

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN LAMONT TOWNSEND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47195

FILED

JAN 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, two counts of false imprisonment with use of a deadly weapon, two counts of robbery with use of a deadly weapon, and one count of grand larceny auto. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

Appellant Jonathan Townsend argues that the district court made numerous reversible errors, including: summarily dismissing as untimely Townsend's motion to dismiss counsel; improperly admitting impermissibly suggestive eyewitness identifications; improperly admitting valuation evidence; improperly admitting hearsay and unauthenticated photographic evidence; refusing to give Townsend's proposed jury instruction; and refusing to directly answer a juror's question. Townsend also argues insufficiency of the evidence and cumulative error. We have considered all the above arguments and find them to be without merit.

Townsend makes two additional arguments regarding the convictions for false imprisonment with a deadly weapon which this court has determined merit discussion. Townsend argues that his convictions for false imprisonment should be reversed for two reasons: (1) the

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convictions for false imprisonment and robbery are redundant and violate double jeopardy principles, and (2) Jury Instruction No. 21 violated this court's decision in Bolden v. State¹ and allowed the jury to convict him based on an improper theory of liability. We agree with both of Townsend's arguments.

Redundancy of the robbery and false imprisonment convictions

Townsend first contends that his convictions for robbery and false imprisonment are redundant and violate double jeopardy principles. Townsend argues that restraint of the victims was incidental to the robbery because it facilitated escape,² and therefore the false imprisonment convictions cannot be sustained as separate charges. We agree. "Double jeopardy protects a criminal defendant . . . from multiple punishments for the same offense in a single trial."³ Further, this court "will 'reverse redundant convictions that do not comport with legislative intent.'"⁴ While the State charged Townsend with kidnapping, the jury found him guilty of the lesser included offense of false imprisonment. In Garcia v. State, this court held that the same test for determining redundancy for kidnapping applied to false imprisonment as well.⁵ In

¹121 Nev. 908, 124 P.3d 191 (2005).

²A taking, for purposes of robbery, includes use of force or fear of force to facilitate escape. NRS 200.380(1)(c).

³Garcia v. State, 121 Nev. 327, 342, 113 P.3d 836, 845 (2005).

⁴Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (quoting State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997)).

⁵121 Nev. at 334-35, 113 P.3d at 841.

Mendoza v. State, this court clarified that test, holding that restraint is considered incidental to a robbery, and will not sustain a kidnapping conviction, unless the restraint either “substantially increase[s] the victim’s risk of harm,” “exceeds that required to complete the associated crime,” or “stands alone with independent significance.”⁶ Here, we conclude that the restraint used appeared to facilitate escape from the robbery and does not meet the Mendoza test so as to sustain separate convictions. Therefore, we conclude that the false imprisonment convictions must be reversed.

Bolden violation

Townsend also contends that Jury Instruction No. 21 allowed the jury to convict him of false imprisonment, a specific intent crime,⁷ on the basis of vicarious coconspirator liability, in violation of this court’s holding in Bolden v. State.⁸ However, because Townsend did not object in district court to the erroneous instruction, we will reverse only if the error was plain or affected Townsend’s substantial rights.⁹ In Bolden, this court

⁶122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006).

⁷NRS 200.460(1) defines false imprisonment as “an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority.” See Lerner Shops v. Marin, 83 Nev. 75, 79, 423 P.2d 398, 401 (1967) (noting that “the intent to confine is an essential element” of false imprisonment).

⁸121 Nev. 908, 124 P.3d 191 (2005).

⁹Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000); see also NRS 178.602 (stating that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court”).

held that an instruction that allowed the jury to convict on the basis of the “natural and probable consequences doctrine” for a specific intent crime relieved the state of its burden to prove the necessary intent element.¹⁰ Jury Instruction No. 21 was identical to the erroneous instruction given in Bolden.¹¹ First, we conclude that Bolden applies to this matter because Townsend’s case was not final when this court decided Bolden.¹² We

¹⁰Bolden, 121 Nev. at 922-23, 124 P.3d at 201.

¹¹Both instructions read:

Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if that was not intended as part of the original plan and even if he was not present at the time of commission of such act.

Bolden, 121 Nev. at 915-16, 124 P.3d at 196 (emphasis in original).

¹²A conviction is not final, for purposes of retroactivity, until there has been a judgment entered, all direct appeals have been exhausted, and the Supreme Court has denied certiorari or time to apply has expired. Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002). This court decided Bolden on December 15, 2005, between Townsend’s October 6, 2005 jury verdict and the district court’s April 7, 2006 entry of final judgment of conviction.

therefore conclude that the jury in this case was improperly instructed as to the issue of vicarious coconspirator liability.

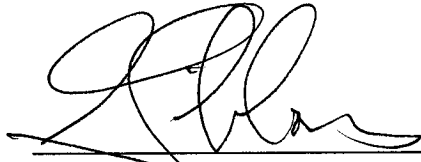
We conclude that giving Jury Instruction No. 21 constituted both plain error and affected Townsend's substantial rights because we are unable to ascertain from the general verdict form upon what theory of liability the jury based its false imprisonment convictions. One juror submitted a question during deliberations that inferred he did not believe Townsend was in the apartment during the robbery and at the time the victims were restrained. Therefore, we cannot determine whether the jury based its convictions for false imprisonment on direct participation or vicarious coconspirator liability. Without being "absolutely certain" that the jury relied upon the legally correct theory to convict [Townsend]," this court will not allow a general jury verdict to stand.¹³ Thus, we conclude that the district court committed plain error by giving the Bolden instruction, thereby violating Townsend's substantial rights.


Considering the redundancy of the robbery and false imprisonment charges, along with the Bolden violation, we conclude that the district court committed plain error as to the false imprisonment convictions, and we


ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the convictions for two counts of false

¹³Bolden, 121 Nev. at 924, 124 P.3d at 201 (quoting Keating v. Hood, 191 F.3d 1053, 1063 (9th Cir. 1999), overruled on other grounds by Payton v. Woodford, 346 F.3d 1204, 1217 n.18 (9th Cir. 2003)).

imprisonment with use of a deadly weapon and enter a new judgment of conviction consistent with this order.


_____, C. J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: Chief Judge, Eighth Judicial District
Honorable John S. McGroarty, Senior Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk