IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY COCA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42724

FILED

MAY 2 0 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

On February 27, 2004, appellant Cory Coca was convicted, pursuant to a jury verdict, of one count of destroying evidence and was sentenced to one year in the White Pine County Jail.

Coca raises several claims on appeal. First, he claims that the district court erred in refusing to give his proposed attempt instruction. A lesser included offense instruction is mandatory when there is evidence that would absolve the defendant of the greater offense but would support a finding of guilt as to the lesser offense.[1] The district court enjoys broad discretion in settling jury instructions, and its decisions in these matters are reviewed for an abuse of discretion or judicial error.[2]

The district court denied Coca's attempt instruction on the ground that it was inconsistent with his claim of innocence. However, more precisely, Coca asserted as his defense that the State had not met its

[1]See Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 473 (2000); Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

[2]See Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

burden of proof and therefore he was not guilty of the charge. We conclude that a defendant does not forfeit a lesser included offense instruction by merely challenging the sufficiency of the State's evidence.[3] Here, evidence adduced at trial sufficiently supported a conviction for attempted destruction of evidence, thus mandating an attempt instruction. Accordingly, we conclude that the district court abused its discretion in refusing to give an attempt instruction, and we reverse Coca's conviction on this basis.

Coca also claims that the district court erred in refusing to give the following proposed instruction regarding specific intent:

> In the crime and allegation charged, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime or allegation to which it relates is not committed or is not true. The specific intent required is included in the definitions of the crimes or allegations set forth elsewhere in these instructions.

The district court instead instructed the jury as follows:

> The court instructs the jury that in every crime or public offense there must be a union or joint operation of act and intention. Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused.

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[3]See State v. McClam, 850 P.2d 1377, 1380 (Wash. Ct. App. 1993); People v. Valdez, 595 N.E.2d 1245, 1253 (Ill. Ct. App. 1992), superseded by statute on other grounds as recognized by People v. Clemons, 657 N.E.2d 388 (Ill. Ct. App. 1995); People v. Eilers, 282 Cal. Rptr. 252, 255 (Ct. App. 1991).

The district court further instructed the jury on the elements of the offense, including that the destruction of evidence involves:

> Willfully and unlawfully with specific intent to conceal the commission of a felony or protect or conceal the identity of a person committing a felony, or with the specific intent to delay or hinder the administration of law destroyed, altered, erased, obliterated or concealed . . . a thing.

Additionally, the district court instructed the jury on the definitions of willfully, unlawfully, and knowingly.

The district court may properly refuse to give an instruction that is substantially covered by another instruction provided to the jury.[4] We conclude that specific intent was sufficiently addressed in the other instructions given to the jury. Accordingly, we conclude that the district court did not err in refusing to give Coca's proffered specific intent instruction.

Third, Coca argues that the district court erred in denying his motion in limine, which was more appropriately a motion to suppress. A district court's factual findings regarding a motion to suppress are accorded deference and will not be disturbed if supported by substantial evidence.[5] Additionally, a district court's decision to suppress evidence is reviewed for an abuse of discretion.[6]

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[4]See Bolin v. State, 114 Nev. 503, 529, 960 P.2d 784, 800-01 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

[5]See State v. Johnson, 116 Nev. 78, 80-81, 993 P.2d 44, 45-46 (2000); State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997).

[6]See Zabeti v. State, 120 Nev. ___, ___, 96 P.3d 773, 776 (2004).

Here, a Nevada Highway Patrol trooper pulled over the car in which Coca was a passenger and cited the driver for speeding. Coca argues that once the driver received the citation, the justification for the stop terminated and the stop became an illegal seizure. He further argues that once the driver's seizure became illegal, the detention of her passengers became illegal as well. Thus, according to Coca, the drugs recovered during the stop should have been suppressed. Coca argues that the detention in this case was unreasonable because the trooper never informed the driver that she was free to leave after the trooper issued her the citation.

However, "[m]ere police questioning does not constitute a seizure."[7] Moreover, the Fourth Amendment does not require that a lawfully detained person be advised that he is free to leave before his consent to search is deemed voluntary.[8] Based on the particular circumstances of this case, we conclude that the consensual searches conducted were voluntary. Accordingly, we conclude that the district court did not abuse its discretion in denying Coca's motion.

Lastly, Coca asserts that there was insufficient evidence to convict him because there was enough of the drug collected at the scene to be tested. "To sustain a conviction, sufficient evidence must exist that establishes guilt beyond a reasonable doubt as determined by a rational

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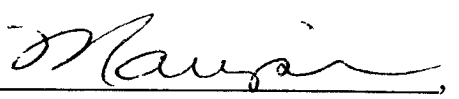
[7]State v. Burkholder, 112 Nev. 535, 538, 915 P.2d 886, 888 (1996) (citing Florida v. Bostick, 501 U.S. 429, 434 (1991)).

[8]See Ohio v. Robinette, 519 U.S. 33, 39-40 (1996); Burkholder, 112 Nev. at 539-40, 915 P.2d at 888-89.

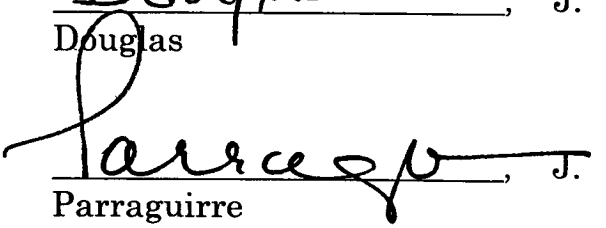
trier of fact."[9] Here, the State introduced evidence that the driver threw a baggie of methamphetamine to Coca immediately preceding the search of her purse, that Coca appeared to place something in or remove something from his waistband, that a small baggie of methamphetamine was found at his feet, that the baggie at Coca's feet was ripped open and that the contents spilled on the ground. Additionally, the trooper testified that the driver and Coca never stood near each other prior to the trooper handcuffing Coca and discovering the baggie of methamphetamine near Coca. Moreover, contrary to Coca's assertion, NRS 199.220 does not require an actual destruction of evidence. Rather, destruction, alteration, erasure, obliteration, or concealment of evidence is sufficient to satisfy the statute. Consequently, we conclude that sufficient evidence supports Coca's conviction for destruction of evidence. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for further proceedings consistent with this order.



_____, J.
Maupin

_____, J.
Douglas



_____, J.
Parraguirre

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[9]Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000).

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Brian Sandoval/Carson City
White Pine County District Attorney
White Pine County Clerk