IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 70069

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT: This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from convictions for Category A and B offenses.

STATEMENT OF THE ISSUES

I. WHETHER APPELLANT WAS PROPERLY CONVICTED OF BOTH ROBBERY AND KIDNAPPINIG
II. WHETHER THE POLICE PROVIDED APPELLANT WITH AN ADEQUATE MIRANDA WARNING

STATEMENT OF THE CASE

On February 18, 2015, the State charged Appellant Tommy Stewart ("Appellant") in a Criminal Complaint with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480—NOC 50141); Count 2 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060—NOC 50426); Count 3 – Robbery with Use of a Deadly Weapon

(Category B Felony – NRS 200.380, 193.165—50138); Count 4 – First Degree Kidnapping with Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165—NOC 50971); and Count 5 – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210—NOC 50971). Respondent's Appendix (RA) 1-4.

Appellant's preliminary hearing was held on April 16, 2015, and he was bound over for trial. AA 5. On April 25, 2016, the State filed an Information charging Appellant with four counts: Count 1 – Conspiracy to Commit Robbery; Count 2 – Burglary While in Possession of a Firearm; Count 3 – Robbery with Use of a Deadly Weapon; and Count 4 – First Degree Kidnapping with Use of a Deadly Weapon. RA 5-9.

On March 7, 2016, Appellant filed a "Motion to Suppress Defendant's Statement." AA 3-8. In his motion, Appellant alleged that the Miranda warning provided by the Las Vegas Metropolitan Police Department ("LVMPD") was legally insufficient. AA 3-8. The motion was denied on March 10, 2016. AA 118, 120.

Appellant's jury trial began on March 14, 2016. AA 116. Prior to jury selection, Appellant again tried to raise the issue of the legal sufficiency of the LVMPD Miranda warning. AA 117-22. The District Court denied Appellant's renewed motion. AA 122. On March 17, 2016, the jury found Appellant guilty on all counts. RA 10-11.

On May 10, 2016, the District Court held a sentencing hearing, adjudged Appellant guilty, and sentenced him as follows: Count 1 – a maximum of 60 months with minimum parole eligibility of 13 months; count 2 – a maximum of 96 months with a minimum parole eligibility of 22 months, concurrent with Count 1; Count 3 – to a maximum of 20 years with a minimum parole eligibility of 8 years, concurrent with Count 2; and Count 4 – life with the eligibility of parole with a minimum parole eligibility of five years, concurrent with Count 3; and 452 days credit for time served. AA 1-2. The Judgment of Conviction was filed on May 17, 2016. AA 1-2.

Appellant filed a Notice of Appeal through his attorney on May 25, 2016 and his Opening Brief on August 18, 2016. AA 176-77.

STATEMENT OF THE FACTS

On January 20, 2015, at approximately 11:00 PM, Natasha Lumba ("Natasha") arrived home after visiting her boyfriend. AA 127. As she was entering her apartment, two African-American men in dark hooded sweatshirts approached her – one pointed a black semiautomatic handgun at her and the other threatened to hurt her if she yelled for help. AA 128, 130. They ordered her to let them into the apartment. AA 129, 131. Natasha complied. AA 129.

In the apartment, Natasha was ordered to "lay face down on the ground in [her] back bedroom." AA 131. The two men took turns guarding Natasha "ransack[ing]" her apartment looking for things to steal. AA 133-34. Natasha was

fearful of the men and did not think there was any possibility of escape, so she continued complying with her assailants' commands. AA 134.

While she laid face down on the floor, one of the attackers told her to turn over onto her back. AA 135. He then put his hand under her bra and under her underwear. AA 135. Natasha was simply told not to look at him. AA 136. Again, she complied. AA 136.

After approximately ten to fifteen minutes, the two men told her not to call the police or they would come back to kill her. AA 146. They exited out the front door while Natasha remained in the back bedroom, terrified. AA 146. Not knowing whether they were still there, Natasha stayed in her room until she believed they were definitely gone. AA 146. When she left her room, she discovered the men took her Toshiba laptop, Canon camera, computer printer, and cash. AA 142. Likewise, her iPad and cell phone were missing, so she had no way to call for help. AA 146.

Natasha went to her boyfriend's home and together they called 9-1-1. AA 149. LVMPD responded to the scene and began to collect evidence. AA 151. The LVMPD evidence technician dusted for fingerprints and found a latent print on Natasha's jewelry box, which had been rummaged through during the robbery. AA 12, 19-20. After the crime scene was processed, LVMPD's Latent Print Unit analyzed the print and identified it as belonging to Appellant. AA 32.

