

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS ANTHONY MCDANIEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81199 COA

FILED

MAR 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Nicholas Anthony McDaniel appeals from a judgment of conviction, pursuant to a jury verdict, of the following offenses: (1) sexual assault with the use of a deadly weapon; (2) kidnapping in the first degree¹ with use of a deadly weapon; (3) false imprisonment with use of a deadly weapon; (4) assault with a deadly weapon; (5) assault with a deadly weapon; and (6) injury to property. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

In March 2019, the victim² ceased communications with McDaniel, the father to her three young children, and befriended Jeremy Randolph.³ This angered McDaniel. In April 2019, McDaniel visited multiple residences in search of both Randolph and the victim. While visiting these homes, McDaniel appeared distraught, and at one point brandished a gun and waved it around.

¹While the judgment of conviction states that McDaniel was convicted of “kidnapping in the second degree with use of a deadly weapon,” this court has determined that this was likely clerical error, as addressed below.

²The victim chose to remain anonymous and is not named throughout the proceedings.

³We do not recount the facts except as necessary for our disposition.

While McDaniel searched, the victim and Randolph were with Darian Hurt at the home she shared with, Josh Hurt. At some point in the evening, Darian and the victim left the home. During their absence, McDaniel arrived unannounced and said he was looking for Randolph. Josh testified that he saw McDaniel had a gun, told McDaniel that Randolph was not there, even though he was, and then closed the door on him. McDaniel then began breaking the windows to the home and then he left. Darian and the victim arrived shortly thereafter. Darian learned what happened and told Randolph and the victim to leave immediately, which they did on foot.

At some point during their walk, McDaniel suddenly appeared and began chasing Randolph and the victim. McDaniel caught up to the victim and placed his hand over her mouth to stop her from screaming. Randolph ran away from the victim and McDaniel and found safety where he was able to call 9-1-1 to report that McDaniel had taken the victim. McDaniel displayed a gun, led the victim to an isolated spot, and disappeared.

The victim told the police the next morning that McDaniel had held her captive and sexually assaulted her. She said he grabbed her by her wrist, hit her on the head with either the gun or his fist, and directed her where to go. She reported that he told her he had disposed of the gun in nearby bushes, but that he had another gun on his person. He then dragged her through a field until they came upon an abandoned truck where he began to undress her. She reported that he forced sexual intercourse upon her despite her repeatedly telling him "no." Afterward, he slept on top of her to prevent her from escaping. The victim stated she did not observe the gun in the vehicle during the sexual assault, but that she had seen McDaniel with a gun prior to the assault, and she felt a gun on his body as they walked through town the next morning. She told similar versions of this story to her

stepfather and his girlfriend, the physician at the hospital, the nurse who prepared the rape kit looking for physical evidence, as well as two police officers—many of whom testified to this at trial, and described injuries to the victim.

At trial, the victim denied the aforementioned events as to coercion or force. She testified that she and McDaniel had consensual sex and that she never saw a gun. At trial, the State presented an expert witness who testified that victims of domestic violence who are sexually assaulted often recant their stories.

A jury found McDaniel guilty of sexual assault with the use a deadly weapon, kidnapping in the first degree with the use of a deadly weapon, false imprisonment with the use of a deadly weapon, two counts of assault with a deadly weapon, and injury to property. McDaniel now appeals the first two convictions.

McDaniel contends that the evidence at trial was insufficient to convict him of sexual assault with use of a deadly weapon because there was no evidence to prove a weapon was present when the alleged sexual assault occurred. He further contends that there was insufficient evidence to convict him of kidnapping in the first degree with a deadly weapon because there was no evidence to show that McDaniel possessed the intent to sexually assault the victim at the time of the alleged kidnapping.

When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). “[I]t is the jury’s function, not that of the [reviewing] court, 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). This court will not disturb the jury’s verdict where substantial evidence supports it. *Id.* Circumstantial evidence alone is sufficient to uphold a conviction. *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

McDaniel first challenges the sufficiency of the evidence for the deadly weapon enhancement to the sexual assault conviction. He does not challenge the sexual assault conviction itself. The sentence for sexual assault must be enhanced if the perpetrator used a firearm or other deadly weapon during the commission of the crime. NRS 193.165. “In order to ‘use’ a deadly weapon for purposes of NRS 193.165, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by *means* or display of the deadly weapon in aiding the commission of the crime.” *Allen v. State*, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980) (emphasis added), *overruled on other grounds by Berry v. State*, 125 Nev. 265, 212 P.3d 1085 (2009). Circumstantial evidence is sufficient to establish that the crime was committed. *Harrison v. State*, 96 Nev. 347, 351, 608 P.2d 1107, 1110 (1980) (stating that the victim’s testimony describing the gun carried by the defendant was sufficient to support the conviction).

