IN THE SUPREME COURT OF THE STATE OF NEVADA

DARNELL HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39461

FILED

JUL 28 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This direct appeal emanates from Darnell Harris' (Harris) conviction on twelve felony counts related to the armed robbery of a Macayo Vegas Restaurant in June 2000.

Harris first claims that his confession was inadmissible because it was coerced and because he was not Mirandized. Because his confession was inadmissible, he further contends that the seizure of DNA evidence was illegal as well. A confession is inadmissible unless freely and voluntarily given.[1] "In order to be voluntary, a confession must be the product of a 'rational intellect and a free will.'"[2] This court employs a totality of the circumstances test to determine "whether the defendant's

[1]Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934, 940 (1989) (citing Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987)).

[2]Passama, 103 Nev. at 213-14, 735 P.2d at 322 (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

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will was overborne when he confessed."[3] "[A] confession obtained by physical intimidation or psychological pressure is inadmissible."[4]

Harris first contends that the presence of parole and probation officers when police requested that he submit to questioning constituted coercion that invalidated his subsequent confession. He argues that refusal to comply with the request of a police officer would have violated conditions of his probation order and subjected him to the possibility of immediate arrest and subsequent revocation of his probation.

Harris' claim that the presence of the parole and probation officers created a coercive environment is unpersuasive. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[5] Harris' alleged fear that he would have violated conditions of his probation order by failing to cooperate would have existed regardless of whether or not his parole and probation officers were present at the time of the request.

Harris also contends that his statements were the result of psychological coercion. Specifically, Harris argues that his requests to stop the interview were ignored and any statements made after these requests were the product of improper psychological pressure. Harris also

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[3]Passama, 103 Nev. at 214, 735 P.2d at 323; see also Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[4]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992), overruled on other grounds by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000).

[5]Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

asserts that the DNA sample obtained during the interview, and all analysis of the sample, should be suppressed as the fruit of his involuntary statements.

Initially, Harris agreed to be interviewed at the detective bureau and voluntarily accompanied the police to that location. Harris agreed to provide the DNA sample at the beginning of the interview process. The record supports the district court's conclusion that the sample was obtained during a time when Harris was voluntarily cooperating with the police. However, after Harris had given a lengthy statement denying any involvement, the detectives told Harris about some of the evidence they had collected linking him to the robbery. Harris was informed that if he wanted to help himself, now was the time to do it. Harris then requested to start the interview all over.

During the second interview, Harris attempted to explain how his fingerprints or DNA might innocently be present on the vehicles or masks used in the robbery. At the conclusion of Harris' comments, the detectives indicated that they did not believe Harris. The detectives then began questioning him point blank about specifics of the crime. Harris began crying and either answered questions in the negative or did not respond to the questions. The officers then told Harris that he should think about his son and being able to see him and how the officers could facilitate a visit. The following exchange then occurred:

> Harris: Can we talk some, can we talk some other time sir, please?
>
> Officer 1: No, we're here to talk now.
>
> Harris: Can we talk another time[?]
>
> Officer 1: We're here to talk now, the time is now. Like he said, he can't give you a third time. We put on two different

interviews for ya, you know what I'm saying.

Harris: Yes sir.

Officer 1: I understand you want to see your son, I understand that bothering ya, but we need to know the truth now and when the truth's done, then you'll have all those, all those things.

Harris: Can I see him [inaudible].

Officer 1: Absolutely, we have no reason to keep your son from you. It's only gonna help you down the road to see your son because of what you're gonna do now in the next five minutes Darnell.

After this exchange, Harris made a number of incriminating statements. A few minutes later, Harris again asked to stop the interview.

Harris: I have to say anymore sir?

Officer 2: You don't have to if you don't want to.

Harris: Sir I can't talk right now, please, no sir.

Officer 2: You can't talk right now?

Harris: No sir, no.

Officer 2: Okay.

Officer 1: Are you sure Darnell?

Harris: You will, you will know, you will know the truth.

Officer 1: Darnell, we, we know what happened out there, okay.

The officers continued to advise Harris that he should tell his story now, referencing topics such as making it easy on himself and getting it off his conscience. Harris made several more incriminating statements after the additional comments by the officers.

Harris indicated he no longer wished to answer questions. The officers were free to inform Harris that they would not grant a third interview, but the references to Harris' son and the inference that he would not be able to see his son if he did not continue the interview constituted improper psychological pressure. Moreover, when Harris unequivocally stated, a few minutes later, that he wanted to stop the interview, the officers should either have stopped the questioning, or arrested Harris and advised him of his Miranda rights before continuing questioning. We conclude that all statements made after the references to Harris' son should have been suppressed. However we also conclude that any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt including the fingerprint and DNA evidence linking Harris to the vehicles and masks used in the robbery.

Finally, Harris contends the entirety of his statements and the DNA sample should be suppressed because he was the subject of a custodial interrogation and he was not advised of his Miranda rights. In Alward v. State,[6] this court reiterated that "a suspect may not be subjected to an interrogation in official 'custody' unless that person has previously been advised of, and has knowingly and intelligently waived [his or her Miranda rights]."[7] The test for determining whether a defendant who has not been arrested is in custody "is how a reasonable man in the suspect's position would have understood his situation."[8] The

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[6]112 Nev. 141, 912 P.2d 243 (1996).

[7]Id. at 154, 912 at 251-52.

[8]Id. at 154, 912 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)); see also State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d

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court will consider the totality of the circumstances, including: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning."[9]

Here, Harris' questioning took place at the detective bureau. He had been informed that he was a suspect. He was told that he was free to leave at any time, he was not handcuffed, and his movement was not restricted at any time. He was questioned for two hours – longer than the one hour legally permitted if he were in custody, but not so long as to support an inference that he was under arrest. Therefore, up until the time of his request to stop the interview, Miranda warnings were not necessary under the totality of the circumstances. Because we conclude that only statements made after that point were involuntary, the issue of the nature of the interrogation and the need for Miranda at that time is moot.

Harris further argues that both of his convictions for kidnapping were improper. He contends that the asportation of Haroon from the kitchen to the front of the restaurant was incidental to the robbery. Similarly, he argues that the asportation of Davis from the Olive Garden Restaurant to another location several miles away was incidental

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. . . *continued*
315, 323 (1998); California v. Beheler, 463 U.S. 1121, 1125 (1983) (ultimate inquiry in custody question is whether there is a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest" (citing Mathiason, 429 U.S. at 495)).

[9]Alward, 112 Nev. at 154-55, 912 P.2d at 252 (citing People v. Celaya, 236 Cal.Rptr. 489, 492 (Cal. Ct. App. 1987)).

to the theft of her automobile. This court considered these same arguments with respect to one of Harris' accomplices and overturned the accomplice's conviction for the kidnapping of Haroon and upheld his conviction for the kidnapping of Davis.[10]

With respect to the alleged kidnapping of Haroon, there is no evidence in the record to suggest that there was a substantial increase in harm due to the asportation and the detention period was minimal. In accordance with this court's decisions in Weatherspoon, the conviction for the kidnapping of Haroon was improper.

Harris maintains that Davis was pushed into the vehicle only in an effort to steal the vehicle, and she was only driven a short distance before being released.

However, the evidence introduced at trial was sufficient to support the conviction for the kidnapping of Davis. Weatherspoon and Harris 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. In forcing Davis into the vehicle instead of merely taking the vehicle, Weatherspoon and Harris increased the risk of harm to Davis.

Harris also contends that his multiple convictions for discharging a firearm at or into a vehicle, battery on an officer with substantial bodily harm, and attempt murder with a deadly weapon are

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[10]Weatherspoon v. State, No. 38505 (Order Affirming in Part, Reversing in Part and Remanding, October 8, 2002).

all based on a single act of firing at the police cruiser, and are therefore redundant convictions that do not comport with legislative intent.[11]

Here, the gravamen of the offenses charged is the same with regard to the battery charge and the attempt murder charge. The material act being prosecuted was the attempt 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. Therefore, consistent with this court's order in Weatherspoon, Harris' multiple convictions for the single act of shooting and injuring Officer Rossi were impermissibly redundant and should not be upheld. Harris' convictions for discharging a firearm at or into a vehicle are not impermissibly redundant, however, because those charges contain an element, the vehicle, not required by the other related charges and because the offense did not involve the intent to commit harm present in the battery and attempt murder charges.

Finally, Harris claims that the State committed acts of prosecutorial misconduct during closing arguments. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[12]

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[11]See, e.g., State v. Koseck, 113 Nev. 477, 936 P.2d 836 (1997); Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987).

[12]Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 61-62 (1997) (quoting United States v. Young, 470 U.S. 1, 11 (1985)), overruled in part on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

Here, the prosecutor's comments must be examined in their proper context – Harris had confessed. Thus, the prosecutor was not expressing personal opinion, but instead emphasizing undisputed fact. This argument might justify comments of the "he did it" variety, but does not adequately justify prosecutorial comments associated with the defendant's guilt, which is a legal, not factual, determination. Prosecutorial misconduct occurred with regard to these statements during closing arguments.

Having determined that the comments were improper, this court must next assess whether the prosecutor's errors were "harmless beyond a reasonable doubt."[13] The evidence against Harris was substantial enough to convict him in an otherwise fair trial. Moreover, the verdict would almost certainly have been the same absent the improper statements of the prosecutor. Thus, the prosecutor's errors were harmless and reversal is unwarranted.

Harris contends that the prosecutor, during closing arguments, told the jury that Harris' confession contained an admission that he was the person that shot Officer Rossi when, in fact, Harris admitted shooting the officer during an unrecorded conversation with detectives and did not include such an admission in his confession. Again, the analysis must focus on whether the prosecutor's misrepresentation was error sufficient to justify reversal.

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[13]Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (citing Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983)).

"It is not enough that the prosecutor's remarks are undesirable."[14] Instead, "the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[15] The volume of physical evidence, testimony of co-conspirators, and Harris' own statements render the prosecutor's erroneous representation of Harris' confession harmless as well.

Harris further claims the prosecutor's use of one of the detectives to summarize video evidence biased the jury and gave the prosecution an additional chance to outline its case theory. He argues that it was an abuse of discretion for the court to permit a detective to summarize video evidence because such testimony was cumulative.

The court permitted the detective's summary in an effort to clarify matters for the jury, not to allow the prosecution an additional opportunity to present its theory of the case. A court not only has the discretion to exclude cumulative presentation of evidence, it also has the discretion to permit such presentations when deemed necessary to assist the jury in understanding the evidence. There was no clear abuse of discretion related to the video summary sufficient to warrant reversal by this court.[16] Accordingly, we

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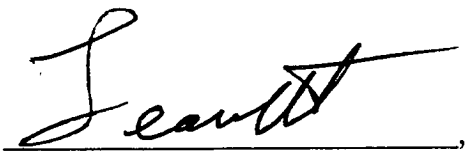
[14]Greene, 113 Nev. at 169, 931 P.2d at 62 (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

[15]Greene, 113 Nev. at 169, 931 P.2d at 62 (citing Darden, 477 U.S. at 181).

[16]See NRS 48.015; NRS 48.035; NRS 178.598.

ORDER the judgment of the district court REVERSED IN PART setting aside the convictions for the kidnapping of Hamid Haroon and the battery on an officer with substantial harm AND AFFIRMED IN PART with respect to the remaining convictions.

_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

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