was sufficient for a rational jury to conclude that the State proved each element of a charge beyond a reasonable doubt, not whether this court would have convicted based on the same evidence. *See Origel-Candido*, 114 Nev. at 381, 956 P.2d at 1380. Furthermore, only "a minimum threshold of evidence" is required to support a conviction. *Purcell*, 110 Nev. at 1394, 887 P.2d at 279.

Here, as noted, the State produced such evidence to support Thomas's conviction. Moreover, it is not obvious or clear from the record that Gullatt's initial 9-1-1 call was placed "unimpeded" as Thomas claims. Indeed, Gullatt's demeanor on that call sounded subdued, and it did not appear as if she was able to speak freely. Specifically, she spoke in hushed tones, appeared distracted, and there were long stretches of silence where the operator repeatedly attempted to regain her attention. Thus, a rational jury could have inferred that Thomas was in some way preventing, hindering, or delaying Gullatt from reporting criminal conduct, especially in light of the circumstances.

Therefore, when viewed in the light most favorable to the prosecution, the State's evidence was sufficient to support Thomas's conviction of preventing or dissuading a victim from reporting a crime or possible crime to a police officer because a rational jury could have found the essential elements satisfied.

The district court did not abuse its discretion when it permitted the State to elicit hearsay testimony from Gullatt's daughter, Tonia Warren

Finally, Thomas argues that "[t]he district court erred in allowing the State to elicit a damaging hearsay statement from Ms. Gullatt's daughter, Tonia Warren."

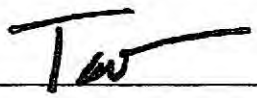
As noted above, this court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan*, 124 Nev. at 267, 182 P.3d at 109. Under NRS 51.095, an excited utterance is admissible as an exception to the general rule prohibiting hearsay. For a statement to be admissible as an excited utterance, it must have been made while the declarant was "under the stress of the startling event." *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006); NRS 51.095. Here, over Thomas's objection, Warren testified that on the day of the incident, her mother, Gullatt, called her "crying hysterically" and said, "Donald [Thomas] . . . won't let me go. He is holding me hostage. And . . . she did say I think he is going to kill me . . . ." Because these statements were made under the stress of, and contemporaneous with, a startling event, they clearly fit within the excited utterance exception.

Nonetheless, Thomas contends that these statements were improperly admitted as prior inconsistent statements. Specifically, Thomas avers that "[t]he prosecutor never asked Ms. Gullatt about any specific statement or statements[, and] therefore, she was never 'subject to cross-examination concerning the statement' as required by NRS 51.035(2) or 'afforded an opportunity to explain or deny the statement' as required by NRS 50.135(2)(b)." But the district court did not indicate on which hearsay exception it was relying. Rather, it simply overruled Thomas's objection. Moreover, the prosecutor proffered either exception—i.e., prior inconsistent statement or excited utterance—as grounds for the statements'

admissibility. Therefore, because Gullatt's statements contained within Warren's testimony were admissible under the excited utterance exception, the district court correctly overruled Thomas's objection. For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.[5]

_____, C.J.
Gibbons



_____, J.
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cc: Hon. David A. Hardy, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[5]Thomas also argues that the district court abused its discretion when it declined to issue an advisory instruction to acquit under NRS 175.381(1) and that cumulative error warrants reversal. In light of our conclusions that the State presented sufficient evidence as to both counts and that the district court's single error was harmless, we conclude that these claims are without merit and thus do not present a basis for relief. *See Belcher v. State*, 136 Nev., Adv. Op. 31, 464 P.3d 1013, 1031 (2020) (holding that cumulative error requires multiple errors to cumulate).