IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON J. MCMILLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48539

FILED

OCT 29 2007

JANETTE M. BLOOM
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, entered pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, one count of conspiracy to commit robbery with the use of a deadly weapon, and one count of burglary while in possession of a firearm. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant Brandon McMillon to serve various consecutive and concurrent prison terms totaling 268 to 672 months.

First, McMillon contends that the district court erred by refusing to allow him to testify that he knew victim Denise Rhoden from previous drug transactions. McMillon argued to the district court that his testimony was relevant to motive, but he did not expand upon this argument in any way. Because McMillon failed to explain how his testimony regarding his alleged drug transactions with Rhoden was

07-23684

relevant, we conclude that the district court did not abuse its discretion in excluding this evidence.[1]

Second, McMillon contends that the district court erred by not dismissing the first-degree kidnapping count prior to trial, and he argues that the kidnapping conviction should be reversed because it was incidental to the robbery. In Mendoza v. State, we held

> [T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.[2]

Here, the district court determined that the question of whether the movement served to substantially increase the risk of robbery was a question of fact for the jury. McMillon has not alleged that the jury was improperly instructed on this issue nor has he included the district court's jury instructions for our review. We conclude that the district court's decision to have the jury decide whether the kidnapping was incidental to the robbery was not erroneous. Further, substantial evidence in the record supports the jury's determination that the kidnapping was not incidental to the robbery. Specifically, we note that from the evidence presented below, the jury could have reasonably found that McMillon created a greater risk of danger and exceeded what was

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[1]See Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) ("A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong.").

[2]122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

necessary to rob Mobley when he moved Mobley from public view to the privacy of the apartment.

Third, McMillon contends that the evidence presented at trial was insufficient to support his conviction for robbing Denise Rhoden. Our review of the record on appeal, however, reveals sufficient evidence to establish McMillon's guilt beyond a reasonable doubt as determined by a rational trier of fact.[3] In particular, we note that Rhoden identified McMillon in the courtroom. She testified that McMillon entered her residence with an accomplice, pointed a gun at her boyfriend, and ordered his accomplice to take her purse. The accomplice took Rhoden's wallet from her purse and rent money from the table. As he left the residence, McMillon told Rhoden that he would kill her if she told anyone. We conclude that a rational juror could reasonably infer from this testimony that McMillon robbed Rhoden.[4] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[5]

Fourth, McMillon contends that the district court erred by denying his motion for a new trial. McMillon claims that during his trial he discovered that the police had arrested Lamont Carter, whom he asserts was a second suspect or an eyewitness to the robbery. McMillon argues that he was entitled to a new trial because the State did not inform

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[3]See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[4]See NRS 200.380(1).

[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

him of Carter's arrest.[6] The decision to deny a motion for a new trial based on newly-discovered evidence rests within the discretion of the district court.[7] To secure a new trial based on newly-discovered evidence:

> (1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.[8]

During the district court's hearing on his motion, McMillon argued that Carter's arrest was evidence that Detective Mark Gregory may have perjured himself and that Carter may have witnessed the actual crime. However, McMillon did not demonstrate that the State had any knowledge of Carter as a potential witness or that the result of the trial would have been different if he had known about Carter. Accordingly, we conclude that the district court did not err in denying his motion for a new trial.

Fifth, McMillon contends that the district court erroneously excluded extrinsic evidence that victim James Mobley was affiliated with a rival gang and therefore had a motive to lie on the witness stand. In Lobato v. State, we held that "extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption

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[6]McMillon cites to Brady v. Maryland, 373 U.S. 83 (1963).

[7]Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991); see also NRS 176.515(1).

[8]Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3)."[9] We further held that,

> Although district courts have wide discretion to control cross-examination that attacks a witness's general credibility, a trial court's discretion is narrowed where bias (motive) is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witness's testimony. Generally, the only proper restriction should be those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.[10]

Here, the district court erred by refusing to allow McMillon to testify about his membership in a gang and Mobley's alleged affiliation with a rival gang.

