IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW DAVID MCNEIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52944

FILED

MAR 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon and child abuse and neglect. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Matthew David McNeil was convicted of attempted murder with the use of a deadly weapon and child abuse and neglect. McNeil was sentenced to a prison term of 48 to 120 months for attempted murder, plus a consecutive term of 24 to 120 months for the use of a deadly weapon, and 12 to 48 months for child abuse and neglect, to run concurrently. The parties are familiar with the facts and we do not recount them here except as pertinent to our disposition.

McNeil argues that the district court's instruction on child abuse and neglect lessened the burden of proof and was plain error because the district court instructed the jury on NRS 200.508(2) and not the statute under which McNeil was charged, NRS 200.508(1).[1] McNeil

[1]McNeil also argues: (1) the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to preserve exculpatory evidence; (2) the district court abused its discretion by admitting testimony regarding McNeil's

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did not object to this instruction but argues that this court can review for plain error, and that the district court should have intervened "sua sponte to protect the defendant's right to a fair trial." Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986). We agree. The error "'is so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 n.2 (1990)).

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). In conducting a plain error analysis, this court must consider whether error exists, "whether the error was plain or clear, and whether the error affected the defendant's substantial rights." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks and citation omitted).

. . . continued

invocation of his right to remain silent; (3) the child abuse and neglect statute (NRS 200.508) is unconstitutionally vague because it fails to give reasonable notice of the proscribed conduct; (4) the district court erred in failing to canvass the appellant regarding legally binding stipulations; (5) the district court abused its discretion by admitting evidence of the 911 call placed by the victim when the victim was available to testify; (6) the State committed prosecutorial misconduct that warrants reversal of the judgment of conviction; (7) the district court abused its discretion by failing to give a lesser-included offense instruction; (8) the State did not present sufficient evidence to support the verdict; and (9) cumulative error warrants reversal of the judgment of conviction. Having fully considered these issues, we conclude that they are without merit.

McNeil argues that jury instruction 11 omitted the requisite mental state and conflated two statutes, NRS 200.508(1), under which he was charged, and NRS 200.508(2), which does not require the defendant to have acted willfully.

Jury instruction 11 provided that:

> Any adult person who is responsible for the safety or welfare of a child and who permits or allows that child to suffer unjustifiable physical pain or mental suffering or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect, is guilty of child abuse.

NRS 200.508(1) states: "A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect." (Emphasis added.) Jury instruction 11 clearly left out the language requiring that the defendant act willfully that is specific to NRS 200.508(1), and instructed the jury using the language from NRS 200.508(2). NRS 200.508(2) states: "A person who is responsible for the safety or welfare of a child and who permits or allows that child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect."

It is clear the district court instructed the jury using the language of NRS 200.508(2), not NRS 200.508(1). This error was plain and affected McNeil's substantial rights because the willfulness requirement set forth in NRS 200.508(1) was not included in the jury instruction. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk