IN THE SUPREME COURT OF THE STATE OF NEVADA

MARKUS WEATHERSPOON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38505

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery (Count I); burglary while in possession of a firearm (Count II); robbery with use of a deadly weapon (Count III); first degree kidnapping with use of a deadly weapon (Count IV); discharging a firearm at or into a vehicle (Counts VI and VII); attempted murder with use of a deadly weapon (Count VIII); battery on an officer with substantial bodily harm (Count X); conspiracy to commit robbery and/or kidnapping (Count XI); first degree kidnapping (Count XII); robbery (Count XIII); and grand larceny auto (Count XIV).

The district court sentenced Weatherspoon as follows: Count I: twenty-four to seventy-two months; Count II: thirty-six to 120 months; Count III: thirty-six to 120 months, with an equal and consecutive sentence for the deadly weapon enhancement; Count IV: sixty months to life imprisonment, with an equal and consecutive sentence for the deadly weapon enhancement; Count VI: twenty-four to seventy-two months; Count VII: twenty-four to seventy-two months; Count VIII: ninety-six to 240 months, with an equal and consecutive sentence for the deadly weapon enhancement; Count X: thirty-six to ninety-six months; Count XI:

twenty-four to seventy-two months; Count XII: sixty months to life imprisonment; Count XIII: forty-eight to 120 months; and Count XIV: one year in the county jail. Counts I to III were to run concurrent to each other, but consecutive to Count IV. Counts VI to X were to run concurrent to each other and consecutive to Count IV. Counts XI to XIV were to run concurrent to each other and consecutive to Count VIII.

Weatherspoon first argues that the State removed the only African-American juror and provided a pretextual explanation for such removal in violation of Batson v. Kentucky.[1] We disagree.

Under Batson, there is a three-prong test for determining when an objection to a peremptory challenge should be upheld on the basis of racial discrimination.[2] A defendant must first make a prima facie showing of racial discrimination.[3] Second, if a prima facie showing is made, the burden shifts to the prosecution to tender a race-neutral explanation.[4] Third, the court must determine whether the explanation is pretextual.[5] To establish a prima facie showing, the defendant must show that he is a member of a minority group, that the exercise of peremptory challenges permits discrimination, and that the circumstances raise an inference of discrimination.[6] "[T]he defendant is entitled to rely on the

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[1]476 U.S. 79 (1984).

[2]Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996).

[3]Id.

[4]Id.

[5]Id.

[6]Batson, 476 U.S. at 96.

fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[7]

Here, the State did, in fact, exercise a peremptory challenge for the removal of the only African-American juror on the panel, and Weatherspoon is African-American. The juror informed the district court that she knew two of Weatherspoon's uncles "very well" and that they were "very good friends" of her son's. She stated that she had known the two relatives of Weatherspoon since the 1970's, but did not know Weatherspoon personally. The juror also informed the district court that she had a grandson who had been convicted of armed robbery, but pointed out that no weapon had ever been located. She stated that her grandson served six years in prison and was murdered shortly after being released. The gunman who shot her grandson was never apprehended. Although the juror stated that she believed she could be objective, the State claimed that her exclusion was not racially motivated. Specifically, the State contended that it excluded her because of her acquaintance with members of Weatherspoon's family and due to the fact that she had a grandson who had been in custody.

Weatherspoon claims that since the juror strongly stated that she could be fair and unbiased, her exclusion by the State violated Batson and requires reversal of Weatherspoon's convictions. However, the district court determined that the State's explanations were not pretextual. The prosecutor's explanations are presumed to be race-neutral unless

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[7]Id. (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

discriminatory intent is inherent in the prosecution's explanation.[8] Therefore, we conclude that the district court properly concluded that there was no Batson violation.

Weatherspoon next contends that there was insufficient evidence to convict him of first degree kidnapping because the detention of the victims was contemporaneous with the crimes of robbery and automobile theft.

"'The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution.'"[9] Furthermore, this court will only disturb a verdict on appeal upon a finding that the verdict was not supported by substantial evidence.[10]

NRS 200.310 provides that:

> 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, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon him, or to exact from relatives, friends, or any other person any money or valuable thing for the return or

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[8]See Purkett v. Elem, 514 U.S. 765, 768 (1995).

[9]Jackson v. State, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001) (quoting Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996)).

[10]Jackson, 117 Nev. at 122, 17 P.3d at 1002.

> disposition of the kidnapped person . . . is guilty of kidnapping in the first degree.

In addition, where the defendant is convicted of first degree kidnapping and associated offenses, the kidnapping conviction will not lie if the movement of the victim was incidental to the associated offenses and did not increase the risk of harm to the victim beyond that necessarily present in the associated offense.[11]

In Wright v. State, three young black males entered a motel lobby.[12] The defendant pulled a revolver on the night clerk, while one of the accomplices pulled a gun on another employee.[13] After removing the cash from the register behind the counter, the two victims were told to walk to a back office approximately twenty to forty feet away.[14] The second employee was then taken back to the lobby to open the safe.[15] When he returned to the back office, he and the clerk were told to lie face down on the floor where they, along with a motel guest who had entered the lobby, were bound with tape.[16] The victims were threatened while lying on the floor.[17] We concluded that the movement of the victims was

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[11]Wright v. State, 94 Nev. 415, 417-18, 581 P.2d 442, 443-44 (1978).

[12]Id. at 416, 581 P.2d at 443.

[13]Id.

[14]Id.

[15]Id.

[16]Id.

[17]Id.

incidental to the robbery and did not involve an increased risk of harm.[18] "Their detention was only for the short period of time necessary to consummate the robbery."[19] Under those circumstances, we set aside the convictions for kidnapping.[20]

In the present case, Weatherspoon maintains that the movement of Melissa Davis was incidental to the offense of automobile theft since she was pushed into the vehicle only in an effort to steal the vehicle, and she was only driven a short distance before being released. We disagree.

Weatherspoon and his accomplice forced Davis into her vehicle, started the engine and drove away. Although Davis pleaded with the men to let her go and just take the vehicle, Weatherspoon refused and threatened to shoot her if she did not cooperate. We conclude that, in forcing Davis into the vehicle instead of only taking the vehicle, Weatherspoon increased the risk of harm to Davis. Further, we conclude that the detention of Davis was not contemporaneous with the automobile theft, and there was sufficient evidence to support the jury's finding that Weatherspoon was guilty of kidnapping Davis.

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[18]Id. at 418, 581 P.2d at 444.

[19]Id.

[20]Id.

Weatherspoon also argues that the movement of Hamid Haroon, an employee at the restaurant, was incidental to the robbery of the restaurant and did not substantially increase the risk of harm to him. With respect to the kidnapping of Haroon, we conclude that a rational trier of fact could not have found beyond a reasonable doubt that Weatherspoon committed first degree kidnapping.

Similar to the facts set forth in Wright, in this case three young black males entered the restaurant with guns drawn. Harris grabbed Haroon around the neck and forced Haroon and several employees at gunpoint from the back kitchen area approximately ten to twenty feet to the front seating area of the restaurant. During the robbery, the employees were ordered to lie down and Harris threatened to shoot one employee. All three eventually exited the rear door shortly after their arrival. Under these circumstances, we conclude that the conviction for the kidnapping of Haroon should be set aside. Similar to Wright, the movement of Haroon appears to have been incidental to the robbery and does not appear to involve an increase in danger to Haroon. "[His] detention was only for the short period of time necessary to consummate the robbery."[21]

Weatherspoon also argues that he was convicted of several offenses based on the single act of his accomplice shooting at and hitting a police officer in the officer's vehicle while fleeing a robbery. We agree.

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[21]Id.

"When a defendant receives multiple convictions based on a single act, this court will reverse 'redundant convictions that do not comport with legislative intent.'"[22] However, "[r]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act."[23] Rather, this court must ask "whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant."[24]

In Barton v. State,[25] we concluded that "for the determination of whether lesser included offense instructions are required,"[26] "the test is whether the offense charged cannot be committed without committing the lesser offense."[27] Furthermore, we held that "[t]he test is met when all of the elements of the lesser offense are included in the elements of the greater offense."[28] The State claims that our holding in Barton mandates

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[22]State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837-38 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

[23]State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000) (quoting Skiba v. State, 114 Nev. 612, 616 n.4, 959 P.2d 959, 961 n.4 (1998)).

