IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRION KION SHAW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55887

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of battery constituting domestic violence. Eighth Judicial District Court, Clark County; David Wall, Judge.

The charges brought against appellant Jerrion Shaw stem from a series of events in which Shaw hit his girlfriend Amber Castro in the face and later grabbed her around the neck, applied pressure, and picked her up by the neck. Shaw was charged with three counts of battery constituting domestic violence. Shaw was found guilty of two counts of battery constituting domestic violence.

On appeal, Shaw assigns the following errors: (1) the justice court erred in granting a continuance of the preliminary hearing, (2) the district court erred in removing a prospective juror for cause sua sponte, (3) his right to confrontation was violated, (4) the jury was provided with erroneous instructions, (5) the two convictions are redundant, and (6) the State failed to prove the requisite prior domestic battery misdemeanor convictions to enhance his current offenses to felonies. Shaw now appeals the judgment of conviction.

For the reasons set forth below, we affirm the judgment of conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The justice court did not err in granting a continuance of the preliminary hearing

Shaw asserts that because the State was aware that Castro did not intend to appear as the State's witness at the preliminary hearing, the State was required to file a written affidavit seeking a continuance of the hearing. Shaw argues that the oral affidavit offered by the State was insufficient, and the State's failure to file a written affidavit mandates reversal of his convictions.

Shaw raises this issue for the first time on appeal. When a defendant asserts a new ground for objection on appeal, we review for plain error. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008). "In conducting plain error review, [this court] . . . examine[s] whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). The appellant bears the burden of establishing that his substantial rights were affected by showing actual prejudice or a miscarriage of justice. Id.

If the State seeks a continuance of a preliminary hearing in the justice court due to the absence of a witness, it must submit a written affidavit demonstrating good cause for the continuance. Hill v. Sheriff, 85 Nev. 234, 235, 452 P.2d 918, 919 (1969). If the State does not have sufficient time to prepare such an affidavit in support of its motion for a continuance, it "need only be sworn and orally testify to the same factual matters that would be stated in affidavit form were time available to prepare one." Bustos v. Sheriff, 87 Nev. 622, 624, 491 P.2d 1279, 1280-81 (1971).

Although Shaw filed a petition for a writ of habeas corpus after being bound over to the district court, he did not object to the State's failure to file a written affidavit in seeking a continuance. Therefore, Shaw's contention is new, and we review for plain error.

The prosecution was diligent in seeking to secure Castro's appearance—it served her with a subpoena four days prior to the preliminary hearing. There was no "'willful disregard' of the rules, nor a 'conscious indifference to the rights of the defendant'" that would require reversal. Id. at 623, 491 P.2d at 1280 (citations omitted). Even if the State conceded at the hearing that it was "not really surprised" that Castro failed to appear for the hearing, there is no evidence that the prosecution knew with any certainty that the witness would not appear after being subpoenaed. Shaw has failed to provide evidence to support his assertion that the State acted with willful disregard of the rules. Additionally, even if the justice court erred in allowing the State to offer an oral affidavit, Shaw had an affirmative burden to demonstrate that such an error affected his substantial rights. Shaw has failed to demonstrate any effect on his substantial rights. Consequently, the justice court did not commit plain error in granting a continuance of the preliminary hearing.

The district court did not err in removing a prospective juror for cause sua sponte

Shaw contends that the district court erred in removing prospective juror 108 for cause sua sponte.

A district court enjoys "broad discretion" in decisions to remove a juror because it "is better able to view a prospective juror's demeanor than a subsequent reviewing court." Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001).

A prospective juror should be removed for cause when the "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting Leonard, 117 Nev. at 65, 17 P.3d at 405). NRS 175.036(1) provides that "[e]ither side may challenge an individual juror . . . for any cause." If either party fails to dismiss a juror who would be unable to adjudicate the facts fairly, the district court may act sua sponte. People v. Jiminez, 15 Cal. Rptr. 2d 268, 272 (Ct. App. 1992), overruled on other grounds by People v. Kobrin, 903 P.2d 1027 (Cal. 1995); see State of Nevada v. Larkin, 11 Nev. 314, 326 (1876) (stating, prior to the enactment of Nevada's current statutory jury selection scheme, that "the court in the exercise of its sound discretion has the right of its own motion to discharge a juror at any time before he is sworn").

Because prospective juror 108 unequivocally indicated that he could not sit in judgment of another, a view that would prevent or substantially impair the performance of his duties as a juror, the district court properly removed the prospective juror for cause on its own motion. Moreover, even if the district court erred in removing the prospective juror on its own motion, grounds for reversal do not exist. To allege reversible error, a party must establish that a juror was unfair or partial. Shaw has not made such a showing here. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125-26 (2005) ("Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors. Because Weber does not establish that any of the jurors who sat in judgment against him were not fair and impartial, his claim warrants no

relief."). Thus, the district court did not abuse its discretion in dismissing prospective juror 108 sua sponte.

Shaw's right to confrontation was not violated

Shaw contends that his right to confrontation was violated when two Las Vegas Metropolitan Police Officers, who arrived at the scene after the incident between Shaw and Castro, were permitted to testify that statements made by witnesses at the scene were consistent with Castro's account. Because Shaw raises this argument for the first time on appeal, we need only review for plain error. Grey, 124 Nev. at 120, 178 P.3d at 161.

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Broadly speaking, the Confrontation Clause prohibits testimonial hearsay statements from being admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine that declarant. Crawford v. Washington, 541 U.S. 36, 68 (2004); Flores v. State, 121 Nev. 706, 714, 120 P.3d 1170, 1175 (2005). Although not expressly adopted by this court, it is a well-settled principle that the Confrontation Clause may be triggered if police officers, "through their trial testimony, refer to the substance of statements given to them by nontestifying witnesses in the course of their investigation, when those statements inculpate the defendant." Ocampo v. Vail, 649 F.3d 1098, 1110 (9th Cir. 2011). In determining whether such reference to statements should be excluded, this court must determine "if the substance of an out-of-court testimonial statement is likely to be inferred by the jury." Id. at 1111.

Neither officer testified to the content of the witnesses' statements; thus, no out-of-court statement was directly quoted. The

officers' testimony in this case did not, when taken in context, lead to any inescapable inference regarding the substance of the witnesses' statements. Specifically, the disputed testimony revealed only that the witnesses' statements relayed basically the same information as Castro; it did not reveal the substance of what those facts were. And, at that point in the trial, no other evidence indicated the contents of any of the statements, what facts the statements had in common, or how any of the facts were consistent. As a result, the officers' testimony did not run afoul of the hearsay rule. Because the Confrontation Clause is premised on the occurrence of hearsay, which is absent here, the Confrontation Clause has no application. Accordingly, we conclude that Shaw's right to confrontation was not violated.

The jury was not provided with erroneous instructions

Shaw argues that the district court abused its discretion in giving Jury Instruction No. 8, which instructed the jury regarding prior inconsistent statements, and in refusing to provide the jury with his proposed instruction.

A district court's decision regarding jury instructions is reviewed for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Jury Instruction No. 8

Jury Instruction No. 8 provided:

> Evidence that at some other time a witness made a statement that is inconsistent with his testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

This court has long held that prior inconsistent statements are admissible as substantive evidence of guilt. E.g., Dorsey v. State, 96 Nev. 951, 953, 620 P.2d 1261, 1262 (1980); see also NRS 51.035(2)(a) (excepting prior inconsistent statements from the hearsay rule). Notably, as jury instructions were being settled, Shaw's counsel conceded that Jury Instruction No. 8 was "an accurate statement of [the] law." Because the instruction was accurate regarding prior inconsistent statements, the district court's decision to give the instruction was not an abuse of its discretion.

Shaw's proposed instruction

Shaw's proposed instruction provided:

> If the evidence permits two reasonable interpretations, one of which points to the Defendant's guilt and the other to the Defendant being not guilty, you must adopt the interpretation that points to the Defendant being not guilty, and reject that interpretation that points to his guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

We have held that it is proper for a district court to refuse this instruction if the jury is correctly instructed on the standards for reasonable doubt. E.g., Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976). The jury in this case was properly given the statutory definition of reasonable doubt as codified in NRS 175.211. See Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991) (holding that "NRS 175.211 satisf[ies] the due process requirements of . . . the United States and the Nevada Constitution[s]"). The district court properly concluded that Shaw was not

entitled to his proposed instruction, and therefore, the district court did not abuse its discretion in its refusal to give the jury this instruction.

