

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD DOUGLAS EBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76287-COA

FILED

JUN 17 2019

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Donald Douglas Eby appeals from a judgment of conviction, pursuant to a jury verdict, of battery causing substantial bodily harm. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Eby's conviction arises from a physical altercation with his former girlfriend, Christy Thompson, whereby Eby punched Thompson in the face multiple times.

Sufficient evidence exists to support Eby's conviction

Eby contends that there was insufficient evidence to support his conviction for battery causing substantial bodily harm based on the evidence presented that he was acting in self-defense. In addition, Eby asserts that the case was based on the credibility of the parties, which Thompson lacked. The State contends that Eby's arguments lack merit. We agree with the State.

In reviewing the sufficiency of the evidence, the appellate court must decide, "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 a crime beyond a reasonable doubt." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks omitted). The verdict will not be overturned when substantial evidence exists to support it. *Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 715 (2009). Substantial evidence is defined as "evidence that a reasonable

mind might accept as adequate to support a conclusion.” *Id.* (internal quotation marks omitted). In addition, it is for the jury to determine the weight and credibility of the testimony. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Battery is defined as “any willful and unlawful use of force or violence upon the person of another.” NRS 200.481(1)(a). Self-defense negates the unlawfulness element of the battery because self-defense is a justifiable use of force. *See Barone v. State*, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993). Justifiable battery or self-defense is defined as

the battery of a human being, which does not result in death and is necessary for self-defense against one who manifestly intends to commit a felony by using violence or surprise, or when there is reasonable ground to apprehend a design on the part of the person injured to do some great personal injury to the person inflicting the injury.

Davis v. State, 130 Nev. 136, 145, 321 P.3d 867, 873-74 (2014); *see* NRS 200.120; NRS 200.275.

At trial, Eby admitted to punching Thompson in the face, and the extent of Thompson’s injuries were confirmed by the sheriff’s deputies who investigated Thompson’s claim, the pictures taken of Thompson’s face, and the oral and maxillofacial surgeon who performed surgery on Thompson’s face. Although the jury heard conflicting testimony from Thompson and Eby regarding whether Thompson became physical with Eby before Eby punched Thompson, the jury could reasonably infer from the evidence presented that Eby committed battery causing substantial bodily harm. It was ultimately up to the jury to determine the weight and credibility of the conflicting testimony to assess Eby’s claim that he acted in self-defense, and we will not disturb the jury’s verdict where, as here, substantial evidence supports the verdict.

The district court properly excluded evidence of Thompson's prior accusations against Eby

Eby argues that the district court improperly excluded Thompson's three prior "false" accusations against him, as they were relevant to prove Thompson's motive and history of fabricating claims against him, and they were relevant to his theory of self-defense. The State argues that the three prior accusations were classic examples of propensity evidence, which are inadmissible pursuant to NRS 48.045(2). We agree with the State.

The district court's decision to "exclude evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

NRS 48.045(2) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"A presumption of inadmissibility attaches to all prior bad act evidence." *Ledbetter*, 122 Nev. at 259, 129 P.3d at 677 (internal quotation marks omitted). Prior to admission of evidence of prior bad acts, the proponent has the burden of establishing at a hearing outside the jury's presence (i.e., a *Petrocelli* hearing) that "the evidence is relevant, it is clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice." *Id.*

Here, the three prior accusations involve incidents where Thompson claimed Eby physically abused her in some fashion. In regard to Eby's first claim that the prior accusations were relevant to show

Thompson's motive of fabricating claims against him, Eby undercuts this theory by also arguing that the prior accusations were relevant to show that he used the necessary force in self-defense. Eby is not disputing that the incident occurred, which makes the prior accusations irrelevant to show Thompson's intent to fabricate claims against Eby. In regard to Eby's claims that the prior accusations were relevant to his self-defense claim, the prior accusations do not involve violence or any threat of violence by Thompson. Thus, under either of Eby's theories, the three prior accusations are irrelevant, and as a result, we need not consider whether the district court was correct in determining the accusations were not proven by clear and convincing evidence and the probative value of the accusations was substantially outweighed by the danger of unfair prejudice. *See Ledbetter*, 122 Nev. at 259, 129 P.3d at 677. In conclusion, the district court did not abuse its discretion in excluding Thompson's three prior accusations.

The State did not commit prosecutorial misconduct during closing arguments

Eby claims that the State committed prosecutorial misconduct during closing argument by misstating certain evidence. The State contends that it did not misstate the evidence. We agree with the State that it did not misstate the evidence.

In evaluating a claim for prosecutorial misconduct, this court first determines "whether the prosecutor's behavior was improper." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). "If the conduct was improper, we next review the comments for harmless error." *Id.*

Here, Eby's prosecutorial misconduct claim is based on the following dialogue from his custodial interrogation:

Eby: That's right, when I was trying to restrain her she was biting me.

Investigator Love: She was?

Eby: Yeah.

Investigator Love: Where'd she bite you at?

Eby: Well, she was trying to bite my hand. I don't know, I don't think she actually got ahold of me. But she was trying.

The State played this portion of the interview in front of the jury and stated, "[t]hat's the one where he first says she was trying to bite him." Eby immediately objected, claiming that the State misstated the evidence. The district court then informed the jurors that they would decide what the evidence shows, not counsel. The State continued, stating, "And [Defense counsel] is correct, [Eby] said -- initially he said that she bit him and then corrected and said she was trying to bite. Let's just play it again for you so you can hear."

The State did not misstate the evidence, as Eby did ultimately state that Thompson was trying to bite him. Further, immediately following Eby's objection to the State's comment, the State clarified that Eby first said that Thompson bit him but changed his response to Thompson was trying to bite him. The State then replayed the relevant portion of Eby's custodial interrogation for the jury, thereby correcting any alleged misstatement on the record. Accordingly, we conclude that the State did not commit prosecutorial misconduct.

The district court did not abuse its discretion by denying Eby's proposed self-defense jury instructions

Eby argues that the district court erred by denying his self-defense jury instruction. The State contends that Eby's proposed jury instructions went beyond an instruction of the law and included factual characterizations and argument. We agree with the State.

District courts have broad discretion to settle jury instructions, and this court reviews “a district court’s denial of proposed jury instructions for abuse of discretion or judicial error.” *Davis*, 130 Nev. at 141, 321 P.3d at 871. “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Id.* (internal quotation marks omitted).

Here, the district court acknowledged that Eby was entitled to a self-defense jury instruction and provided the jury a statement of the law on self-defense. However, Eby contends that the jury should have been instructed as follows:

Donald Eby maintains that Christy Thompson attacked him in a violent, drunken rage at his home on January 2, 2017, and that he acted in self-defense. Mr. Eby maintains that he tried to restrain Christy Thompson and eventually hit Ms. Thompson only to defend himself against further bodily injury because he reasonably feared that if he did not act in self-defense, he would suffer further serious bodily injury.

Eby does not dispute that the district court accurately charged the jury with its statement of the law on self-defense. Instead, Eby contends that the jury should have been presented with his proposed instruction that “provided much more detail regarding [his] self-defense claim and provided a step-by-step factual account of why [he] acted in self-defense which may have impacted the verdict.” As the district court pointed out, Eby’s proposed jury instruction was essentially his closing argument. Indeed, during closing arguments, Eby’s counsel provided a factual account of why Eby acted in self-defense, and instructed the jurors on the law of self-defense. Further, in providing the jury instructions, “[t]he judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact.” NRS 175.161(1). Because Eby’s proffered jury instruction

went beyond what is allowed by NRS 175.161(1), and the district court properly instructed the jury on self-defense, we conclude that the district court did not abuse its discretion or commit judicial error by denying Eby's proposed jury instruction.

Eby did not provide a sufficient record for this court to address his due process claim


Eby argues that his due process right to a fair trial was violated when a custodial interrogation video of him in handcuffs and jail attire was played to the jury. He argues that the video destroyed his presumption of innocence and cloaked him in the garb of guilt. It is appellant's responsibility to provide this court with the portions of the record "essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). *See also* NRAP 3C(e)(C)(applying NRAP 30 to fast track criminal appeals). Eby has not provided this court with copies of his "Motion to Prevent the State from Showing the Defendant in Shackles," the State's opposition to the motion, the transcript of the hearing on the motion, and the district court order resolving the motion. Without these documents, we are unable to address the merit of this claim. Therefore, we decline to address this issue on appeal.


Eby has not demonstrated cumulative error warranting reversal

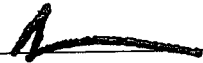
Eby argues the cumulative effect of errors committed during his trial warrants reversal of his conviction. However, because Eby has failed to demonstrate any error there is no error to cumulate. *See Watson v. State*, 130 Nev. 764, 790 n.11, 335 P.3d 157, 175 n.11 (2014).¹

Having concluded Eby has not demonstrated he is entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Tao

_____, C.J.
Gibbons

_____, J.
Bulla

cc: Hon. Thomas W. Gregory, District Judge
Donald Douglas Eby
Edward T. Reed, PLLC
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

¹We take this opportunity to resolve two outstanding motions on our docket in this case. We deny both as moot. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 603, 245 P.3d 572, 575 (2010) (“This court will not render advisory opinions on moot or abstract questions.” (internal quotation omitted)). The first, Eby’s “Motion for Order to Compel NDOC to Issue Funds from Appellant’s NDOC Trust Account,” is denied as moot, as Edward T. Reed has appeared as counsel in this matter representing appellant. *Id.* The second, the State’s “Opposition to Order Granting Telephonic Extension,” we also deny as moot as Eby declined to file a Supplemental Fast Track Statement in this matter. *Id.*