Officer Coombs testified that the victim reported McDaniel pointed a gun at her head and told her to keep moving after he grabbed her. She said she saw the gun and even briefly held it before McDaniel took it from her and told her he tossed it into nearby brush. However, McDaniel then told her he had another gun on him. Although the victim did not see the other gun during the sexual assault, she reported that she believed he had one, and she felt the gun on McDaniel’s body as they walked closely together through town the next morning. Further, other witnesses testified that they saw McDaniel carrying a gun that evening and he waved it around.

At trial, the victim denied ever seeing the gun; however, the State presented evidence that domestic violence victims who are sexually assaulted often recant their stories.

Reviewing the evidence in the light most favorable to the prosecution, this testimony as a whole is sufficient for a reasonable juror to conclude that McDaniel possessed a gun the night in question and used it, threatened its use, or created fear of him possibly using it to force the victim's acquiescence to the sexual encounter. Although the victim recanted her crime report during trial, the jury reasonably could have believed the testimony of the various witnesses and the police officer to be more credible, especially when coupled with the expert testimony that domestic violence sexual assault victims often recant their stories. Therefore, McDaniel's sufficiency-of-the-evidence claim is unavailing in this instance.

McDaniel next challenges the sufficiency of the evidence for his conviction of kidnapping in the first degree with the use of a deadly weapon. NRS 200.310(1) makes it a category A felony for "a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain . . . the person . . . for the purpose of committing sexual assault." Carrying or leading the victim to a private location increases the risk of harm to the victim and may be sufficient to sustain a conviction of first degree kidnapping if a sexual assault occurs at some point later. *Hutchins v. State*, 110 Nev. 103, 108-09, 867 P.2d 1136, 1140 (1994) (concluding that when a perpetrator moves the victim away from the public, the potential risk of harm to the victim is increased, which is sufficient evidence to support a kidnapping conviction).

Multiple witnesses testified that McDaniel came to their home to look for the victim. All the witnesses reported that McDaniel appeared

angry or distraught when they encountered him. McDaniel argues that he was searching for the victim in order to repair their relationship and that he did not have the intent to sexually assault her. However, Officer Coombs testified that the victim reported that McDaniel pointed a gun at her head, directed her where to go, and hit her over the head with either the gun or his fist. McDaniel then carried her to an abandoned vehicle in a field—concealing her from the public where it was less likely someone would hear her pleas for help or see McDaniel with the victim. The victim also told Officer Coombs that McDaniel sexually assaulted her in the vehicle despite her telling him “no” multiple times. McDaniel then lay atop her, preventing her escape, thereby confining her.

Reviewing the evidence in the light most favorable to the prosecution, this testimony is sufficient for a reasonable juror to conclude that McDaniel kidnapped the victim with the intent to sexually assault her. Again, despite the victim later recanting her story, the jury reasonably could have found other testimony to be more credible. Therefore, McDaniel’s sufficiency-of-the-evidence claim is unpersuasive.


We note that the charged kidnapping offense and the judgment of conviction are inconsistent. The amended information charged McDaniel with kidnapping in the first degree, a category A felony, and alleged that he kidnapped the victim with the intent to commit sexual assault. *See* NRS 200.310(1). The district court instructed the jury on first-degree kidnapping and identified intent to commit sexual assault as a requisite element. However, the amended judgment of conviction states that McDaniel was found guilty of kidnapping in the second degree, a category B felony, with a maximum 15-year term of imprisonment. *See* NRS 200.330. However, the sentence the court imposed for the kidnapping charge was life in prison,


which is allowed only for kidnapping in the first degree. *Compare* NRS 200.320(2)(a) *with* NRS 200.330.


While the record does not include a verdict form, and the transcript of the jury's verdict does not reflect which degree of kidnapping the jury convicted McDaniel, it seems clear that there is a clerical error in the amended judgment of conviction. Neither party points out this inconsistency between the degree of the crime and the sentence imposed and both make arguments on appeal as though McDaniel was convicted of kidnapping in the first degree, rather than the second degree. Therefore, this court issues a limited remand to the district court to correct the judgment of conviction to ensure that the imposed sentence is consistent with the verdict and the applicable statute. *See* NRS 176.565 (stating that clerical errors in judgments may be corrected at any time as the court orders).

Accordingly, we

ORDER the judgment of conviction AFFIRMED AND REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
Walther Law Offices, PLLC
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk