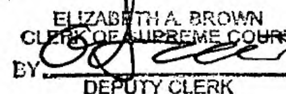
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BAYZLE DYLAN MORGAN, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 85548-COA



NOV 27 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

Bayzle Dylan Morgan appeals from a judgment of conviction, pursuant to a jury verdict, of one count of battery with a deadly weapon.[1] Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

In June 2020, Morgan was in lawful custody of the Nevada Department of Corrections (NDOC) at Ely State Prison (ESP).[2] One afternoon, correctional officers (CO) David Halsey and Adam Caldwell were escorting inmate Marko Hernandez back to his cell at ESP when the cell door directly next to Hernandez's (Morgan's cell) started to open. The door began to close almost immediately, but Morgan managed to squeeze through the small opening. No other inmates were in the vicinity. Outside his cell, Morgan approached the COs and Hernandez with an inmate-made sharpened piece of metal fashioned as a stabbing device (the weapon) in his

[1]At trial, the jury found Morgan guilty of one count of battery by a prisoner with a deadly weapon and one count of possession or control of a dangerous weapon or facsimile by an incarcerated person. At Morgan's sentencing hearing, the district court dismissed the possession count, concluding that it was a lesser included offense of Count I.

[2]We recount the facts only as necessary for our disposition.

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hand.[3] The COs yelled at Morgan to return to his cell and deployed multiple cans of a chemical agent on Morgan when Morgan continued to advance. Morgan physically attacked Hernandez and stabbed him with the weapon. At some point during the incident, which was video recorded, the weapon flew out of Morgan's hand, and CO Stephen Mollet recovered it and booked it into evidence. Hernandez suffered multiple puncture wounds, and the State charged Morgan with one count of battery by a prisoner with a deadly weapon and one count of possession or control of a dangerous weapon or facsimile by an incarcerated person.

Morgan filed a motion for production of Hernandez as a witness, which the district court granted.[4] Morgan also filed a motion in limine to exclude evidence of the weapon based on insufficient chain of custody. The State opposed the motion, arguing that the surveillance footage and CO Mollet's compliance with ESP's evidence procedure established that the weapon had neither been tampered with nor substituted in the period between its collection at the crime scene and trial. The State filed an additional notice of intent to impeach Morgan with his prior felony convictions, as well as a motion for electronic restraint.

The district court ordered a hearing pursuant to *Hymon v. State*, 121 Nev. 200, 111 P.3d 1092 (2005), to address the State's motion for electronic restraint. At this hearing, the court also considered the State's notice of intent to impeach Morgan with his prior felony convictions. At the hearing, the State argued that Morgan should be required to wear a stun

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[3]The weapon was a flat piece of sharpened metal that was around six to eight inches long.

[4]Morgan contended that the victim, Hernandez, would testify as to whether it was a CO or Morgan who struck him.

belt during trial because he was a high-risk prisoner who had a violent criminal history and multiple violent incidents reflected in his ESP disciplinary reports. The State expressed concern that Morgan would be in close proximity to Hernandez if Hernandez testified and would also be near the jury and judge if Morgan chose to testify in his own behalf. In response, Morgan argued that the White Pine County Courthouse had recently undergone renovations that made it uniquely equipped to handle ESP prisoners, and that Morgan was no more dangerous than any other ESP inmate. The court heard testimony from ESP CO Chet Rigney who testified that Morgan was not on the "no shock" list, meaning that Morgan was not exempt from this type of restraint. CO Rigney also explained how the stun belt worked, the requirements for its activation, and asserted that the belt was in proper working order and unlikely to be accidentally activated. The district court granted the motion for electronic restraint and ordered Morgan to wear a concealed stun belt during trial. The district court also authorized the State to impeach Morgan with his prior felony convictions on cross-examination.

During trial, neither Morgan nor Hernandez testified. Morgan objected to the introduction of the evidence log, evidence box, and weapon, arguing that the State failed to lay a proper foundation and establish an adequate chain of custody. To that end, Morgan argued that the ESP custodian of records did not testify, and that the custodian's testimony was necessary to support the weapon's admission. CO Mollet identified the markings on the evidence box, as well as his entry on the evidence log, and testified to his compliance with ESP's evidence booking procedures. The district court concluded that the State had laid a proper foundation for admission of the evidence log, box, and weapon. CO Mollet opened the box

on the stand and identified the weapon inside as the one he collected at the crime scene, and that it was in the same condition as when he recovered it. No evidence suggesting tampering or substitution was presented. The jury found Morgan guilty as charged.

On appeal, Morgan raises four issues that relate to the district court requiring him to wear a stun belt.[5] He argues that the district court abused its discretion pretrial by holding a *Hymon* hearing that was (1) substantively deficient because the district court lacked an essential state interest, improperly shifted the burden to Morgan, and did not consider less restrictive methods of restraint and (2) procedurally deficient because the court sua sponte ordered the hearing one week before trial. Morgan also argues that being required to wear the stun belt during trial (3) violated his Sixth Amendment right to confer with counsel, participate in his own defense, and be present at trial and (4) adversely impacted his right to testify on his own behalf. We disagree.

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[5]Morgan also argues that the district court abused its discretion by admitting evidence of the weapon. However, Morgan raises the issue of improper admission in the conclusion of his opening brief in a single conclusory sentence. He does not present cogent argument or authority, and his claims are unsupported by factual assertions. We, therefore, do not consider the argument on appeal. *See 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); *see also Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (providing that where a party's framing of an issue consists primarily of bare and naked allegations unsupported by factual assertions, that party is not entitled to relief).

The district court did not abuse its discretion in requiring Morgan to wear a stun belt

Morgan argues that the district court abused its discretion by ordering him to wear a stun belt after conducting a substantively deficient hearing pursuant to *Hymon v. State*, 121 Nev. 200, 111 P.3d 1092 (2005). Specifically, Morgan asserts that the court's security concerns were unfounded, the court improperly shifted the burden to Morgan to prove that wearing the belt would have an adverse psychological impact on him, and the court did not consider less restrictive methods of restraint. The State contends that the record supports the court's decision to order use of the stun belt to protect the courtroom and its occupants, and that the district court's findings adequately address the *Hymon* hearing requirements, including consideration of the stun belt's psychological impacts and less restrictive methods of restraint.

We review a district court's decision to physically restrain a defendant for abuse of discretion. *Hymon*, 121 Nev. at 209, 111 P.3d at 1099. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or exceeds the bounds of law or reason. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A stun belt is a specific form of physical prisoner restraint. *Hymon*, 121 Nev. at 207, 111 P.3d at 1098. It is an electronic device worn under the defendant's clothing, typically around the defendant's waist, arm, or leg. *Id.* The belt is controlled remotely by a third party and delivers a high voltage electrical current throughout the defendant's body when activated. *Id.* Upon activation, the belt may cause "incapacitation, severe pain, uncontrolled defecation or urination, muscular weakness, heartbeat irregularities, or seizures." *Id.* Accidental activation has occurred. *Id.* Because the belt is worn under the defendant's clothes, it is not visible to the jury. *Id.*

In *Hymon*, the Nevada Supreme Court considered the conditions under which a district court may permissibly order a defendant to wear a stun belt during trial. In doing so, it established the required findings the court must make before it can order the belt's use, and the procedure the court must follow in making its determinations. *Id.* at 209, 111 P.3d at 1099. The court concluded that district courts must conduct hearings to determine whether an essential state interest, like courtroom security or an escape risk specific to the defendant, is served by compelling the defendant to wear a stun belt. *Id.* As part of this hearing and analysis, the court must consider less restrictive means of restraint, and: "(1) make factual findings regarding the belt's operation, (2) address the criteria for activating the stun belt, (3) address the possibility of accidental discharge, (4) inquire into the belt's potential adverse psychological effects, and (5) consider the health of the individual defendant." *Id.* Morgan does not dispute that the court made adequate findings regarding the belt's operation, the possibility of accidental discharge, and his health. On appeal, Morgan challenges only the district court's stated security interest, its procedure for establishing adverse psychological effects, and its consideration of less restrictive methods of restraint.

An essential state interest existed

Here, the district court held the necessary *Hymon* hearing and complied with the hearing's substantive requirements. Morgan argues that the court lacked a valid security interest because the White Pine County Courthouse had recently been renovated to accommodate prisoner litigation. Consequently, Morgan contends that because the courthouse had recently been renovated and designed for ESP inmates, and because his disciplinary history is consistent with a person housed at ESP, he presented no special security risk that justified the stun belt's use. The State argues

there were courtroom security concerns due to Morgan's proximity to the witness stand, judge, and jury, particularly because at the time of the hearing, the victim was expected to testify. The State argued that a threat still existed towards Hernandez because Morgan's attack was allegedly motivated by Hernandez's race and prior gang affiliation.

Morgan attempts to distinguish his case from *Hymon* where "a number of case[-]specific security factors were present," but Morgan fails to appreciate his own case-specific security factors that set him apart from other ESP inmates. Morgan is classified as a high-risk prisoner in a maximum security state prison and has an extensive violent criminal history, including murder, and violent inmate disciplinary history where, among other things, Morgan has made threats against ESP staff and other inmates, injured staff by grabbing handcuffs and cuff keys, stabbed an inmate while in the shower with an inmate-made weapon, headbutted a CO, and been found with an inmate-made weapon in his cell. Morgan's inmate disciplinary history report was admitted as an exhibit at the *Hymon* hearing, and the court made specific findings regarding Morgan's security risk based on that report. The district court noted that the concern was not the courthouse's design and structure; rather "[t]he concern is the safety and security of everybody in the courtroom." Further, Morgan was on trial for a violent crime he committed in front of COs. Consequently, Morgan's propensity towards violence against COs, other inmates, and the public constituted a security threat sufficient to warrant the stun belt's use.

Accordingly, the district court's finding of an essential state interest in courtroom security is supported by substantial evidence and does not constitute an abuse of discretion.

The district court did not improperly shift the burden to Morgan

Morgan argues that the district court abused its discretion by shifting the burden to Morgan to prove that the stun belt would have an adverse psychological impact on him. However, far from being an impermissible burden shift, the court's inquiry to Morgan as to how the stun belt may have adversely impacted him psychologically was a mandatory part of the *Hymon* hearing's substantive requirements and was made in the attempt to fully assess Morgan's situation and unique characteristics. *See Hymon*, 121 Nev. at 209, 111 P.3d at 1099. Further, Morgan does not make a cogent argument, as he neither elaborates on how the court's consideration of the belt's potentially adverse psychological impact constituted an impermissible burden shift nor cites any authority supporting his claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). In its findings, the court acknowledged that the belt "may have a negative psychological impact" on Morgan but concluded that the impact was mitigated by the security officers' training and instructions to activate the belt only upon an "overtly aggravated motion." Additionally, CO Rigney testified at the hearing that Morgan was not listed on ESP's "no-shock" list,[6] which prohibits use of a stun belt on prisoners for whom the belt would cause severe physical or psychological distress.

Accordingly, the district court's inquiry into the stun belt's potentially adverse psychological impact on Morgan, and conclusion that he

[6]The ESP medical department creates the "no-shock" list and places inmates on that list if they have medical issues, heart conditions, are on certain medications, or have physical ailments or mental health issues that would make shocks to their bodies uniquely dangerous. CO Rigney testified that people on this list are also exempted from the use of tasers and shock vests.

would not be adversely impacted, was a proper exercise of its compliance with the *Hymon* hearing's requirements and did not constitute an abuse of discretion or impermissible burden shift.

The district court properly considered less restrictive methods of restraint

Morgan argues that the district court abused its discretion by failing to consider less restrictive methods of restraint. In its findings, the court stated that "the stun belt is the least restricted measure of security to this Court and this courtroom" because it can be "worn underneath the clothing, out of view of the jury, and is only activated if the Defendant makes an aggressive movement towards another person." Morgan does not specifically challenge this finding and did not offer any less restrictive methods of restraint for the court to consider during the hearing or in his briefing.

In *Hymon*, the supreme court did not expound on what it meant for a district court to consider less restrictive methods of restraint, but it did cite to *Gonzalez v. Piler*, 341 F.3d 897 (9th Cir. 2003), in its discussion of the issue. *Hymon*, 121 Nev. at 209, 111 P.3d at 1099. In *Gonzalez*, the United States Court of Appeals for the Ninth Circuit determined that the district court had not properly considered "less restrictive alternatives" such as taking precautions to minimize the effect of the jury's view of shackles worn by the defendant. *See Gonzalez*, 341 F.3d at 902 (citing *Morgan v. Bunnell*, 24 F.3d 49, 51-52 (9th Cir. 1994) (concluding that the trial court adequately assessed and utilized less restrictive alternatives when it took precautions to minimize the shackles' effect on the jury)).

Here, the district court stated during the hearing that it would "do everything [it could] to preserve the dignity of the Defendant Mr. Morgan in this case and the jury trial." To that end, the court requested

that any ankle or foot shackles "be taped so as to eliminate any sound," and that if Morgan testified, the court would "make sure that the Defendant [was] seated at the counsel table before the jury comes in," so that the jury would not hear the shackles while Morgan walked to the witness stand (the only shackles on Morgan would be on his ankles). Consequently, the district court's conclusion that the concealed stun belt was the "least restricted measure of security," coupled with its requests to tape Morgan's ankle shackles to minimize their sound, constitute a consideration of less restrictive methods of restraint sufficient to satisfy *Hymon*'s contemplation of that requirement.[7]

The district court did not abuse its discretion by sua sponte ordering a Hymon *hearing one week before trial*

Morgan argues that the district court's *Hymon* hearing was procedurally deficient because the court sua sponte ordered the hearing one week before trial. The State responds that Morgan provides no authority that a court cannot sua sponte order a hearing on courtroom security matters, and that *Hymon* always requires a district court to hold a hearing before the use of a stun belt, regardless of when the security concerns arise.

We review decisions regarding courtroom security for abuse of discretion. *Hymon*, 121 Nev. at 209, 111 P.3d at 1099. We need not consider an argument that is non-cogent or lacks the support of relevant authority. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

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[7]Notably, during the charged crime, the means used to stop Morgan's attack on Hernandez—verbal commands and chemical spray—failed, which further underscores Morgan's volatile behavior, propensity for noncompliance with lawful orders, and resistance to other forms of restraint.

Here, Morgan provides no statute, rule, or caselaw that addresses the timeliness of either general courtroom security hearings or *Hymon* stun belt hearings. This court therefore need not consider the argument. *See id.* Even on the merits, however, Morgan's argument that he was negatively impacted by the hearing's short notice is also unpersuasive because he did not request a continuance or otherwise demonstrate that he needed more time to prepare. Morgan's argument that he "assumed the State had waived its right to argue the *Hymon* matter" because the hearing was "not timely noticed" is additionally unconvincing because *Hymon* hearings are meant to be conducted when the security concerns arise—regardless of timing—and Morgan presents no authority to support that this cannot occur sua sponte.[8] Further, Morgan has not demonstrated any prejudice. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Accordingly, because Morgan did not cogently argue the issue or present authority as to what would have constituted a timely *Hymon* hearing, did not request a continuance to prepare for the hearing, and did not otherwise argue how the result of the hearing would have been different had there been additional time to prepare, the district court did not abuse its discretion by sua sponte ordering a *Hymon* hearing one week before trial.

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[8]In *Hymon*, for example, had the court conducted a hearing, it would have done so sua sponte mid-trial when the stun belt issue was first addressed.

Wearing the stun belt during trial did not violate Morgan's Sixth Amendment rights to confer with counsel, participate in his defense, and be present at trial

Morgan argues that the district court's order requiring him to wear a stun belt during trial violated his Sixth Amendment rights to confer with counsel, participate in his defense, and be present at trial. He contends that wearing the belt caused him to fear receiving a painful shock after making the movements necessary for effective communication, and that the belt drew his focus away from the proceedings due to anxieties associated with the belt's activation. The State counters that because Morgan was advised of the criteria for activation and assured that the belt was in proper working order and would be operated by a trained courtroom officer, Morgan's concerns regarding accidental activation for less than overt aggravated movements were assuaged. Further, the State argues that Morgan presented no argument that he suffered actual prejudice at trial, or that wearing the stun belt inhibited his ability to communicate with counsel. We review constitutional challenges de novo. *See Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019).

District courts are afforded sufficient discretion to determine whether to physically restrain a defendant during a trial's guilt phase, but in making this determination, the court must carefully balance the defendant's constitutional rights with the defendant's security risk. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) (discussing disruptive defendants). Stun belts may interfere with a defendant's Sixth Amendment right to confer with counsel to the extent that the defendant's fear of receiving a painful shock chills his or her inclination to make the movements necessary for communication. *Hymon*, 121 Nev. at 208, 111 P.3d at 1098. Stun belts may also impact the defendant's ability to be fully

present at trial and participate in his or her own defense because the belt occupies the defendant's attention and pulls it away from the proceedings. *Id.* at 208, 111 P.3d at 1098-99.

However, as *Hymon* demonstrates, these constitutional concerns are not determinative and must be balanced against the trial court's interest in preserving courtroom security and protecting the judicial proceeding's integrity and decorum. *Id.* at 207, 111 P.3d at 1098; *see Allen*, 397 U.S. at 344. Nevada implemented the *Hymon* hearing requirements to formalize this balancing process. *See Hymon*, 121 Nev. at 209, 111 P.3d at 1099 ("It is for these reasons . . . that the district court must conduct a hearing [to] determine whether an essential state interest . . . is served by compelling the defendant to wear a stun belt.").

Here, by complying with the *Hymon* hearing's procedural and substantive requirements, and reasonably concluding that the stun belt would not adversely impact Morgan, the district court's order requiring Morgan to wear a stun belt during trial did not run afoul of Morgan's Sixth Amendment rights to confer with counsel, participate in his defense, and be present at trial. In making the necessary findings, the court sufficiently balanced Morgan's constitutional rights with the court's interest in protecting the courtroom and its occupants. Morgan has several violent felony convictions and an extensive inmate disciplinary history that demonstrate a propensity to engage in violent conduct against fellow inmates, the general populace, and COs—all of whom the court had reason to believe would be present at various points throughout Morgan's trial. The district court made findings that the belt was in proper working order, would be activated by a trained officer only upon an overt aggravated

movement towards another person,[9] and had never been either intentionally or accidentally activated in the approximately 500 instances the district court had used the stun belt over an 18-year period. These advisories and assurances minimized the impact on Morgan's ability to follow and participate in the proceedings.

Accordingly, the district court's order requiring Morgan to wear a stun belt during trial did not violate his Sixth Amendment rights to confer with counsel, participate in his defense, and be present at trial.

