IN THE SUPREME COURT OF THE STATE OF NEVADA
CASE NO. 65193

MICHAEL J. SCHOFIELD,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

APPEAL

From the Eighth Judicial District Court, Clark County
District Court Case No. C-13-287009-1

APPELLANT'S REPLY BRIEF

Karen K. Wong
Nevada Bar No. 13284
Wong Appellate Law
9484 S. Eastern Ave., #408
Las Vegas, Nevada 89123
(702) 830-6080
karen.wong@wongappellatelaw.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The facts material to this appeal are simple: one Sunday afternoon in the course of his normal routine, Mr. Schofield visited his teenage son, remembered that he had to go to the store, and then asked his son to go with him. When his son refused, Mr. Schofield dragged him to the vehicle parked in the driveway where neighbors stopped Mr. Schofield.

While the jury properly found Mr. Schofield guilty of child abuse, the facts in this case do not amount to first-degree kidnapping. Mr. Schofield lacked the requisite *mens rea* to commit first-degree child kidnapping: the intent to keep, imprison, or confine the minor from his or her parents, guardians or lawful custodian. In addition, the trial court committed plain error by failing to include a *Mendoza* instruction for the child abuse and kidnapping charges, and it abused its discretion by failing to instruct the jury regarding lack of consent.

ARGUMENT

I. The State failed to prove that Mr. Schofield's intent to bring his son to the store satisfied the intent requirement of first-degree child kidnapping.

Nevada's first-degree child kidnapping statute is a specific intent crime and requires that a perpetrator have the "intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act." NRS 200.310(1). Mr. Schofield's

case raises two novel questions of statutory interpretation: What does *intent to keep* mean, and can a parent commit first-degree kidnapping by intending to keep a minor from his "parents, guardians, or any other person having lawful custody" as a matter of law?

a. Standard of Review.

"The standard of review in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979)). "The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt. *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007).

Questions of statutory interpretation are reviewed de novo. *Moore v. State*, 122 Nev. 27, 31–32, 126 P.3d 508, 511 (2006) (reviewing de novo whether "use" of a credit card under NRS 205.760 included defendant's conduct in presenting the credit card for payment). Where a defendant has not raised a question of statutory interpretation below, the Court first resolves the statutory interpretation question de novo and then reviews the record for plain error. *See Mendoza-Lobos v. State*, 125

Nev. 634, 644, 218 P.3d 501, 507 (2009) (applying a de novo standard to the statutory interpretation question first and then reviewing the record for plain error).

Trial error, when properly preserved, is reviewed for harmless error; error that has not been properly preserved in the district court is ordinarily reviewed for plain error. *Martinorellan v. State*, 343 P.3d 590, 593 (Nev. 2015). To constitute plain error, an error must be plain from a review of the record and must affect the defendant's substantial rights. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Mr. Schofield did not immediately object to the prosecutor's closing arguments concerning his intent to keep Michael from his parents, guardians, or legal custodians. Mr. Schofield, however, did respond to the comments by stating in his own closing argument that his intent to take Michael to the store did not constitute kidnapping:

- "That's why, in my opinion, I was not kidnapping. I wasn't trying - I wasn't going anywhere but to the store, and I was coming back with him." AA at 1143.
- "As for the kidnapping charge . . . I did not intend to keep or confine Michael Joshua." AA at 1152.

Due to his pro se status, Mr. Schofield requests that this Court consider the issue preserved for appeal and apply a harmless error standard.

b. The State did not show that Mr. Schofield had the "intent to keep" required by the statute.

The statutory language includes no qualifier on the word *keep*. In normal English usage, *keep* used without a qualifier implies permanent possession, or "to not return" something, as Merriam-Webster defines the word.[1] Here, Mr. Schofield did not intend to *keep* his son, Michael, without returning him. In addition, Mr. Schofield's intent, or purpose, was not to deprive anyone of Michael's presence—Mr. Schofield's acts, though inappropriate, were acts of attempted discipline not kidnapping. *Cf. State v. Nath*, 52 P.3d 857, 861 (Idaho 2002) ("[T]here must exist in the mind of the perpetrator the specific intent to cause the child who is kidnapped to be unlawfully kept from persons having lawful care or control of the child."). Mr. Schofield therefore lacked the specific intent necessary to convict him under the child kidnapping statute.

The State spins the question of statutory interpretation as one of prosecutorial misconduct and argues that no prosecutorial misconduct occurred because the prosecutor's comments were based on a reasonable interpretation of the law. The State misses the point: The issue is not one of whether the prosecutor committed misconduct but rather whether the jury's first-degree kidnapping verdict was based on a proper interpretation of the statute. Where a jury instruction is subject to two competing interpretations, the proper inquiry is "whether there is a

---

[1] "keep," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/keep (last visited September 30, 2015).

reasonable likelihood that the jury has applied challenged instruction," incorrectly. *Watson v. State*, 335 P.3d 157, 173 (Nev. 2014); *see also Waddington v. Sarausad*, 555 U.S. 179, 190–91 (stating that a defendant challenging constitutionality of a jury instruction that quotes a state statute must show that the instruction was ambiguous, and there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden to prove every element beyond a reasonable doubt). The jury instructions in this case were based on the statutory language, but, as discussed in the opening brief, they were ambiguous as to the intent requirement of the statute. There is more than a reasonable likelihood that the jury relied on the State's explanation of the law—particularly here where the defendant appeared pro se. If this Court, interpreting the statute de novo, decides that first-degree child kidnapping requires an intent to keep the minor more than momentarily, then the record demonstrates that the jury's verdict was based on a misinterpretation of the statute. The jury consequently did not find beyond a reasonable doubt that Mr. Schofield intended to keep Michael, for more than a moment, an essential element of the crime. *Cf. Fiore v. White*, 531 U.S. 225, 226, 121 S.Ct. 712, 713 (2001) (holding that appellant's conviction violated due process where the state court interpreted the statute to include an element of the offense that the State had not proved). The misinterpretation goes to the heart of whether Mr. Schofield actually committed a crime. Mr. Schofield was wrongly convicted of first-degree kidnapping, and his conviction must be reversed.

The State falsely contends that binding precedent regarding kidnapping establishes that no permanent or indefinite keeping is required. In support of this, the State cites three cases: *Isler v. Sheriff, Clark Cty.*, 92 Nev. 248, 250, 548 P.2d 1373, 1374 (1976), *Hutchins v. State*, 110 Nev. 103, 867 P.2d 1136 (1994), and *Garcia v. State*, 121 Nev. 327, 113 P.3d 836 (2005). None of these cases involves the kidnapping of a minor and thus none shed any light on the interpretation of "intent to keep" as used in the second half of NRS 200.310(1). The State's argument that under this interpretation of "intent to keep" a typical kidnapping, *ie.* taking someone for ransom, would no longer be considered a kidnapping, is also untrue because that situation is covered by the general kidnapping language in the first half of NRS 200.310(1). Here, the jury was never asked to consider whether Mr. Schofield had violated the first half of NRS 200.310(1). Thus, the State's reliance on general first-degree kidnapping case law is misplaced.

Because *intent to keep* requires more than a momentary keeping and because the jury likely relied on the State's closing argument that even an intent to keep momentarily satisfies the statute, the State was not required to prove every element of the kidnapping offense beyond a reasonable doubt as required by due process. Under a correct interpretation of the statute, insufficient evidence supports Mr. Schofield's kidnapping conviction, and his conviction should be reversed.[2]

---

[2] *Cf. Berry v. State*, 125 Nev. 265, 271, 212 P.3d 1085, 1089 (2009) ("We conclude that *based on the applicable statutory definitions* of 'deadly weapon,' no

II. NRS 200.310 does not apply to noncustodial parents

Whether NRS 200.310's phrase "to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor" applies to a noncustodial parent keeping the minor from a guardian, is a question of statutory interpretation which this Court reviews de novo. The statute requires an intent to keep the minor *from* his parents, guardians, or other legal custodian. The context of this language (*i.e.,* its place in the first-degree kidnapping statute and the existence of a separate custodial interference statute for parents) indicates that the legislature did not intend for a parent, such as Mr. Schofield, who brings a child to the store to be guilty of first-degree kidnapping.

The custodial interference statute, NRS 200.359, which applies to non-custodial parents, includes a requirement that the parent or person with limited custody act "in violation of an order, judgment, or decree." NRS 200.310 does not include this language because it is not intended to apply to parents or persons with limited rights of custody. The State demonstrates its confusion regarding the law by asserting NRS 200.359 is not applicable to Mr. Schofield's situation "as it specifically applies to parents who have limited legal custody rights." AB at 12. By its own terms, NRS 200.359 applies to persons with limited custody rights "*or any parent having no right of custody*." NRS 200.359 (emphasis added). NRS

---

rational trier of fact could have found beyond a reasonable doubt that the toy pellet gun used in this case was a deadly weapon." (emphasis added)).

200.359, not the first-degree kidnapping statute, was intended by the legislature to cover situations where a non-custodial parent takes away a child from his or her legal guardian. A different interpretation would give prosecutors unlimited discretion to charge every instance of custodial interference as first-degree kidnapping.

The State cites *Hernandez v. State*, 118 Nev. 513, 50 P.3d 1100 (2002), *Armenta-Carpio v. State*, 306 P.3d 395 (Nev. 2013), and *Sheriff, Washoe Cty. v. Dhadda*, 115 Nev. 175, 980 P.2d 1062 (1999), to support its statement that a parent can be convicted of kidnapping his or her own child. Again, these citations are disingenuous because none of the cases involve convictions under the child kidnapping portion of NRS 200.310(1).

Armenta-Carpio does not involve kidnapping at all. In *Hernandez*, a defendant had killed his daughter's mother and was planning to take the child to Mexico. He was convicted of second-degree kidnapping for unlawfully seizing his daughter to take her out of state. In *Dhadda*, the defendant was convicted because he committed the kidnapping "for the purpose of killing [his daughter] or inflicting substantial bodily harm upon her." *Sheriff, Washoe Cty. v. Dhadda*, 115 Nev. 175, 183, 980 P.2d 1062, 1067 (1999). The child kidnapping provisions of NRS 200.310(1) were not implicated.

The difference between a conviction under the first-degree child kidnapping provisions of NRS 200.310(1) and general first-degree kidnapping convictions is

substantial. First-degree kidnapping, generally, requires seizure for the purpose of committing an enumerated crime, such as robbery, sexual assault, extortion, and battery to inflict substantial bodily harm. *Mendoza v. State*, 122 Nev. 267, 274 n.18, 130 P.3d 176, 180 (2006). Where the victim is a child, the purpose of the seizure need not be an enumerated crime, but can include merely an intent to keep the child from his or her parents, guardians, or legal custodians. This relaxed requirement for first-degree kidnapping was not intended to apply to parents. Because there must be an intent to keep the child away from this group of people (*i.e.*, parents, guardians, and custodians), a member of that group cannot violate this second half of NRS 200.310(1). On the other hand, if a perpetrator's conduct rises to the level of general kidnapping, then the perpetrator's status of a parent does not protect them.

This Court should clarify that the child kidnapping provisions of NRS 200.310(1) do not apply to non-custodial parents and reverse Mr. Schofield's conviction accordingly.

III. Mr. Schofield's kidnapping conviction should be reversed because the jury instructions were erroneous.

a. Standard of Review.

When a jury instruction omits, misdescribes, or presumes an element of an offense, this Court will review the error under a harmless-error analysis. *Collman v. State*, 116 Nev. 687, 720, 7 P.3d 426, 447 (2000). An error was not harmless

unless the court concludes that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 722–23. The harmless error standard is applied even when an erroneous instruction was not challenged below. *See id.* at 711–12 (noting that the defendant did the challenge the instruction below or even initially on appeal).

Mr. Schofield concedes that he never requested a *Mendoza* instruction regarding whether any kidnapping was incidental to the child abuse and that this Court has previously applied plain error analysis to omission of this instruction. *See, e.g.*, *Garcia v.* State, 121 Nev. 327, 334, 113 P.3d 836, 840 (2005) (reversing a conviction for plain error where the trial court failed to give an instruction regarding a dual conviction for false imprisonment and robbery). To constitute plain error, an error must be plain from a review of the record and must affect the defendant's substantial rights by causing actual prejudice or a miscarriage of justice. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). When a conviction is entered for kidnapping and an associated crime arising from the same course of conduct, failure to give an instruction regarding incidental movement or restraint has been held to be plain error. *See, e.g.*, *Garcia*, 121 Nev. 327.

b. The district court's failure to instruct the jury on incidental movement was plain error.

In *Mendoza*, this Court clarified that "movement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter,

will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes." *Mendoza v. State*, 122 Nev. 267, 274, 130 P.3d 176, 180 (2006). A dual conviction will only be sustained where the movement or restraint substantially increases the risk of harm to the victim, where the seizure substantially exceeds that required to complete the associated crime charged, or where the seizure stands alone with independent significance from the underlying charge. *Id.*

The State splits hairs by arguing that no instruction on incidental movement was necessary because this case involves a kidnapping and child abuse conviction rather than a kidnapping and robbery conviction. AB at 14. It has long been the law in Nevada that a kidnapping conviction must not be incidental to an *associated offense*—not just robbery, but any offense arising from "the same course of conduct" to which restraint or movement is inherent. *Id.* at 274–75. *Mendoza* listed robbery, extortion, and battery as examples of associated offenses. *See id.* at 274; *see also Wright v. State*, 106 Nev. 647, 649, 799 P.2d 548, 549 (1990) (acknowledging the defense in a dual conviction for kidnapping and sexual assault). Here, there is no doubt that the child abuse and kidnapping charges arose from the same course of conduct. In addition, restraint or movement was inherent in the child abuse charge, just as it would be in a case of battery or sexual assault. The failure to instruct the jury that a dual kidnapping and child abuse conviction requires that the kidnapping not be incidental to the child abuse allowed the jury to

convict Mr. Schofield without finding an essential element of the crime. Accordingly, the trial court erred by failing to give the instruction, and the error is plain from a review of the record.

The failure to give the dual conviction instruction also affected Mr. Schofield's substantial rights. Where an error is plain, this Court reviews the context of the trial as a whole to determine whether the error had a prejudicial impact on the verdict. *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005). Even where evidence is sufficient to support a conviction, a plain error may affect a defendant's substantial rights where the evidence is not overwhelming. *See Anderson v. State*, 121 Nev. 511, 517, 118 P.3d 184, 188 (2005) (holding that a plain error affected the defendant's substantial rights where the evidence was sufficient to sustain a conviction but not overwhelming).

The State attempts to argue that the testimony supports its position that the movement for kidnapping was not incidental to the child abuse. We do not know whether the jury considered the child abuse over inside the house, or whether they considered the entire event of forcing Michael into the van child abuse. The jury was never given the opportunity to consider whether or not the kidnapping was incidental to the child abuse. In addition, the evidence was not overwhelming.

The incident grounding both convictions was blown out of proportion when Michael Joshua refused his father's request and attempted to run from his father. Mr. Schofield wanted to discipline his son, to "make him listen." (5AA 1008,

2AA 486-87, 3AA 705, 4AA 817, 5AA 1014.) The jury could easily have believed that the entire act of dragging Michael to the car was child abuse, particularly since they determined that Mr. Schofield had not committed domestic battery-strangulation. In that case, the movement or restraint did not exceed that required to commit the child abuse, and it did not substantially increase the risk of harm to the victim. Additionally, the restraint or movement that grounded the kidnapping conviction did not stand alone with independent significance from child abuse conviction because the purpose of Mr. Schofield's restraint of Michael was to "teach him a lesson." Yes, Mr. Schofield intended to bring Michael to the store, but that purpose was secondary to Mr. Schofield's disciplinary goal, which led to the child abuse. Without the physical restraint that made up the child abuse, this case would never have been charged as a kidnapping. The record reflects that Mr. Schofield often took his son to other places; Norman Duplissie only objected in this instance because of the perception that Mr. Schofield was hurting Michael. (3AA 700, 702, 705.)[3] In summary, the restraint and movement of the victim from the house to the van was child abuse, and there is no overwhelming evidence that any restraint or movement occurred that exceeded the child abuse.

[3] Patricia Duplissie testified that she had given permission for Mr. Schofield to take his son to the store, but that she called 911 because of the commotion and her fear of property damage. (3AA 594, 656–59.)

The court failed to instruct the jury that it could convict Mr. Schofield of kidnapping and child abuse only if it found beyond a reasonable doubt that the kidnapping was not incidental to the child abuse. This error was harmful, plain, and it substantially affected Mr. Schofield's rights. Accordingly, Mr. Schofield's kidnapping conviction should be reversed.

c. The Court abused its discretion by declining to include a lack of consent element to Jury Instruction No. 10.

"A defendant has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008). "'[A] positive instruction as to the elements of the offense does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction.'" *Id.* (quoting *Crawford v. State*, 121 Nev. 744, 753, 121 Nev. 746, 121 P.3d 582, 588 (2005)). "Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law." *Id.* "Rather, jurors should be advised of relevant legal principles through 'accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.'" (quoting *Crawford*, 121 Nev. at 753).

Here, evidence supported Mr. Schofield's theory that he had consent to take Michael to the store: both Mr. Schofield and Patricia Duplissie testified that Patricia had given Mr. Schofield permission to take Michael to the store. In

contrast, Norman Duplissie stated only that he had not personally given Mr. Schofield permission and that he did not know whether Patricia had given permission or not. The jury was not charged to convict Mr. Schofield of kidnapping only if it found Mr. Schofield lacked consent beyond a reasonable doubt. Even if the jury discredited the testimony regarding Mr. Schofield's consent as the State suggests, it may not have inferred that lack of consent must be found beyond a reasonable doubt. Accordingly, the district court's failure to give an instruction on consent violated Mr. Schofield's due process rights to have every element of the offense proven beyond a reasonable doubt.

CONCLUSION

Mr. Schofield did not commit first-degree child kidnapping in this case because he did not have an *intent to keep* his son in violation of that element of NRS 200.310(1). Furthermore, the child kidnapping portion of the statute should not be interpreted to apply to Mr. Schofield as a parent. Finally, the district court erred by failing to instruct the jury on incidental movement and lack of consent. Accordingly, this Court should reverse Mr. Schofield's kidnapping conviction.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 15 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of October, 2015.

/s/ Karen K. Wong
Karen K. Wong

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 5, 2015. Electronic service of the foregoing document shall be made, in accordance with the service list, upon the following counsel of record:

Adam Paul Laxalt

Steven S. Owens

Jonathan VanBoskerck

/s/ Karen K. Wong
Karen K. Wong
Wong Appellate Law