IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROSARIO JAVIER ZAZUETA-OCHOA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81624-COA

ORDER OF AFFIRMANCE

Rosario Javier Zazueta-Ochoa appeals from a judgment of conviction, pursuant to a jury verdict, of unlawfully driving under the influence (DUI) of intoxicating liquor with one or more prior felony DUI convictions. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Deputy Brian Shoaf of the Elko County Sheriff's Office observed a pickup truck cross traffic lines, swerve into oncoming traffic, and cross back into its proper lane. Deputy Shoaf initiated a traffic stop; however, the truck failed to stop and proceeded to accelerate. Deputy Shoaf continued to follow the truck, as the vehicle's operator was driving erratically and evasively. Eventually, the truck pulled into a local trailer park, ultimately coming to an abrupt stop outside one of the trailers located several rows down.

Deputy Shoaf radioed dispatch and continued to observe the now stopped truck. At some point, Deputy Shoaf observed a person in a bright yellow shirt move from the driver's seat to the front passenger seat. However, Deputy Shoaf did not witness another person moving from the passenger seat to the driver's seat. When the driver's side door suddenly opened, Deputy Shoaf instructed the occupants to stay in the vehicle, which they did. After backup arrived, Deputy Shoaf made contact with the

occupants, identifying the man who was in the yellow shirt and sitting in the passenger seat as Zazueta-Ochoa, and the man in the driver's seat as "Hector."[1] Neither Zazueta-Ochoa nor Hector were wearing seatbelts and both showed signs of intoxication.

Deputy Shoaf began investigating Zazueta-Ochoa for DUI. Deputy Shoaf made several observations. Zazueta-Ochoa was slumped forward in the passenger seat, appeared sleepy, exhibited slurred speech, had blood shot eyes, smelled strongly of alcohol, and was actively bleeding from a mouth wound. Deputy Shoaf asked Zazueta-Ochoa for his driver's license, but instead Zazueta-Ochoa reached into the glove compartment and handed over a crumpled registration, which showed the truck was registered to Zazueta-Ochoa. When specifically asked by Deputy Shoaf if he had switched seats with Hector, Zazueta-Ochoa denied it. Deputy Shoaf instructed Zazueta-Ochoa to step out of the truck, but Zazueta-Ochoa had difficulty getting out and appeared off balance. Deputy Shoaf instructed Zazueta-Ochoa on the standardized field sobriety testing (SFST), but Zazueta-Ochoa had difficulty following the instructions, and there may have been some language barriers as Zazueta-Ochoa primarily spoke Spanish. Deputy Shoaf also investigated Hector for DUI. At the completion of his investigation, Deputy Shoaf arrested Zazueta-Ochoa for DUI and Hector for being in actual physical control of the vehicle while under the influence.

The State charged Zazueta-Ochoa with felony DUI because of his prior DUI felony conviction(s). After a three-day jury trial, Zazueta-Ochoa was found guilty of DUI with one or more prior felony DUI

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[1]Hector's surname was not contained in the record.

convictions, a category B felony pursuant to NRS 484C.110 and NRS 484C.410.

On appeal, Zazueta-Ochoa first contends that his conviction was not supported by sufficient evidence. Specifically, Zazueta-Ochoa argues that the State failed to show any direct evidence that he was driving the truck, and failed to meet its burden to prove he was "under the influence" as defined by NRS 484C.105. Second, Zazueta-Ochoa asserts that the district court committed reversible constitutional error by including the word "felony" in the criminal information read to potential jurors by the clerk at voir dire. Finally, Zazueta-Ochoa argues that the trial court committed reversible error by showing overt favoritism to the State and by making inappropriate comments about, and to, defense counsel. We disagree.

When reviewing the sufficiency of the evidence, this 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 the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). It is the jury's role, not the reviewing court's, "to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, "a verdict supported by substantial evidence will not be disturbed by a reviewing court." *Id.* Moreover, "circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Here, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that (1) Zazueta-Ochoa was the driver of the

truck and (2) he was under the influence. First, as to the issue of Zazueta-Ochoa being the driver, Deputy Shoaf witnessed a "bright yellow shirt upon a person go from the driver's seat to the passenger seat," and later identified Zazueta-Ochoa sitting in the passenger seat and wearing a bright yellow shirt. Neither Zazueta-Ochoa nor Hector were wearing their seat belts, making a switch feasible. Further, Sergeant Fisher testified that Zazueta-Ochoa was approximately eight inches taller than Hector, and the driver's seat was adjusted farther back when compared to the passenger seat, indicating that a taller individual, Zazueta-Ochoa, most likely had been sitting in the driver's seat when the truck was moving. Further, the truck was registered to Zazueta-Ochoa, and he knew exactly where to find the vehicle's registration when asked for his identification. Thus, there was sufficient evidence for the jury to conclude that Zazueta-Ochoa was the driver when the truck first came to Deputy Shoaf's attention.

Second, the record reflects that there was sufficient evidence supporting the jury's conclusion that Zazueta-Ochoa was under the influence of alcohol. "'Under the influence' means impaired to a degree that renders a person incapable of safely driving or exercising actual physical control of a vehicle." NRS 484C.105.

Deputy Shoaf testified at length regarding his observations of Zazueta-Ochoa's erratic and unsafe driving, as well as his intoxication, including that he smelled strongly of alcohol. Zazueta-Ochoa admitted to Deputy Shoaf that he had consumed two to four beers that night. Additionally, Deputy Shoaf testified about the SFSTs that he administered, which revealed numerous indications of Zazueta-Ochoa's intoxication, specifically that he did not follow directions, began the test prematurely,

and lost his balance.[2] Sergeant Fisher also testified to Zazueta-Ochoa's intoxication; specifically, that Zazueta-Ochoa was having trouble balancing, slurred his speech, had blood shot eyes, and smelled of alcohol. Thus, the jury had sufficient evidence to find Zazueta-Ochoa was under the influence of alcohol based on the testimony of Deputy Shoaf and Sgt. Fisher, as well as Zazueta-Ochoa's conduct, admission to drinking, and SFST testing. Based on Deputy Shoaf's testimony and Zazueta-Ochoa's clothing, a rational jury could also believe that Zazueta-Ochoa, and not Hector, had been the driver of the truck. Accordingly, we conclude that a rational trier of fact could have found the essential elements of DUI beyond a reasonable doubt.

Next, we address whether the district court committed judicial misconduct amounting to reversible error. Properly preserved allegations of judicial misconduct are reviewed de novo. *See Azucena v. State*, 135 Nev. 269, 272, 448 P.3d 534, 537 (2019). On appeal, Zazueta-Ochoa alleges multiple instances of judicial misconduct.

First, relying on *Jones v. State*, 93 Nev. 287, 289-90, 564 P.2d 605, 607 (1977), Zazueta-Ochoa argues that the district court committed misconduct when the court clerk read the following criminal information to

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[2]Zazueta-Ochoa argues that there was insufficient evidence for the jury to find that he was under the influence because the defense's expert witness testified that Deputy Shoaf made deviations in conducting the SFSTs. However, the record reveals conflicting evidence on this point, as the State's expert testified that deviations from the standard tests do not invalidate everything else observed and that the accumulation of impairment indicators establish whether a person is under the influence of alcohol. Nevertheless, on appeal, all evidence is viewed in the light most favorable to the State. *Origel-Candido*, 114 Nev. at 381, 956 P.2d at 1380. Observing this standard, we conclude that Zazueta-Ochoa's insufficiency of the evidence argument regarding this point is unpersuasive.

the jury pool: "Count 1, driving under the influence, a *felony*." (Emphasis added.) Zazueta-Ochoa contends that this suggested to the potential jurors that his DUI was being elevated for unnamed reasons, such as a prior conviction for felony driving under the influence.

In *Jones*, "a small portion of the habitual criminal charge contained in the information was inadvertently read to the jury by the district court clerk, contrary to the mandate of NRS 207.010(5)." 93 Nev. at 289-90, 564 P.2d at 607. On appeal, the supreme court concluded that this was error, but "deem[ed] the error harmless." *Id.* at 290, 564 P.2d at 607. We conclude that Zazueta-Ochoa's reliance on *Jones* is misplaced.

Unlike the criminal defendant in *Jones*, Zazueta-Ochoa was not adjudicated under the habitual criminal statute and is therefore not entitled to its protections. Rather, he was charged under NRS 484C.110 and NRS 484C.410, which mandates in part only that "[t]he facts concerning a prior offense must be alleged in the complaint, indictment or information, [but] must not be read to the jury . . . ." NRS 484C.410(2). Here, the district court clerk merely stated the word "felony" when reading the criminal charge to the jury pool. No facts regarding Zazueta-Ochoa's prior DUI conviction(s) were presented to the jury, nor was there any reference to Zazueta-Ochoa's prior DUI conviction(s) being the basis for the charge. Because there was substantial evidence to support Zazueta-Ochoa's conviction, the error in reading the word "felony," if any, was harmless. *Cf. Koenig v. State*, 99 Nev. 780, 784, 672 P.2d 37, 40 (1983) (holding that the district court erred in referencing defendant's prior convictions in felony DUI case but concluding that the error was harmless in light of the evidence adduced at trial).

Additionally, Zazueta-Ochoa cites no other authority demonstrating that the clerk's one-time reference to the word "felony" without any reference to his prior conviction(s) constitutes reversible error. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).[3]

Zazueta-Ochoa also contends that the district court's admonishments to defense counsel amounted to reversible error. Specifically, Zazueta-Ochoa argues that the district court erred in censuring his trial attorney during voir dire and again during his opening statement. Because Zazueta-Ochoa failed to object, he has waived all but plain-error review. *Azucena*, 135 Nev. at 271, 448 P.3d at 537 (providing that "judicial misconduct falls within the category of error which must normally be preserved for appellate review"); *see also Oade v. State*, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998).

Under plain-error review, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as

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[3]Even if the clerk erred in reading the word "felony" to the jury, Zazueta-Ochoa provides no cogent argument as to how this in and of itself affected his substantial rights without additional facts of his prior DUI conviction(s) having been provided to the jury (which they were not). *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *see also Phenix v. State*, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998) (holding that "the burden is on the appellant to show substantial prejudice").

'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49 (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008)).

Having reviewed the record, we conclude that the district court's admonishments were unnecessarily strong and could easily have been handled outside the presence of the jury, particularly where the court believed that statements made by defense counsel disregarded its pretrial rulings. Nevertheless, we agree that the court's admonishments do not amount to plain error. First, the district court was within its discretion to limit the scope of voir dire to exclude any kind of golden rule arguments. *See Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006) (recognizing that the scope of voir dire is within the district court's discretion); *see Anderson v. Babbe*, 933 N.W.2d 813, 821 (Neb. 2019) (holding golden rule questions during voir dire may be improper). The record reflects that on more than one occasion defense counsel asked questions that arguably invited the prospective jurors to put themselves in Zazueta-Ochoa's shoes, despite the district court's pretrial ruling excluding such statements and the court's repeated admonishments regarding potential violations of the golden rule during voir dire.

Further, the district court's commentary during opening statements in conjunction with an admonishment did not rise to the level of plain error. The trial transcript reveals that defense counsel was beginning to reference excluded evidence in her opening statements, drawing an objection from the State. Thus, the district court did not err in admonishing defense counsel and reading a jury instruction regarding the purpose of opening statements. *See Rudin v. State*, 120 Nev. 121, 140, 86 P.3d 572, 585 (2004) (holding that the district court's admonishment of defense counsel during opening statements was appropriate because counsel

repeatedly attempted to argue the facts); *Robins v. State*, 106 Nev. 611, 624, 798 P.2d 558, 566-67 (1990) (holding that a district court's admonishment directing defense counsel to stop confusing a juror and move on in cross-examination was appropriate in the interest of "controlling the flow of the trial").[4] Therefore, we conclude that Zazueta-Ochoa has failed to establish that the district court plainly erred in its admonishments. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Alvin R. Kacin, District Judge
Barbara W. Gallagher
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

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[4]Zazueta-Ochoa claims another instance of misconduct, where the trial judge admonished defense counsel during closing arguments for interpreting the court's jury instructions. However, Zazueta-Ochoa makes no legal argument as to how the district court's third admonishment of defense counsel was in error. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.