[24]State of Nevada, 116 Nev. at 136, 994 P.2d at 698.

[25]117 Nev. ___, 30 P.3d 1103 (2001).

[26]Id. at ___, 30 P.3d at 1108.

[27]Id. at ___, 30 P.3d at 1106 (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

[28]Id. at ___, 30 P.3d at 1106.

that we inquire into the elements of each charge. Since a count for battery on an officer,[29] and a count for attempted murder[30] all involve elements that are distinct and not required by the others, the State claims that the jury properly found Weatherspoon guilty of both offenses. However, we conclude that Barton is not controlling since it involved whether lesser-included jury instructions were required, but did not explicitly discuss the issue of "redundant" convictions.

Instead, our language in State of Nevada v. District Court mandates that this court consider the "gravamen" of the charges against Weatherspoon. In that case, motorists were charged with traffic offenses and driving under the influence of alcohol.[31] We found that the gravamen of a traffic offense such as changing lanes without properly signaling was not merely driving, but rather changing lanes without signaling.[32] With respect to driving under the influence, we found that the gravamen was not driving, but doing so under the influence of alcohol.[33] Therefore, we rejected the claim that the charges were redundant because the gravamen was not the act of driving, which overlapped between each offense.[34] We added that "[t]he gravamen of an offense typically is the material act

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[29]See NRS 200.481(1)(a), (2)(c).

[30]See NRS 193.330(1); see also NRS 200.020(1)(c).

[31]State of Nevada, 116 Nev. at 138, 994 P.2d at 699.

[32]Id.

[33]Id.

[34]Id. at 138 n.9, 994 P.2d at 699 n.9.

being punished—driving is not itself being punished pursuant to any of the charges."[35]

Moreover, in Servin v. State,[36] we held that an analysis under Blockburger v. United States[37] would permit a conviction for both burglary and home invasion.[38] There, "despite the different elements which burglary and home invasion require in the abstract, the actual conduct underlying both aggravators was identical."[39] We found pertinent its analysis invalidating redundant convictions, holding that "it [was] improper to find the aggravating circumstance of burglary and the aggravating circumstance of home invasion under NRS 200.033(4) when both are based on the same facts."[40]

Here, we conclude that under the analysis invalidating redundant convictions, the gravamen of the offenses charged is the same. The material act being punished was attempting to murder Officer Rossi while fleeing the restaurant. Although each charge involves a separate and distinct element, the common act of attempting to murder the officer encompasses the gravamen of the offenses charged. Here, unlike the facts in State of Nevada, "the material act being punished" was attempting to murder an officer. Therefore, we conclude that Weatherspoon's conviction

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[35]Id.

[36]117 Nev. ___, 32 P.3d 1277 (2001).

[37]284 U.2. 299 (1932).

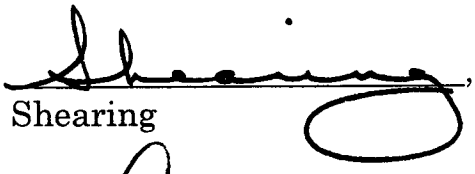
[38]Servin, 117 Nev. at ___, 32 P.3d at 1287.

[39]Id.

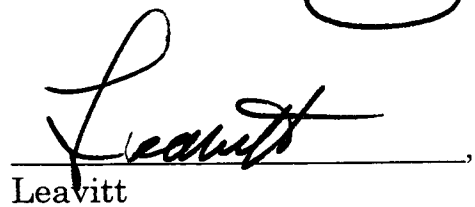
[40]Id. at ___, 32 P.3d at 1287-88.

for battery on an officer with substantial bodily harm was impermissibly redundant and should not be upheld. Accordingly we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to amend the judgment of conviction consistent with this order.



_____, J.
Shearing



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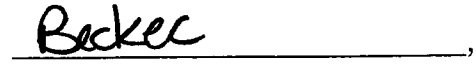

_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Amesbury & Schutt
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Clark County Clerk