IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY JOHN LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38564

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of one count each of burglary, invasion of the home, first degree kidnapping with use of a deadly weapon, and attempted murder with use of deadly weapon with substantial bodily harm.

In the early morning hours of September 9, 2000, Gregory Lopez went to the condominium of his ex-wife, Beverly Whitby. He admittedly broke the glass next to the front door with a barbell and entered the premises. Although the facts are in dispute, evidence at trial showed that Whitby was hit in the head with a blunt object, causing a skull fracture and a laceration to her head. Whitby then fired shots at Lopez. Lopez admitted to officers that he grabbed Whitby. Lopez testified that he held onto Whitby's hair and the force of his pulling her hair moved them a distance of eight to ten feet to the front door. At the front door, Whitby fell, causing broken glass to become embedded in her right hand and cuts and abrasions to her arms and legs.

Lopez first argues that there was insufficient evidence at trial for the jury to find first degree kidnapping.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this Court is "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."'"[1]

NRS 200.310(1) provides the requirements for first degree kidnapping as follows:

> 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 . . . the purpose of killing the person or inflicting substantial bodily harm upon him, . . . is guilty of kidnapping in the first degree . . . .

Although the statute does not require asportation, we have concluded that asportation is required "when the kidnapping is incidental to another offense" and "restraint of the victim is inherent with the primary offense."[2] However, if there is physical restraint, kidnapping is established as an additional offense.[3] Moreover, if there is movement of

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[1]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))) (emphasis in original).

[2]Clem v. State, 104 Nev. 351, 354, 760 P.2d 103, 105 (1988) (overruled on other grounds by Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990)).

[3]Id.

the victim that increases the risk of harm to the victim, a kidnapping charge is also appropriate.[4] There is no minimum distance requirement for the element of asportation to be met.[5] "It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping."[6]

Careful review of the record indicates that the jury could find the essential elements of the crime of kidnapping beyond a reasonable doubt. Not only was there evidence of physical restraint, sufficient by itself to support kidnapping as a separate offense, there was also evidence of asportation. Lopez, himself, admitted that the force of his pulling Whitby's hair moved them the eight to ten foot distance to the front door. Further, the record shows that this movement increased Whitby's harm: first, when she fell, causing glass to be embedded in her hands, arms, and legs and then when her hair was ripped from her head.

Lopez next argues that there was insufficient evidence to support the jury's finding that he used a deadly weapon during the kidnapping. NRS 193.165 provides, in pertinent part, "any person who uses a firearm or other deadly weapon . . . in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime."[7]

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[4]See Wright v. State, 94 Nev. 415, 418, 581 P.2d 442, 444 (1978).

[5]Jensen v. Sheriff, White Pine County, 89 Nev. 123, 125, 508 P.2d 4, 5 (1973) (citing State v. Clark, 455 P.2d 844 (N.M. 1969)) (emphasis in original).

[6]Id. at 125-26.

[7]NRS 193.165(1).

Lopez contends that there can be no use of a deadly weapon because Whitby did not testify that she actually saw the steel barbell while she was being dragged through her condominium. To support his argument, Lopez relies on Culverson v. State.[8] In Culverson, we stated, "[i]n 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 a (deadly weapon) in aiding the commission of (a crime).'"[9] Culverson does not, however, stand for the proposition that there must also be fear of harm when there is actual harm present. Thus, Lopez's reliance upon Culverson is misplaced.

In this case, although Whitby did not actually see the barbell in Lopez's hand during the dragging, she did see him raise his arm and hit her in the head with an object when she first opened her bedroom door. This act produced actual harm and facilitated the kidnapping. Thus, because there was actual harm, there is no need for fear of harm or force.

Lopez also argues that there was insufficient evidence that the barbell was used in the kidnapping. Lopez relies on Carr v. Sheriff, where we held that there cannot be an enhancement for use of a weapon when the underlying crime has been completed before the use of the weapon.[10] Lopez's reliance on Carr is also misplaced.

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[8]95 Nev. 433, 596 P.2d 220 (1979).

[9]Culverson, 95 Nev. at 435, 596 P.2d at 221 (1979) (quoting People v. Chambers, 498 P.2d 1024, 1027 (Cal. 1972)) (emphasis in original).

[10]See Carr v. Sheriff, 95 Nev. 688, 690, 601 P.2d 422, 424 (1979).

