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Guerrina v. State, 134 Nev. Adv. Op. 45 (June 7, 2018)

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CRIMINAL APPEAL

Summary

The Court affirmed *Lyons v. State*, which gives the courts discretion to reject a defendant's request for self-representation if the request is untimely. Further, the Court affirmed the *Mendoza v. State* test, which allows a single incident to sustain convictions for both robbery and kidnapping if any movement or restraint creates a risk to the victim substantially exceeding what is necessarily present in the crime of robbery. Finally, the Court held that the State must satisfy NRS § 193.165 to sustain deadly weapon charges.

Background

Ana Cuevas was a FastBucks employee. One day, as she was walking toward the store, a man carrying a plastic bag with an object that Cuevas believed was a knife, approached her and ordered her to accompany him inside. Once inside, he sprayed the surveillance camera and ordered Ana to give him the money, as well as her personal wallet and cellphone. He then ordered her to disconnect the FastBucks telephone, poured chlorine on the floor in front of the door, and exited the store, locking Cuevas inside.

Detectives learned that the man was Robert Guerrina, a former FastBucks employee, who was staying at a Motel 6 in Las Vegas. After reviewing the surveillance video of the motel, which showed Guerrina entering the motel shortly after the incident, detectives decided not to make a copy of the tape because it did not establish probable cause or an alibi.

At his arraignment, Guerrina was appointed a public defender. Ten weeks later Guerrina moved to dismiss the public defender. Subsequently, Edward Hughes was appointed as his counsel. Eight months later, and twenty-four days before trial, Guerrina again moved to dismiss his attorney and moved to represent himself. The district court denied his request because it was untimely.

Guerrina was found guilty of burglary while in possession of a deadly weapon, first degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, and coercion. This appeal followed.

Discussion

Guerrina's sixth amendment right to self-representation was not violated

Although a criminal defendant has the right to self-representation under the Sixth Amendment,² in Nevada, a court may deny the request if it is untimely, equivocal, or made solely for purposes of delay or if the defendant is disruptive.³ To determine whether a request is untimely, the court must consider whether the request can be granted without the need for a

¹ By Xheni Ristani.

² *Vasini v. State*, 117 Nev. 330, 337, 22 P.3d 1164, 1169 (2001).

³ *Id.* at 338.

continuance.⁴ If so, then the request is timely. The court may deny a request that is untimely if there is no “reasonable cause to justify [the] late request.”

Guerrina argues that the *Lyons* timeliness test violates the Sixth Amendment right to self-representation in *Faretta v. California*.⁵ However, in *Faretta*, the United States Supreme Court did not address the issue of timeliness. Accordingly, the *Lyons* timeliness rule is consistent with Supreme Court precedent.

Here, Guerrina needed a continuance if the request was granted. As such, under *Lyons*, the court had discretion to deny the request unless there was “reasonable cause to justify [his] late request”.⁶ However, since Guerrina presented no evidence to satisfy the reasonable cause requirement, the district court did not abuse its discretion in denying his request.

The evidence was sufficient to support convictions of robbery and kidnapping

The evidence presented satisfies both of Guerrina’s convictions. First degree kidnapping occurs where a person “holds or detains” another person “for the purpose of committing. . . robbery upon or from the person.”⁷ “Robbery is the unlawful taking of personal property from the person of another, or in the person’s presence against his or her will, by means of force or violence or fear of injury. . . .”⁸ In *Mendoza v. State*, this Court held that in order to satisfy convictions for robbery and kidnapping 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.”⁹

Here, viewing the evidence in the light most favorable to the State, both convictions are supported. Guerrina approached Cuevas outside the building and forced her to go inside with him. By taking Cuevas from a public place to a private one, Guerrina substantially increased the risk of harm to her. Further, a rational trier of fact could have found that the pouring of bleach around the door and locking Cuevas in the store was in excess of what is necessary to complete the robbery. Therefore, both the robbery and kidnapping are affirmed.

The evidence was insufficient to support a finding that Guerrina used or possessed a deadly weapon

To support that Guerrina committed robbery and kidnapping with the use of a deadly weapon, the State has to satisfy NRS 193.165(6). A knife is not necessarily a deadly weapon under NRS 193.165(6), and “deadly weapon” is not clearly defined within the context of burglary while in possession of a deadly weapon.

Here, Guerrina’s burglary sentence was enhanced by NRS 205.060(4). However, there is no need to elaborate on this, because the record is devoid of any evidence that Guerrina’s weapon was deadly. Cuevas admitted that she never saw the blade of a knife, but assumed that

⁴ *Lyons v. State*, 106 Nev. 438, 446, 796 P.2d 210, 214 (1990).

⁵ *Faretta v. California*, 417 U.S. 906 (1974).

⁶ *Id.* at 446.

⁷ NEV. REV. STAT. § 200.310(1) (2017).

⁸ NEV. REV. STAT. § 200.380(1) (2017).

⁹ *Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

the object was a knife. Further, she could not tell the difference between a corkscrew, a folding knife, and a folding comb when they were closed. Based on this, the use of a deadly weapon is stricken from Guerrina's robbery and kidnapping convictions and the enhanced sentences are vacated. However, since it cannot be determined what portion of his burglary sentence was enhanced due to the alleged deadly weapon possession, the Court remanded to the district court for resentencing the burglary conviction.

Guerrina's remaining claims are without merit

Guerrina argues that the State failed to prove coercion. Felony coercion requires the use or immediate threat of violence against a person or property, with "the intent to compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing".¹⁰ Here, Guerrina committed coercion because he ordered Cuevas to disconnect the FastBucks telephone. Given the circumstances, a reasonable jury could have concluded that Guerrina's order was accompanied by a threat of physical force.

Guerrina also argues that the district court should have dismissed the indictment due to the detective's decision not to obtain the Motel 6 tape, which constituted a failure to gather exculpatory evidence. To show this, Guerrina must demonstrate that the tape was material and the detective's actions amount to negligence, gross negligence, or bad faith. Guerrina fails to show that the tape was material because he does not offer any evidence to contradict the detective's testimony that the timing on the tape did not conflict with the timing of the robbery. Accordingly, the district court did not abuse its discretion.

Conclusion

The Court affirmed the district court's decision to deny Guerrina's request to represent himself as untimely and affirmed Guerrina's dual convictions of robbery and kidnapping. Finally, the Court vacated and reversed Guerrina's deadly weapon enhancements pursuant to NRS 193.165 and remanded to the district court to resentence him for burglary.

¹⁰ NEV. REV. STAT. § 207.190(1)–(2)(a) (2017).