

8-12-2016

McNamara v. State, 132 Nev. Adv. Op. 60 (August 12, 2016)

Annie Avery
Nevada Law Journal

Follow this and additional works at: <http://scholars.law.unlv.edu/nvscs>

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Avery, Annie, "McNamara v. State, 132 Nev. Adv. Op. 60 (August 12, 2016)" (2016). *Nevada Supreme Court Summaries*. Paper 999.
<http://scholars.law.unlv.edu/nvscs/999>

This Case Summary is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

CRIMINAL LAW: TERRITORIAL JURISDICTION

Summary

The Court determined that (1) the state of Nevada has territorial jurisdiction under NRS 171.020 when a defendant has criminal intent and he or she performs any act in this state in furtherance of that criminal intent; (2) territorial jurisdiction is a question of law for the court, not a question of fact for the jury; (3) the State bears the burden of proving territorial jurisdiction by a preponderance of the evidence; and (4) omitting a lesser offense on a jury form is not a reversible error where the jury is properly instructed on the lesser offense.

Background

From December 2010 to February 2011, Kathryn Sharp resided with James McNamara in the suburbs of Chicago. During this time, McNamara's behavior toward Sharp became abusive. McNamara isolated Sharp from family and friends, and beat her physically. Repeated beatings left Sharp with open wounds on her legs, but McNamara refused to let her seek medical treatment. The wounds became infected and gave Sharp excruciating pain.

On February 13, 2011, Sharp flew with McNamara to Las Vegas, where they stayed at the Circus Circus Hotel and Casino. Although McNamara was not physically violent with Sharp in Las Vegas, he continued to threaten her and refused to allow her to seek medical treatment. Sharp managed to escape from the hotel room and sought help from hotel security, who called an ambulance to take her to the hospital.

Police arrested McNamara while Sharp was at the hospital, and on April 15, 2011, charged him with kidnapping with substantial bodily harm, coercion, and possession of a controlled substance. McNamara challenged the substantial bodily harm enhancement, and the district court dismissed this enhancement for lack of territorial jurisdiction, since all physical violence against Sharp had occurred outside of Nevada. However, the State, using different wording to support their case, was able to obtain a grand jury indictment of McNamara on one count of first-degree kidnapping with substantial bodily harm, and one count of possession of a controlled substance. On May 31, 2013, a jury found McNamara guilty on both counts, and he was sentenced to life in prison without parole.

Discussion

Territorial jurisdiction

McNamara presented a three-part argument that Nevada lacked the territorial jurisdiction to prosecute him for first-degree kidnapping with substantial bodily harm. First, McNamara claims that NRS 171.020 requires formation of intent to kidnap within the state of Nevada. By arguing that the kidnapping was an ongoing event that originated in Illinois, McNamara claimed the State admitted that he did not form intent in Nevada. Second, McNamara claimed that he should not be found guilty of first-degree kidnapping with substantial bodily harm because Sharp

¹ By Annie Avery.

admitted that he never physically hurt her in Nevada, which in his opinion negates the substantial bodily harm enhancement. Third, McNamara claimed that the district court made an error by not submitting the issue of territorial jurisdiction to the jury at trial.

Proving territorial jurisdiction under NRS 171.020

Territorial jurisdiction has long been required in criminal cases. Originally a common law doctrine requiring the prosecution to affirmatively prove the crime was committed within the jurisdiction of the court, the Nevada Legislature modified this rule in the context of interstate crimes. NRS 171.020 states that whenever a person with criminal intent engages in any part of that crime in the state of Nevada, that person may be punished for the crime in the same manner as if the crime had been entirely committed within Nevada.² The Court previously held in *Shannon v. State* that NRS 171.020 does not require that there be partial execution of the actual crime in Nevada, but rather that it requires only some carrying out of the criminal intent within Nevada.³

McNamara argued that NRS 171.020 and *Shannon* require the defendant both form criminal intent in Nevada and accomplish any act in furtherance of that intent in Nevada. The Court disagreed, stating that nothing in the language of the statute or in *Shannon* requires the criminal intent be formed in Nevada. Instead, Nevada courts obtain jurisdiction when (1) a defendant has criminal intent and (2) he or she performs any act in this state in furtherance of that intent. The legislative object, apparent in the broad language of the statute, was to confer territorial jurisdiction over crimes with a sufficient connection to Nevada.

Kidnapping is a continuing crime, and the victim is not free until she feels, and is in fact, free. McNamara confined Sharp against her will in both Illinois and Nevada. Territorial jurisdiction over McNamara was proper because Sharp was not free until her escape while in Nevada.⁴

Substantial bodily harm enhancement

McNamara argued that since he never physically abused Sharp while in Nevada, there is no territorial jurisdiction over the substantial bodily harm enhancement.⁵ The state argued McNamara preventing Sharp from receiving medical treatment in Nevada constituted substantial bodily harm because it caused prolonged physical pain. NRS 0.060 defines substantial bodily harm as “(1) Bodily injury which creates a substantial risk of death or...(2) Prolonged physical pain.”⁶ Since McNamara denied Sharp the ability to seek medical treatment for her wounds, which causes prolonged physical pain, his actions fell within the definition of substantial bodily harm, and Nevada had jurisdiction over the enhancement.

Procedure for establishing territorial jurisdiction

² NEV. REV. STAT. § 171.020 (2015).

³ See *Shannon v. State*, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989).

⁴ McNamara attempted to analogize his case to a domestic battery case where the California Court of Appeal f lacked jurisdiction when a California resident punched his wife’s face while in Hawaii once. McNamara’s argument was “misplaced” because a single punch to the face is not a continuing offense, and different jurisdictional rules exist for kidnapping than for domestic violence.

⁵ This enhancement to a first-degree kidnapping removed the possibility of parole from McNamara’s sentence.

⁶ NEV. REV. STAT. § 0.060 (2015).

Jurisdiction over a criminal matter is a procedural question that does not speak to the defendant's guilt or innocence and therefore can be decided as a matter of law by a preponderance of the evidence. McNamara argued that the district court was required to instruct the jury on territorial jurisdiction and that the State was required to prove jurisdiction beyond a reasonable doubt. The Court disagreed, stating that prior decisions make clear that territorial jurisdiction is a matter of law, but noting that the Court had not expressly articulated the burden of proof issue.

Some jurisdictions require proof beyond a reasonable doubt, reasoning that territorial jurisdiction is an essential element of the crime charged or that the question of jurisdiction is a factual dispute best left to the jury. Nevada precedent, however, indicated that the preponderance of the evidence standard applies when pleading and proving territorial jurisdiction. Past cases stated that issues not involving an element of the offense or implicating the defendant's guilt or innocence do not need to be proved beyond a reasonable doubt.⁷ The Court held that the State need only prove territorial jurisdiction by a preponderance of the evidence because, as it held in *Shannon*, Nevada's jurisdiction under NRS 171.020 over crimes occurring in another state is not an element of the crime charged.

The Court rejected McNamara's argument that failure to submit the territorial jurisdiction question to the jury violated his Sixth Amendment rights under *Apprendi v. New Jersey*. There, the Supreme Court held that a hate-crime sentence enhancement was invalid because the statute allowed the trial judge to increase the sentence based on a preponderance of the evidence.⁸ The Supreme Court held that the statute inherently involved a determination of the defendant's mens rea, and the intent in committing a crime is a core criminal defense element. The relevant inquiry under *Apprendi* is one of effect, asking whether the finding exposes a defendant to a greater punishment than that authorized by a jury's guilty verdict. But, the Supreme Court did not discuss procedural issues in *Apprendi*, and that courts deciding jurisdictional issues after *Apprendi* have found the case inapplicable to territorial jurisdiction challenges because it is a procedural matter and not a matter of guilt or the limits of punishment. Territorial jurisdiction, therefore, does not have to be submitted to the jury and the district court may decide any factual disputes concerning jurisdiction by a preponderance of the evidence.

Further, the issue of territorial jurisdiction *was* submitted to the jury to determine under the reasonable doubt standard because the jury instructions included the language of NRS 171.020. The jury in this case was only instructed on the reasonable doubt standard, so, in finding McNamara guilty of first-degree kidnapping with substantial bodily harm, the jury resolved factual disputes of territorial jurisdiction under the reasonable doubt standard. While the district court did not state jurisdiction was proper explicitly, this error was harmless because the State proffered extensive testimony on the subject. Nevada had territorial jurisdiction over McNamara with regard to the first-degree kidnapping with substantial bodily harm charge.

Notice of Grand Jury Proceedings

The Court did not accept McNamara's argument that he did not receive sufficient notice of the grand jury proceedings. McNamara argued that he had less than one-day's notice of the actual time, date and place of the proceedings, and this was unreasonable. NRS 172.241 states

⁷ See *Dozier v. State*, 124 Nev. 125, 129-30, 178 P.3d 149, 152-53 (2008).

⁸ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

that a district attorney must only provide notice of *intent* to seek indictment, and give 5 judicial days notice to defense counsel of this intent.⁹ The district attorney complied with the requirements in NRS 172.241, as notice of intent to seek indictment was faxed to defense counsel on November 8, 2011, when the proceedings were scheduled for November 17, 2011. The State provided defense counsel with the required information regarding date, time, and place of the proceedings when it received the written request from defense counsel. The Court held that the State complied with the requirements in NRS 172.241, and that McNamara failed to show how the State's notice was unreasonable.

Verdict Form Did Not Include Second-Degree Kidnapping

The district court's failure to include second-degree kidnapping on the verdict form was not reversible error. Both parties and the district court agreed to include the second-degree kidnapping charge on the verdict form, and while the jury was instructed on second-degree kidnapping, the district court mistakenly gave the jury a verdict form that did not include second-degree kidnapping. This is not a reversible error because the district court properly instructed the jury on the lesser-included offenses. Case precedent in Nevada has stated that jury forms are given as a guide the jury may use to frame their verdict, and are not intended or considered to limit the jury to specific verdicts.¹⁰ While McNamara argued an analogous case from the Florida District Court of Appeals that held differently, the Court noted that they are not bound by this precedent.

Jurors are presumed to follow instructions given, and this jury was instructed that they must find the defendant guilty of every element of first-degree kidnapping to convict McNamara. They had the choice to sign and return the not guilty form, to question the form, or to amend the form to find him guilty of second-degree kidnapping. The district court individually polled the jurors as well, meaning there is further support of the accuracy of the verdict. The Court held that while the omission of second-degree kidnapping was in error, it was not a reversible error.

Conclusion

Territorial jurisdiction was proper in this case because McNamara continued his kidnapping of Sharp from Illinois into Nevada, and he prevented her from receiving medical treatment in Nevada, causing her prolonged physical pain. Causing prolonged physical pain warranted the substantial bodily harm enhancement to the kidnapping charge. Further, though the district court erred in both failing to explicitly state that it had territorial jurisdiction and in mistakenly leaving second-degree murder off the verdict form, both errors were harmless. McNamara's other claims had no basis on appeal and therefore did not warrant a new trial. The judgment of conviction was affirmed.

⁹ NEV. REV. STAT. § 172.241 (2015).

¹⁰ *State v. St. Clair*, 16 Nev. 207, 212 (1881).