

***Bolden v. State*, 121 Nev. Adv. Op. 86, 124 P.3d 191 (2005)¹**

CRIMINAL LAW – COCONSPIRATOR LIABILITY

Summary

The State of Nevada successfully prosecuted Anthony Thomas Bolden, Appellant, for burglary, home invasion, first-degree kidnapping, second-degree kidnapping, robbery, and conspiracy to commit robbery and/ or kidnapping. The charges resulted from an incident in which Bolden and four other masked men broke into an apartment looking for drugs and money. The State advanced three alternative theories of Bolden’s guilt: direct participation, aiding and abetting, and vicarious coconspirator liability. The jury returned a general guilty verdict in response, which means that it did not specify on which theory it based its verdict.

Bolden filed an appeal, alleging error during jury selection under *Batson v. Kentucky*,² and contended that the State failed to present sufficient evidence. The Nevada Supreme Court determined that the State justified its juror challenges on race-independent grounds and that the *Batson* challenge was without merit. While the court rejected Bolden’s specific claims with respect to the sufficiency of the evidence argument, it determined that the jury instruction regarding vicarious coconspirator liability was improper.

The court concluded that Bolden’s conviction under the theories of direct participation and aiding and abetting were legally and factually sufficient, the improper jury instruction made a conviction under the vicarious coconspirator theory faulty.

Issues

1. The primary issue is what standard should be required to convict a coconspirator of a specific intent crime.
2. The second issue is whether a general jury verdict can stand when it could have been based on either a legally valid or invalid ground.

Disposition

The Nevada Supreme Court reversed Bolden’s conviction for the specific intent crimes of burglary and first and second-degree kidnapping and remanded on those counts. The court affirmed Bolden’s convictions for the remaining counts.

Commentary

¹ By Kelly Dove

² 476 U.S. 79 (1986).

Issue 1

State of the Law Before *Bolden v. State*

The “natural and probable consequences” doctrine holds criminal conspirators liable for acts of coconspirators committed in furtherance of the conspiracy and that follow as a natural or probable consequence of the unlawful agreement.³ Mere foreseeability of the related crime is insufficient to meet the natural and probable consequences standard.⁴ Rather, the State must show some specific intent or knowledge of the charged crime.⁵ *Sharma v. State*⁶ overruled *Garner* in that the court held that a defendant may not be convicted under an aiding and abetting theory absent proof of specific intent to aid the other conspirator.

To convict a defendant of a general intent crime, the defendant need not have intended the precise harm or result. General intent is “the intent to do that which the law prohibits.” Conversely, specific intent is “the intent to accomplish the precise act which the law prohibits.” Thus, specific intent crimes require proof that the defendant possessed the state of mind required by the statutory definition of the crime. The *Sharma* court ultimately concluded that the natural and probable consequences doctrine should not be applied to specific intent crimes because it allows a defendant to be convicted for a crime even if he lacked the statutorily required intent. In the present case, the Nevada Supreme Court notes that *Sharma* addressed the doctrine as applied only to principal liability for aiding and abetting.

Bolden v. State addresses a question left previously unanswered by *Garner* and *Sharma*: whether a theory of vicarious coconspirator liability based on the natural and probable consequences doctrine is a legally viable theory in Nevada. The concern presented by the “natural and probable consequences doctrine” and its effect on vicarious coconspirator liability, as intimated above, is that it allows a defendant to be convicted of a specific intent crime even though he did not possess the statutorily required intent for the offense.

The United States Supreme Court defined coconspirator liability in terms of reasonable foreseeability in *Pinkerton v. United States*.⁷ However, *Pinkerton* has been extensively criticized and Nevada has not adopted the *Pinkerton* rule. The Nevada Supreme Court agrees with the criticism that *Pinkerton* excessively broadens conspiracy liability and notes that many other jurisdictions, such as Washington, New Mexico, Arizona, and New York have explicitly declined to adopt the rule.

³ *Garner v. State*, 116 Nev. 770, 779 6 P.3d 1013, 1019 (2000), *overruled in part by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002).

⁴ *Id.* at 782, 6 P.3d at 1021.

⁵ *Id.*

⁶ 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

⁷ 328 U.S. 640 (1946).

Other Jurisdictions

States are divided in their application of the natural and probable consequences doctrine to criminal defendants. For instance, New Mexico has rejected similar use of the doctrine.⁸ However, several other jurisdictions have recently affirmed the doctrine as an established component of common law.⁹

Effect of *Bolden v. State* on Current Law

In *Bolden v. State*, the Nevada Supreme Court rejects the natural and probable consequences doctrine for coconspirator liability regarding specific intent crimes. It extends *Sharma* to include vicarious coconspirator liability. “[A] defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy.” To convict a defendant of a specific intent crime, the State must show that the defendant possessed the requisite statutory intent. The Court limited its holding to vicarious coconspirator liability based on the natural and probable consequences for specific intent crime; the holding does not extend to general intent crimes.

Unanswered Questions

Though the court explicitly limited its holding as applying only to specific intent crimes, it “cautioned” the State that it will consider the doctrine’s applicability to general intent crimes in the future if the theory of liability for crimes has too attenuated a connection from the conspiracy.

Issue 2

The jury in *Bolden v. State* had delivered a general verdict in response to the prosecution’s three alternative theories. This is acceptable if each of the presented alternative theories is legally valid. However, the general rule is that if one or more theories is legally invalid, the verdict cannot stand because a reviewing court cannot know on what ground the jury based its verdict. In the present case, the Nevada Supreme Court adopts the Ninth Circuit Court of Appeals’ exception to the general rule from *Keating v. Hood*¹⁰ in holding that reversal of the verdict may not be required if it is “absolutely certain” that the jury relied on the legally correct theory to convict the defendant in cases such as this – where the general verdict could have been based on either a legally valid or invalid ground.

Here, the Court was unable to conclude with absolute certainty that the jury relied on one of the legally valid grounds. Accordingly, the Court reversed the convictions on the specific intent crimes (burglary, first-degree kidnapping, and second-degree kidnapping).

⁸ See *State v. Carrasco*, 946 P.2d 1075 (N.M. 1997).

⁹ See *People v. Prettyman*, 926 P.2d 1013 (Cal. 1996); *State v. Howard*, 30 S.W.3d 271 (Tenn. 2000).

¹⁰ 191 F.3d 1053, 1063 (9th Cir. 1999).

Conclusion

Bolden v. State extends *Sharma v. State* by declining to apply the natural and probable consequences doctrine to vicarious coconspirator liability for specific intent crimes. In doing so, it also cautioned prosecutors against taking this holding as license to overzealously apply the doctrine to general intent crimes. In addition, the Nevada Supreme Court adopts a narrow exception to the invalidity of general verdicts when one or more grounds is legally invalid. A general verdict may stand, even if one theory is legally invalid if the court can be “absolutely certain” the jury based its verdict on a legally valid basis.