In addition, we agree with McMillon that the district court erred by failing to suppress evidence found during a search of his residence. In Georgia v. Randolph, the Supreme Court held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another

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[9]120 Nev. 512, 519, 96 P.3d 765, 770 (2004). NRS 50.085(3) provides in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime, may not be proved by extrinsic evidence."

[10]Id. at 520, 96 P.3d at 771 (internal quotation marks and citations omitted); see also United States v. Abel, 469 U.S. 45, 50 (1984) ("the Confrontation Clause of the Sixth Amendment requires a defendant to have some opportunity to show bias on the part of a prosecution witness"); Alford v. United States, 282 U.S. 687, 692-94 (1931).

resident."[11] The Randolph court recognized that it was drawing a fine line in light of its previous decisions, and further stated

> So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practicable value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.[12]

Here, McMillon was not present when the police asked his girlfriend for consent to search the apartment. However, McMillon had already expressly refused to consent to the search and the police knew of his refusal before they obtained his girlfriend's consent. Under these circumstances, the warrantless search was unreasonable and the necklace should have been suppressed.[13]

McMillon contends that the accumulation of multiple errors deprived him of a fair trial and due process of law. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."[14] We evaluate a claim of cumulative error by considering "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the

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[11]547 U.S. 103, 120 (2006).

[12]Id. at 121-22.

[13]See Casteel v. State, 122 Nev. 356, 358, 131 P.3d 1, 2 (2006) (holding that "a warrantless search of a residence is valid based on the consent of one occupant where the other occupant fails to object" (emphasis added)).

[14]Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

crime charged."[15] Here, the district court erred by excluding extrinsic evidence relevant to a witness's possible bias and by failing to suppress evidence obtained through an illegal search. However, even if McMillon had testified regarding Mobley's membership in a rival gang and the necklace had been suppressed, more than sufficient evidence was presented to support all of his convictions. In particular, we note that Rhoden positively identified McMillon in court as the perpetrator of the charged offenses and described the necklace. In addition, McMillon's former girlfriend contradicted McMillon's testimony by testifying that McMillon was not home at the time of the robberies. McMillon stands convicted of committing five serious felonies with the use of a deadly weapon. We conclude that these errors taken together were harmless beyond a reasonable doubt and did not contribute the verdict.[16]

Although we have determined that none of McMillon's contentions warrant reversal, our review of the record reveals that the district court improperly enhanced his sentence for conspiracy with a deadly weapon enhancement.[17] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSE IN PART AND REMAND this matter to the

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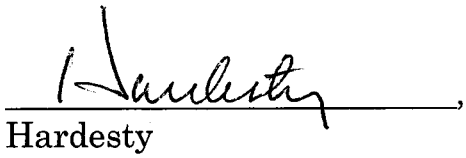
[15]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (internal quotation marks and citations omitted).

[16]See Chapman v. California, 386 U.S. 18, 24 (1967) (federal constitutional errors are harmless beyond a reasonable doubt if they do not contribute to the verdicts obtained).

[17]See Moore v. State, 117 Nev. 659, 663, 27 P.3d 447, 450 (2001) (holding that a sentence for the crime of conspiracy cannot be enhanced by a deadly weapon enhancement).

district court with instructions to vacate the deadly weapon enhancement on the conspiracy count and enter a corrected judgment of conviction.



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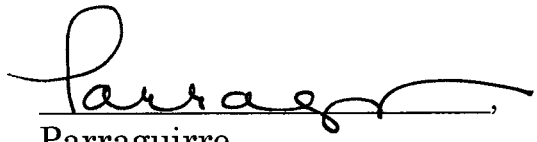
Hardesty



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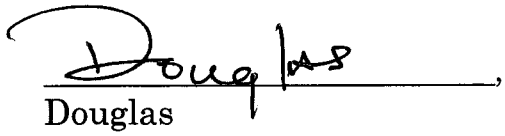

_____, J.
Douglas

cc: Eighth Judicial District Court Dept. 17, District Judge
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Clark County District Attorney David J. Roger
Eighth District Court Clerk