Unlike Carr, where the burglary was complete upon entry,[11] in this case, the kidnapping was not completed before Lopez used the barbell as a weapon. Even though Lopez claims he dropped the weapon after obtaining entry into Whitby's condominium, there is ample evidence in the record to support a contrary conclusion.

Whitby testified that Lopez hit her in the head with a hard object just after she opened her bedroom door. Dr. Harrington testified that Whitby's head injuries were consistent with a blow from an object like the barbell. Whitby further testified that she began shooting at Lopez just after she was hit in the head. Detective Prieto testified that there was a bullet hole in the hallway wall just across from Whitby's bedroom. Whitby's older daughter also testified that there was a bullet hole at this location. Further, Detective Prieto testified that there was blood on the barbell. This evidence substantiates Whitby's testimony and supports the conclusion that Lopez brought the barbell into Whitby's condominium with him.

We have previously stated that it is the jury's function to weigh the credibility of witnesses.[12] Further, we will not overturn a jury's verdict where there is substantial evidence to support the verdict.[13] Here, there was substantial evidence to support the jury's verdict that Lopez used a deadly weapon during the kidnapping of Whitby.

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[11]Id. at 689, 601 P.2d at 423-24.

[12]See e.g. Culverson, 95 Nev. at 435, 596 P.2d at 221.

[13]Id.

Lopez next argues that the district court erred in allowing the State to introduce evidence of Lopez's prior conviction for conspiracy to commit battery with substantial bodily harm to Catherine Lopez, Lopez's first wife.

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[14]

The admissibility of evidence is within the district court's sound discretion and will not be disturbed unless manifestly wrong.[15] The district court must conduct a hearing to determine if evidence of the prior act is admissible.[16] To be admissible, the prior act must be relevant to the current charged crime, be proven by clear and convincing evidence, and the probative value must not be substantially outweighed by the danger of unfair prejudice.[17]

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[14]NRS 48.045(2).

[15]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985) (citing Brown v. State, 81 Nev. 397, 400, 404 P.2d 428, 430 (1965)).

[16]Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 505 (1998).

[17]Id. (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

In this case, the district court conducted a hearing outside the jury's presence on May 22, 2001. Authenticity, relevance, probative value versus prejudice, and scope were addressed. The district court judge ruled that testimony from police officers, the treating physician, and photographs of the crime scene regarding the prior incident would be admitted to show common scheme or plan to Lopez's wives and similarity of injury.

In Gallego v. State, a case involving the murder of two young girls, this court allowed evidence of a prior, similar killing of two other young women.[18] Although the methods used in the two incidents were different,[19] this court concluded that there were substantial similarities in the plan and intent.[20]

Like in Gallego, here, there are similarities between the prior act and the present crime. Both incidents involved Lopez's wives: the first, his estranged wife; the second, his recently divorced wife. Both incidents resulted in similar injuries and involved injury to the women's faces and heads. Finally, both incidents concluded with Lopez admitting to officers his fault in the matter.

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[18]101 Nev. 782, 711 P.2d 856 (1985).

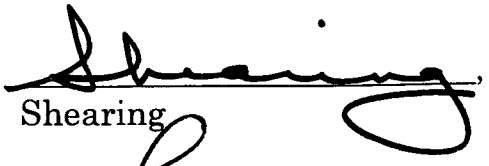
[19]The earlier two were killed by bullets to the head, while the latter two were bludgeoned to death by a hammer.

[20]Gallego, 101 Nev. at 789, 711 P.2d at 861.

Because there were substantial similarities between the two incidents, the trial court did not err by allowing evidence of the prior conviction to be introduced by the State to show common scheme or plan. Furthermore, the district court complied with the procedural requirements of a hearing on the matter prior to allowing the evidence to be introduced.

Having considered Lopez's contentions on appeal and concluded they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing

_____, J.
Leavitt

cc: Hon. Donald M. Mosley, District Judge
Sciscento & Montgomery
J.E. Ring Smith
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

BECKER, J., concurring:

With one exception, I concur in the order of affirmance. I do not agree with the majority on the admissibility of Lopez' prior conviction for conspiracy to commit battery. I conclude the prior conviction was not admissible under the common plan or scheme exception to NRS 48.045(2). However, I find its admission tc be harmless error in light of the overwhelming evidence presented by the State.

Becker, J.
Becker