

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39698

FILED

OCT 07 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Schaefer*
CHIEF DEPUTY CLERK

Appellant, Matthew James King, appeals from a judgment of conviction entered upon verdicts of guilty in connection with charges of attempted murder, first-degree kidnapping, robbery and grand larceny auto.¹ He contends on appeal that the district court erred in admitting opinion testimony from a police officer concerning the cause of the victim's injuries; admitting a hearsay statement made by King's mother; allowing the State to amend the criminal information; and denying King's motion to dismiss the first-degree kidnapping charge. He also claims that the trial evidence does not support the guilty verdicts. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2001, the victim, an escort with Room Service Escort Service, visited King in his room at the Del Mar Motel in Las Vegas. She left her wallet containing \$300.00 in her automobile. The victim entered the room, asked King for the \$200.00 agency fee and called her manager to check in. She placed the money in her purse, which also contained her car keys and cellular telephone. Over the course of several minutes, King paid her an additional \$100.00 for a striptease dance and \$400.00 for sex. The victim also placed these sums in her purse.

¹See NRAP Rule 3B; NRS 177.015(3).

The victim gave the following account of the events that followed. After unsuccessfully attempting intercourse several times, she determined to leave and called her manager to check out, according to procedure. As she was dressing, King approached her from behind and put his arm around her neck in a chokehold. They both fell to the floor near the bathroom entrance. King got on top of her, placed his hands around her neck and began choking her. As the victim attempted to fight back, King began to bang her head on the floor and bed frame. The victim tried to lay still hoping King would stop, but King only pressed the attack with more vigor, causing her to lose consciousness. When the victim awoke, about one-half hour later, she found herself in the motel room shower face down with a telephone cord tightly wrapped around her neck and handcuffs on her wrists.

The victim began dressing and noticed that her purse, money, keys, cellular phone, and car were missing. Police and medical personnel responded to her 911 call placed from the motel office. Police investigated the motel room and medical personnel transported the victim to the hospital, documenting bruises on her face and neck, bloodshot eyes, and marks on her wrists and hands. Police recovered her car, wallet and keys weeks later; but not the money and cellular phone.

On July 25, 2001, two days following the alleged attack, Marlene King-Adams, King's mother, contacted Officer Pete Davis of the Coconino County Sheriff's Office in Arizona. King-Adams requested assistance, stating that her son was in trouble with law enforcement and that she was afraid of him. Upon Davis's arrival at her residence, King-Adams and King were on the porch. King told the officer he knew why the officer was there and then relayed a story to the officer regarding the incident with the victim. Davis handcuffed King and called Las Vegas

officials who verified the outstanding warrant for King's arrest. Davis took King into custody. Officer George Sherwood of the Las Vegas Metro Police Department then contacted the victim and conducted a photographic line-up at her residence, at which time the victim identified King as the assailant.

The case proceeded to trial. During trial proceedings, Sherwood testified that, when he went to the victim's residence to conduct the photo line-up, he observed, "[the victim] had extremely red, bloodshot eyes that are consistent with hemorrhaging from strangulation or suffocation." King objected to this testimony on the basis that King did not receive notice that the State intended to call Sherwood as an expert witness. The State replied Sherwood was not testifying as an expert but testifying as to his experience in the homicide division and his familiarity with strangulation. The judge overruled King's objection and allowed the testimony.

The district court also allowed Officer Davis to testify as to King-Adams' reason for contacting the Arizona authorities, *i.e.*, that she believed her son was in trouble with law enforcement and was afraid of him at that time.

The trial jury found King guilty on all charges and the district court sentenced King to concurrent sentences of 90 to 225 months for attempted murder; life with the possibility of parole after 5 years for first-degree kidnapping; 36 to 90 months for robbery; and 22 to 96 months for grand larceny auto. The district court gave King credit for 274 days of pre-sentence incarceration. Additionally, the court assessed a \$25.00 administrative assessment fee, \$150.00 DNA analysis fee and \$3,783.17 restitution. King appeals.

DISCUSSION

Police testimony as to the cause of the victim's injuries

King argues that the district court committed reversible error by permitting Officer Sherwood to testify at trial as an expert concerning the cause of the victim's injuries. The State responds that King's argument lacks merit because Sherwood properly testified as a non-expert as to his opinion based on his involvement in the investigation and from his observation of the victim.

NRS 50.275 sets forth the parameters under which expert testimony is admissible:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

When a witness does not qualify as an expert, opinion testimony may be admissible under NRS 50.265, which states:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

1. Rationally based on the perception of the witness; and
2. Helpful to a clear understanding of his testimony or the determination of a fact in issue.

In Lord v. State,² we concluded that the district court erred in admitting lay opinion that the defendant's injuries were sustained in an altercation, but also concluded that the error did not prejudice Lord's

²107 Nev. 28, 806 P.2d 548 (1991).

substantial rights in light of other strong evidence of guilt.³ Because we conclude that Sherwood was competent to testify as an expert based upon his experience, Lord is not controlling of the outcome in the present case. Further, any procedural failures to notify the defense concerning the testimony do not compel reversal given the overwhelming body of evidence of guilt against King.

King-Adams' statement

King contends that the district court committed prejudicial error by admitting a hearsay statement of his mother, Marlene King-Adams, through Officer Davis. As noted, the district court allowed Davis to testify to the mother's statement that she called for the authorities because she believed her son was in trouble in Nevada and that she was afraid of him. The State contends the district court properly admitted King-Adams' statement to prove King-Adams' present sense impression and state of mind in calling for police assistance.

NRS 51.035 defines hearsay as "a statement offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible, subject to exceptions.

Although hearsay, King-Adams' statement was admissible under NRS 51.105(1) as a statement of her "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health" More particularly, the statement was admissible to rebut the inference that the call from King-Adams to the Arizona authorities was simply to effect cooperation. King-Adams' statement verifies that King did not cooperate with law enforcement because he fled the Las Vegas area to Arizona following the

³Id. at 33-34, 806 P.2d at 551.

incident with the victim. We therefore conclude the trial court did not err in admitting Officer Davis's testimony as to King-Adams' statement. We also conclude that admission of the testimony, even if improper, would not require reversal.

Amended information

King contends that the district court committed reversible error by allowing the State to amend the criminal information to state that the kidnapping was committed for the purpose of murder as well as robbery.

Before the amendment, count two of the information stated:

Count II – First Degree Kidnapping

did then and there willfully, unlawfully, feloniously, and without authority of law, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap or carry away [THE VICTIM], a human being, with the intent to hold or detain the said [THE VICTIM] against her will, and without her consent, *for the purpose of robbing*⁴ the said [THE VICTIM].

On the first day of trial, the State moved to amend the information to include murder as one of the purposes of the kidnapping. The district court stated that the amended information did not prejudice the defense and granted the State leave to file the amended information.⁵

Because the original information separately charged King with attempted murder, the amended information did not change the substance of the prosecution's theories against King, nor did it require any

⁴The italicized language shows the placement of the amendatory language, "for the purpose of robbing and/or murdering," in the information.

⁵See NRS 173.095(1).

changes in defense strategy. We therefore conclude that the district court committed no error in granting the State leave to amend the information.⁶

First-degree kidnapping

King contends that the district court committed reversible error by denying his pre-trial motion to dismiss the first-degree kidnapping charge.

NRS 200.310(1) defines first-degree kidnapping as:

A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever . . . for the purpose of committing . . . robbery . . . is guilty of kidnaping in the first degree

In Wright v. State, we held that, to uphold a conviction for contemporaneous charges of robbery and kidnapping, there must be movement or restraint of the victim, which results in increased danger over and above that present in the crime of robbery itself.⁷ If the movement or restraint is incidental to the act of robbery and does not result in increased harm or danger to the victim, a conviction for both robbery and kidnapping cannot stand.⁸

We conclude sufficient evidence supports the first-degree kidnapping conviction. The element of asportation is satisfied based on the victim's testimony that before losing consciousness, she was struggling with King near the bed outside the bathroom, and that when she regained

⁶Appellate counsel at oral argument could not indicate how King could have changed his trial strategy had the amendment been offered at an earlier time.

⁷94 Nev. 415, 417-18, 581 P.2d 442, 443-44 (1978).

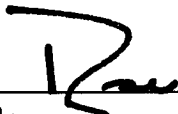
⁸Id.


consciousness she was handcuffed in the shower and was bound with a telephone cord around her neck. This amount of movement and restraint was not merely incidental to the robbery. While the victim was unconscious, King could have taken her keys, money and car without having to move or otherwise restrain her.

CONCLUSION

We conclude that the district court did not err (1) in admitting the officer's opinion testimony; (2) in admitting hearsay statements of King's mother; (3) in allowing the State to amend the information; or (4) in denying King's motion to dismiss the first-degree kidnapping charge.⁹

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Valorie Vega, District Judge
Chad A. Bowers
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹We have considered and reject King's final contention on appeal, that insufficient evidence was adduced at trial to sustain his convictions.