Wearing the stun belt did not adversely impact Morgan's ability to testify in his own behalf

Morgan argues that his decision to testify was adversely impacted by wearing the stun belt because he made the decision based on his knowledge that the belt would cause him to look fearful and apprehensive. To that end, Morgan asserts that he chose not to testify because he felt the jury would misinterpret his fear while wearing the belt as the fear of "being guilty," as opposed to the fear of being shocked. The State asserts that Morgan had worn the stun belt on prior occasions with no issue,[10] that the court had made findings regarding the belt's safety and the officer's training, and that Morgan had not presented any argument of actual prejudice associated with wearing the belt at trial. We review

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[9]Notably, Morgan could not accidentally activate the stun belt with his own movements. Rather, a third-party officer trained in the stun belt's operation would have had to make a conscious choice to press two activation units separate from the stun belt for the belt to activate. An "overt aggravated movement towards another person" is also significantly different from the smaller communicative movements necessary to confer with counsel.

[10]The district court took judicial notice of the fact that Morgan was wearing the stun belt on the day of the *Hymon* hearing.

constitutional challenges de novo. *See Lipsitz*, 135 Nev. at 136, 442 P.3d at 143.

Criminal defendants have a right to testify on their own behalf under the Fourteenth Amendment's due process clause, the Sixth Amendment's compulsory process clause, and a right not to testify under the Fifth Amendment's privilege against self-incrimination. *See Phillips v. State*, 105 Nev. 631, 632, 782 P.2d 381, 382 (1989). The decision to testify at trial rests with the defendant, but counsel must advise the defendant of the right to testify or not testify, and the district court must ensure that the defendant understands his or her rights before invoking or waiving them. *See Lara v. State*, 120 Nev. 177, 182, 87 P.3d 528, 531 (2004).

Here, Morgan failed to advise the district court during its canvass that wearing the stun belt either influenced or caused him not to testify. Thus, Morgan failed to properly preserve the argument, and we are not required to consider it. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (recognizing that, in order to properly preserve an argument, a defendant must object at trial on the same grounds he asserts on appeal). Even on the merits, Morgan's decision not to testify came after the district court advised Morgan of his constitutional rights, ensured he understood those rights, and explained the consequences associated with invoking or waiving them. Morgan makes a conclusory argument that his decision not to testify was the result of wearing the stun belt. However, the record supports that Morgan made his decision after considering the possibility of impeachment[11] and the introduction of additional evidence

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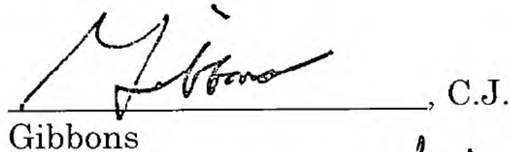
[11]The State planned to use a January 2014 conviction for possession of a firearm by an ex-felon, a November 2016 conviction for robbery, and a January 2020 conviction for conspiracy to commit burglary while in

on cross-examination.[12]

Therefore, because Morgan does not demonstrate how his decision not to testify resulted from wearing the stun belt, and not other factors, and Morgan made his decision after the district court advised Morgan of his constitutional rights and solicited his understanding of those rights, the stun belt did not adversely impact Morgan's ability to testify at trial, such that his constitutional rights were violated.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_______________, C.J.
Gibbons

_______________, J.
Bulla

_______________, J.
Westbrook

cc: Hon. Gary Fairman, District Judge
Kirsty E. Pickering Attorney at Law
Attorney General/Carson City
Attorney General/Ely
White Pine County Clerk

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possession of a deadly weapon; burglary while in possession of a deadly weapon; robbery with use of a deadly weapon, victim over 60; and first-degree murder with use of a deadly weapon, victim over 60. The district court concluded that these convictions were admissible for impeachment purposes pursuant to NRS 50.085 and NRS 50.095.

[12]The State had recorded phone conversations between Morgan and other inmates, as well as between Morgan and a female acquaintance. These phone conversations were damaging and personal, and the State indicated during the pretrial motions hearing that it planned to introduce these phone conversations only if Morgan testified.