

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER D. MACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.


No. 42073

CHRISTOPHER D. MACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42149

FILED

FEB 14 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

These are consolidated appeals challenging convictions, pursuant to a jury verdict, of eight counts of crimes including robbery, burglary, attempted robbery, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The criminal convictions at issue arise from two robberies that occurred at an Arby's restaurant in Las Vegas, Nevada on November 25, 2001 and December 1, 2001. Appellant Christopher D. Mack raises three claims of reversible error on appeal including: (1) his kidnapping conviction should be vacated as incidental to the robbery conviction; (2) his confessions were coerced and should have been suppressed; and (3) the district court abused its discretion in granting the State's motion for joinder. We agree with Mack's first contention, but reject his remaining arguments.

FACTS

On March 5, 2002, the State charged appellant Christopher Mack with thirteen counts of crimes, including burglary with the use of a deadly weapon, robbery, attempted robbery and kidnapping, for two robberies that occurred at a Las Vegas Arby's restaurant, located at 3121 West Sahara Avenue. Because the charges were included under two different cases, the State filed a motion for joinder, and the district court granted the motion, finding that there was "a sufficient similarity between" the November 25, 2001 burglary and the December 1, 2001 burglary "as a common scheme."

In late July 2003, Mack was convicted of two counts of burglary while in possession of a firearm, four counts of robbery with the use of a deadly weapon, one count of attempted robbery with the use of a deadly weapon, and one count of first-degree kidnapping with the use of a deadly weapon.

During Mack's trial, Natasha Vanweydeveltdt, an Arby's employee, testified regarding the events surrounding the November 25, 2001 robbery. She testified that Mack was the individual who robbed the store that night, and that he took her to the back office and demanded the money from the safe and the registers. Roxanne Shandrew, an Arby's employee, testified regarding the December 1, 2001 robbery. Shandrew testified that Mack robbed the store at gunpoint and demanded money from the safe and registers. She also testified that Mack had Jarrad Coombs, another employee, in a headlock. Shandrew stated that after receiving the safe money, Mack released Coombs, pointed a gun at his head, and directed him to stand with Shandrew. She testified that he

directed both of them to turn toward the wall, and get down on their knees.

Detective Mogg testified regarding his interview with Mack after Mack was apprehended. Mogg testified that he advised Mack of his Miranda rights and obtained a signature that Mack understood his rights.¹ During the interview, Mack testified he did not want to speak with Mogg and did not want to tell Mogg what happened. Later, Mack asked, “What do you want to know?” and the interview continued. Toward the end of the interview, Mack confessed to the November 25, 2001 robbery at Arby’s.

In early August 2002, Mack filed a motion to suppress his confession regarding the November robbery, and the district court denied the motion in July 2003. At the conclusion of the trial, Mack’s counsel made a motion to the district court to dismiss the kidnapping charges, and the court denied that motion finding that the issue was a question of fact that should be left to the jury.

DISCUSSION

Kidnapping

Mack contends his kidnapping conviction should be overturned because his incidental use of a headlock on an Arby’s employee did not substantially increase the victim’s risk of harm. Mack was convicted of first-degree kidnapping with the use of a deadly weapon, as alleged in count 13, which provides that Mack kidnapped “a human being, with the intent to hold or detain the said [victim], against his will, and without his consent, for the purpose of committing robbery.”

¹Miranda v. Arizona, 384 U.S. 436 (1966).

NRS 200.310 provides that a “person who willfully seizes, confines . . . abducts . . . conceals, kidnaps or carries away a person by any means whatsoever . . . for the purpose of committing . . . robbery . . . shall be deemed guilty of kidnapping in the first degree.”

In Wright v. State, this court acknowledged the wide breadth of NRS 200.310 stating, “[l]iterally applied, it would encompass an ordinary robbery in the course of which the victim happens to be moved from one room to another.”² Furthermore, the court recognized that it would be difficult to conceive of a robbery that could be accomplished without some form of kidnapping.³ Noting that the punishment for robbery is substantially less severe than that for kidnapping, the court in Wright concluded that if “the movement of the victim is incidental to the robbery and does not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself, it would be unreasonable to believe that the legislature intended a double punishment.”⁴

Mack contends Wright is analogous to this case. In Wright, three males entered the lobby of a Las Vegas hotel, pulled a revolver on the night clerk, directed two victims to walk to a back room, ordered the night auditor and clerk to lie face down, and taped the victims’ hands and feet.⁵ This court concluded these actions were “incidental to the robbery”

²94 Nev. 415, 417, 581 P.2d 442,443 (1978).

³Id.

⁴Id. at 417, 581 P.2d at 443-44.

⁵Id. at 416, 581 P.2d at 443.

and without an increase in danger to [the victims],” and noted the “detention was only for the short period of time necessary to consummate the robbery;” therefore, the court overturned the kidnapping convictions.⁶

In this case, Mack held the victim in a headlock, moved with him to the restaurant’s back office, and pointed a gun at him. In accord with Wright, the kidnapping was incidental to the robbery; therefore, the kidnapping conviction must be reversed.

Motion to Suppress

Mack contends that during his police interrogation he was coerced into confessing his involvement in the November 25, 2001 robbery, and that he attempted to exercise his right to remain silent, but the interrogators ignored him and demanded answers to questions.

“The Fifth Amendment privilege against self-incrimination requires that a suspect’s statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning. In order to admit statements made during custodial interrogation, the defendant must knowingly and voluntarily waive the Miranda rights.”⁷

This court has noted “[t]o determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant” considering factors such as “the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of the detention; the

⁶Id. at 418, 581 P.2d at 444.

⁷Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001)(citations omitted).

repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.”⁸

Mack voluntarily confessed to the November incident. Before the interrogation, the detective advised Mack of his Miranda rights and obtained an acknowledgment that Mack understood these rights. Although Mack stated early in the interview that he did not want to speak with the detective, he continued the discussion by asking what the detective wanted to know. Following that line of questioning, Mack never restated that he did not wish to speak nor did he ask to have an attorney present. Under the totality of these circumstances, the confession was freely and voluntarily given. Thus, we reject Mack’s argument.

Motion for Joinder

Mack’s final argument is that the district court erred in granting the State’s motion for joinder because the State presented substantial evidence against Mack regarding the December robbery, and no evidence supporting the November robbery. We disagree.

NRS 173.115 provides that two or more offenses may be joined in the same indictment if the offenses charged are

1. [b]ased on the same act or transaction; or
2. [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.


In Nevada, the established rule is that joinder decisions are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion.⁹


⁸Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

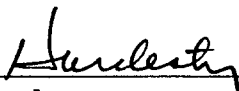
Two crimes committed in a common, similar setting during a relatively short period of time has been held to evidence a common scheme or plan.¹⁰ Similarly, we conclude that the two separate robberies in this case satisfy NRS 173.115(2). The incidents took place less than a week apart and were similarly accomplished by Mack by entering an Arby's restaurant at gunpoint and forcing employees to take him to the safe and registers.

Furthermore, Mack's argument that the State did not have evidence to link him to the November robbery is without merit, as Mack confessed to it, and an Arby's employee identified Mack in court as the robber during the November incident.

Accordingly we ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, AND REMANDED with instructions to vacate Mack's kidnapping conviction.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

... continued

⁹Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996).

¹⁰Id. (finding two car burglaries evidenced a common scheme or plan when both offenses involved vehicles in casino parking garages and occurred only seventeen days apart).

cc: Hon. Jackie Glass, District Judge
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