Shaw's convictions were not redundant

Shaw asserts that his two battery convictions are redundant because the facts forming the basis for the two crimes overlap and occurred close in time. Because this issue was not properly preserved, we review for plain error. Grey, 124 Nev. at 120, 178 P.3d at 161.

Convictions are redundant "when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather than multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." Wilson v. State, 121 Nev. 345, 355-56, 114 P.3d 285, 292-93 (2005) (citations omitted).

A battery is "any willful and unlawful use of force or violence upon the person of another."[1] NRS 200.481(1)(a). The clear intent of NRS 200.481 is to criminalize any instance of intentional and unwanted exertion of force or violence upon another person. The Legislature's use of the word "any" demonstrates its intent to separately punish multiple acts that occur during the course of criminal conduct. NRS 200.481(1)(a). Shaw was convicted of two counts of domestic battery. He hit Castro in the face, causing Castro's face to bleed. Shortly thereafter, Shaw grabbed Castro around the neck, applied pressure, and picked her up by her neck.

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[1]Although Shaw was convicted for domestic battery under NRS 200.485, that statute uses the term "battery" as it is defined in NRS 200.481(1)(a). NRS 200.485(9)(b). The relevant statute is therefore NRS 200.481, Nevada's criminal battery statute.

Shaw's acts of hitting Castro and choking her were two distinct and separate acts of force and violence upon Castro. The two convictions punish two separate acts. We therefore conclude that Shaw's convictions are not redundant.

The State did not fail to prove the requisite prior domestic battery misdemeanor convictions in order to enhance Shaw's current offenses to felonies

Shaw contends that the State failed to prove at the sentencing hearing that he had two prior misdemeanor domestic battery convictions. Shaw alleges that because of this failure, the district court erroneously enhanced his current domestic battery offenses to felonies. Because this allegation was not preserved, we review for plain error. Grey, 124 Nev. at 120, 178 P.3d at 161.

NRS 200.485(1)(c) provides that a defendant's third domestic violence battery conviction within seven years must be enhanced to a felony and punished as such under NRS 193.130. It further states that:

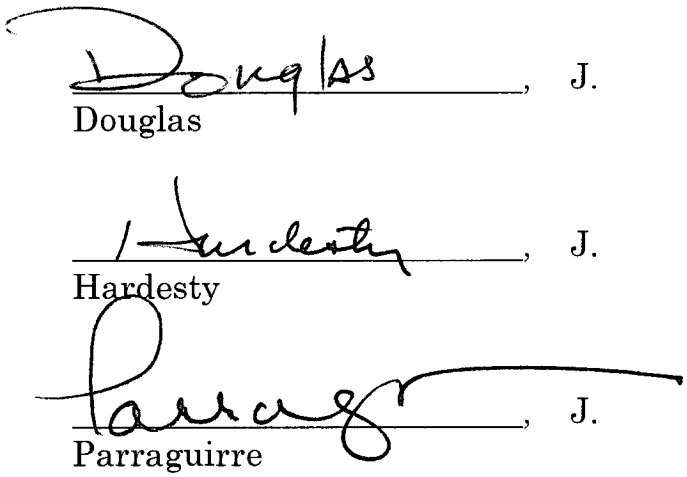
> An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense . . . . The facts concerning a prior offense . . . must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination . . . .

NRS 200.485(4) (emphasis added).

Additionally, "the State must prove the prior convictions at or anytime before sentencing. Additionally, . . . a defendant may stipulate to or waive proof of prior convictions." Hudson v. Warden, 117 Nev. 387, 394-95, 22 P.3d 1154, 1159 (2001) (footnotes omitted).

Shaw contends his stipulation to and waiver of the requirements of proof was invalid because the district court incorrectly believed that the State was required to prove his prior convictions at trial. Although the district court was mistaken as to the timing and requirements of proof, Shaw's knowing and voluntary waiver was not rendered invalid. Consequently, the State was divested of its burden to prove the existence of the prior convictions. Accordingly, we conclude that the district court did not erroneously enhance Shaw's current offenses to felonies under NRS 200.485.[2] For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. David Wall, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]We have reviewed all of Shaw's remaining contentions and conclude that they are without merit.