LVMPD Detective Abell was assigned to the case and met with Natasha on February 6, 2015, to conduct a follow up interview and photographic lineup. AA 88-89. Although she was not sure, and stated so, Natasha identified two individuals in the lineup as potential suspects, focusing on their facial similarities to the robbers. AA 90. One of the suspects Natasha identified was Appellant. AA 92.

LVMPD's Problem Solving Unit ("PSU") began looking for Appellant. AA 52-54. On February 14, 2015, PSU located Appellant at the Bells Gas Station at H Street and Owens Avenue in Las Vegas. AA 52. Prior to making contact with Appellant, officers observed him place a handgun into a parked car. AA 70. Officers detained Appellant and brought him to LVMPD headquarters, where he met Detective Abell. AA 62, 98.

Before questioning began, Detective Abell read Appellant, verbatim, the warning from his LVMPD Miranda advisement card:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning. Do you understand these rights?

AA 98-99. Appellant indicated he understood his rights and agreed to talk with Detective Abell. AA 100. Appellant initially denied ever being at Natasha's apartment or knowing anyone from there. AA 100. After he was confronted with the fingerprint, Appellant changed his story. AA 100-01. He said that he and a friend

met Natasha near the MGM and that they followed her home. AA 101. Appellant admitted to being in Natasha's home and stealing a watch, ring, and coins. AA 102.

SUMMARY OF THE ARGUMENT

The State presented sufficient evidence to support both of Appellant's convictions. This evidence constituted physical and circumstantial evidence above and apart from Natasha's testimony. As the record indicates, a rational trier of fact could find that the kidnapping substantially increased the risk of danger to Natasha because concealing her in the back bedroom made her escape more difficult. Additionally, the evidence presented at Appellant's trial demonstrated that the restraint of Natasha had independent significance from the robbery, because she was groped by one of the suspects and unable to escape. Thus, dual convictions were proper.

Likewise, the Miranda warning reasonably conveyed Appellant's rights to him. Indeed, the warning provided was virtually identical to the warning required by Miranda. Therefore, Appellant's statements were properly admitted.

ARGUMENT

I. APPELLANT WAS PROPERLY CONVICTED OF BOTH ROBBERY AND KIDNAPPING

A. Standard of Review

"The standard of review [when analyzing the sufficiency of evidence] 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.'" Grey v. State, 124 Nev. 110, 121, 178 P.3d 154, 162 (2008) (quoting Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006)).

B. Dual Convictions Were Proper Because the Confinement Substantially Increased the Danger to Natasha and Had an Independent Significance

The evidence established that the kidnapping of Natasha was a separate offense from the robbery. Under NRS 200.310, First Degree Kidnapping occurs where a person "willfully seizes, confines … conceals, kidnaps or carries away a person by any means whatsoever … for the purpose of … robbery upon or from the person…" The Court clarified that:

> [W]here the movement or restraint serves to *substantially increase the risk of harm to the victim* over and above that necessarily present in an associate offense, i.e., robbery…or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper. Also…dual culpability is permitted where the movement, seizure or restraint stands alone with independent significance from the underlying charge.

Mendoza v. State, 122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006) (emphasis added). In Mendoza, the Court recommended that the State employ the following jury instruction:

> In order for you to find the defendant guilty of both first-degree kidnapping (or second-degree kidnapping) and an associated offense of robbery, you must also find beyond a reasonable doubt either:

(1) That any movement of the victim was not incidental to the robbery;
(2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery;
(3) That any incidental movement of the victim exceeded that required to complete the robbery;
(4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or
(5) The movement or restraint had an independent purpose or significance. "Physically restrained" includes but is not limited to tying, bind, or taping.

Mendoza, 122 Nev. at 275-76, 130 P.3d at 181. In accordance with Mendoza's guidance, the District Court gave Jury Instruction No. 27, which was virtually identical to the Court's instruction. AOB 8-9.

Appellant incorrectly argues that he could not be properly convicted of kidnapping as a separate offense from robbery because any movement of Natasha was incidental to the robbery and did not increase the risk of harm to her nor go beyond movement or confinement contemplated for the completion of a robbery. AOB 8. However, Mendoza uses disjunctive language, thus requiring that the State prove either that there was increased risk of harm to the victim *or* that the movement had an independent purpose or significance. Determining "[w]hether the movement of the victims is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact…." Curtis D. v. State, 98 Nev. 272, 274, 646 P.2d 547, 548 (1982).

Here, the jury could have found that, by moving Natasha from her front door to the back bedroom, Appellant substantially increased the risk of harm to Natasha because had she been detained at the front door or even in her living room close to the door, she might have been seen, had a chance to yell for help, or had an easier opportunity to escape. See Gonzales v. State, 131 Nev. Adv. Rep. 49, ___, 354 P.3d 654, 665 (Nev. Ct. App. 2015). But these chances were diminished once she was moved to the back bedroom. Natasha testified that she "was really afraid for [her] safety" and that she did not have a clear path of escape to her front door and did not think she could make it out of the apartment. AA 134. Additionally, moving Natasha from the front door into the apartment's back bedroom "may have psychologically emboldened [Appellant] to escalate the violence of the crime, as well as to extend the length of time over which it took place, once [Natasha's] fate was less likely to be witnessed by her neighbors." Gonzales, 131 Nev. at ___, 354 P.3d at 665. Thus, confining Natasha in the back bedroom substantially increased the risk of harm to her.

Likewise, a rational trier of fact could have found that Natasha's restraint had independent significance from the robbery. This Court found in Pascua v. State, 122 Nev. 1001, 145 P.3d 1031 (2006), that restraint has independent significance when it "lessened [the victim's] chances of being found or being able to escape while providing [the defendant] with greater opportunity to cause further harm…" Id. at

1006, at 1034. Indeed, in Pascua, this Court affirmed dual convictions for robbery and kidnapping when the defendants moved their victim from the kitchen to the back bedroom. Id. Similarly, Appellant and his accomplice moved Natasha into the apartment and then into the back bedroom. AA 131, 165.

As previously discussed, concealing Natasha in the back bedroom was not merely incidental to the robbery. It had the independent purpose and significance of substantially lessening Natasha's chances of receiving help or escaping. Moreover, it also provided her assailants with a "greater opportunity to cause further harm." Id. Indeed, one of Natasha's assailants "put his hand up under [her] bra and under [her] underwear" and "moved it around." AA 135, 138. Thus, being concealed in the back bedroom gave her attackers the opportunity to further harm Natasha, independent of the robbery.

Because a rational trier of fact could find that the movement and concealment of Natasha in the back bedroom substantially increased the risk of harm and had an independent purpose, Appellant was properly convicted of both robbery and first-degree kidnapping.

II. THE POLICE PROVIDED APPELLANT WITH AN ADEQUATE MIRANDA WARNING

The Fifth Amendment of the United States Constitution affords an individual the right to be informed, prior to custodial interrogation, that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966). Miranda's procedural safeguards are only prophylactic in nature, designed to advise suspects of their rights, and "not themselves rights protected by the Constitution." Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974).

However, the United States Supreme Court has held that Miranda does not require some "talismanic incantation." California v. Prysock, 453 U.S. 355, 360, 101 S. Ct. 2806, 2809 (1981) (per curiam). Rather, the warning need only "reasonably convey to a suspect his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 (2010) (internal quotations omitted). Thus, the Supreme Court has instructed reviewing courts that they need not examine the warning rigidly "as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989).

Appellant argues that Detective Abell did not provide him with a legally adequate Miranda warning prior to questioning and that his statements are therefore inadmissible. AOB 15-16. However, "[t]o be found inadequate, an ambiguous warning must not readily permit an inference of the appropriate warning." *Doody v. Schriro*, 548 F.3d 847, 863 (9th Cir. 2008), *aff'd on remand by Doody v. Ryan*, 649

F.3d 986 (9th Cir. 2011) (*en banc*). Not only is the warning Appellant received unambiguous, but it readily permits an inference of the appropriate warning.

Here, LVMPD Detective Abell read Appellant the standardized Miranda warning from his department-issued Miranda card verbatim. AA 98. The warning he gave Appellant was:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have the presence of an attorney *during* questioning. If you cannot afford an attorney one will be appointed *before* questioning. Do you understand these rights?

AA 99 (emphasis added). The LVMPD warning provided is virtually identical to the warning required by Miranda. Thus, it is unambiguous. See Miranda, 384 U.S. at 467-68, 479, 86 S. Ct. at 1624, 1630 (discussing need for "clear" warnings and providing the standard warning necessitated by the Constitution).

Yet Appellant asserts that the LVMPD standard advisement is insufficient because it did not expressly inform him that he could consult with an attorney before and during questioning. AOB 15. As support, Appellant points to the Ninth Circuit Court of Appeals decisions in United States v. Noti, 731 F.2d 610 (9th Cir. 1984), and United States v. Bland, 908 F.2d 471 (9th Cir. 1990), for the proposition that the warning must expressly communicate the right to counsel before and during questioning. Indeed, Appellant implicitly asks this Court to uncritically adopt Noti and dictate the specific manner in which Miranda advisements are given. However, "the decisions of … panels of the federal circuit court of appeal are not binding upon

this [C]ourt." Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987).

Moreover, the Ninth Circuit's expansion of Miranda is at odds with Supreme Court precedent, which has repeatedly declined to dictate any specific formulation of Miranda advisements. See Powell, 559 U.S. at 62, 130 S. Ct. at 1204-05 (warnings adequate where "in combination" they conveyed right to have an attorney present at all times); Duckworth, 492 U.S. at 202-03, 109 S. Ct. at 2880 (quoting Prysock at 359, at 2809) (affirming "the 'rigidity' of Miranda [does not] extend to the precise formulation of the warnings given a criminal defendant."). Furthermore, in Powell, the Supreme Court applied a "commonsense reading" to the warnings and looked at them "in their totality" to determine whether they satisfied Miranda. Id.; see also Duckworth, 492 U.S. at 205, 109 S. Ct. at 2881. Likewise, the Court has permitted reasoned inferences to find Miranda advisements adequate. See Duckworth, 492 U.S. at 217, 109 S. Ct. at 2887 (Marshall, J. dissenting) (discussing majority's use of inferences to affirm warning).

Rather than focusing on each clause of the warning in isolation, the warning should be read as a whole. Powell, 559 U.S. at 62, 130 S. Ct. at 1204-05. Like in Powell, the warnings "in combination" conveyed the right to have an attorney present at all times and therefore adequately informed Appellant of his rights under Miranda. Although Detective Abell told Appellant that he had "the right to the

presence of an attorney *during* questioning" in the next sentence he clarified that "[i]f you cannot afford an attorney, one will be appointed to you *before* questioning." AA 99. In conjunction, the two clauses reasonably conveyed that Appellant had the right to have counsel present at all times as required by Miranda.

Indeed, it appears as if the Ninth Circuit Court of Appeals is abandoning Noti. In United States v. Ortega, 510 F. App'x 541 (9th Cir. 2013)[1], the Ninth Circuit rejected an argument similar to Appellant's in a brief, unpublished memorandum:

> The Miranda warning was not constitutionally deficient. The officer's warning "reasonably conveyed [Alcaraz's] right to have an attorney present ... at all times." Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195, 1205, 175 L.Ed.2d 1009 (2010); see also Duckworth v. Eagan, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). The given warning was "sufficiently comprehensive and comprehensible when given a commonsense reading," Powell, 130 S.Ct. at 1205, and "nothing in the warning[] ... suggested any limitation on the right to the presence of appointed counsel." California v. Prysock, 453 U.S. 355, 360–61, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (per curiam). As in People of the Territory of Guam v. Snaer, 758 F.2d 1341 (9th Cir. 1985), the Miranda warning Alcaraz received "adequately convey[ed] notice of the right to consult with an attorney before questioning," even though it did not explicitly inform him of that right. Id. at 1342–43. In both Snaer and this case, the right to talk to a lawyer before questioning "[could] easily be inferred from the warnings actually given." United States v. Connell, 869 F.2d 1349, 1352 (9th Cir. 1989). United States v. Ortega, 510 F. App'x 541, 541-42 (9th Cir. 2013).

Id. at 542. Similarly, in United States v. Scaggs, 377 F. App'x 653 (9th Cir. 2010), the Court stated:

[1] The Federal Rules of Appellate Procedure permits citation to unpublished opinions for persuasive authority. FRAP 32.1.

> We reject David's argument that the warnings were inadequate. The investigator who questioned David did not tell him in so many words that he had a right to speak to an attorney before questioning. But advice of that right can be inferred from the investigator's statement that David had the right to have counsel appointed before questioning.

Id. at 656 (citing United States v. Connell, 869 F.2d 1349, 1352 (9th Cir.1989); Florida v. Powell, 130 S. Ct. 1195, 1204–05, 175 L.Ed.2d 1009 (2010) (warnings adequate where "in combination" they convey right to have an attorney present at all times)).

Finally, Appellant argues that the warning failed to advise him of his right to actively consult with his attorney throughout the questioning. AOB 15. However, it is unreasonable to think that an appointed attorney would not be able to consult with the client before questioning began. Likewise, it is unreasonable to think that Appellant could not consult with his attorney during the interview. See Powell, 559 U.S. at 62 n.6, 130 S. Ct. at 2881 n.6 ("It is equally unlikely that the suspect would anticipate … [h]is lawyer would be admitted into the interrogation room each time the police ask him a question, [and] then [be] ushered out each time the suspect responds."). Because the Miranda warning provided to Appellant reasonably conveyed his right to speak with a lawyer before and during questioning, it was sufficient.

//

//

CONCLUSION

Because there was sufficient evidence to convict Appellant of robbery and first-degree kidnapping and the Miranda warning was adequate to advise him of his constitutional rights, the Judgment of Conviction should be affirmed.

Dated this 15th day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 3,619 words and does not exceed 30 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 15th day of September, 2016.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 15, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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