IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY JOHN PELLEGRINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43308

FILED

MAY 18 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
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 one count of attempted burglary while in possession of a deadly weapon (count I), one count of attempted home invasion while in possession of a deadly weapon (count II), and three counts of assault with a deadly weapon (counts III, IV, V). Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant Anthony Pellegrino to serve terms of 48 to 120 months in the Nevada State Prison for counts I and II, and terms of 28 to 72 months for counts III, IV, and V. All sentences were imposed to run concurrently.

First, Pellegrino contends that the State elicited improper testimony concerning his post-arrest silence.[1] Pellegrino did not object to

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[1]Pellegrino claims that the following exchange between the prosecutor and Officer Michael Rowley was improper:

> Q: What did you do after taking [Pellegrino] into custody?
>
> A: At that time, he really didn't give me any problems. He wasn't cooperating but he wasn't non-cooperating.
>
> Q: What do you mean by wasn't cooperating?

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this exchange at trial, and we conclude that it did not amount to plain error.[2]

"It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights."[3] Reversal is not warranted, however, if the improper comments were harmless beyond a reasonable doubt.[4] Here, Officer Rowley's comments with respect to Pellegrino's silence were brief, and the prosecutor did not repeat or emphasize this testimony. Further, Pellegrino testified at trial, and any significance to Officer Rowley's comments was lessened by Pellegrino's detailed explanation of the incident.[5] We therefore conclude that Officer Rowley's comments were harmless beyond a reasonable doubt.

Second, Pellegrino asserts that the district erred in instructing the jury that the defense had the burden to prove voluntary intoxication. Jury instruction 31 provided: "The burden of proof is upon the defendant

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. . . *continued*

> A: Well, he wasn't answering my questions. Like I said, he wouldn't tell us what his name was, he wouldn't say what he was doing in the area, those types of questions. But as far as struggling, you know, obstructing, he really wasn't doing that.

[2]See NRS 178.602.

[3]McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986) (citing Doyle v. Ohio, 426 U.S. 610 (1976)).

[4]Washington v. State, 112 Nev. 1054, 1060, 921 P.2d 1253, 1257 (1996); see also Shepp v. State, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971) (providing that, "mere passing reference to such silence, without more, does not mandate an automatic reversal").

[5]See Shepp, 87 Nev. at 181, 484 P.2d at 564.

to show by a preponderance of the evidence that he was intoxicated to such an extent that he did not form the specific intent."

We agree that jury instruction 31 was erroneous; it implied that Pellegrino had the burden to disprove an element of the State's case.[6] We conclude, however, that this error was harmless.[7] The evidence presented in support of Pellegrino's voluntary intoxication defense was weak, and he failed to demonstrate that he was even entitled to a voluntary intoxication instruction. "In order for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings."[8] Pellegrino did not present any evidence at trial concerning the effect of alcohol on his intent to commit the charged offenses. Pellegrino therefore failed to demonstrate that he was prejudiced by jury instruction 31, and we conclude that the error is harmless; it is clear beyond a reasonable doubt that the jury would have found him guilty absent the error.

Next, Pellegrino contends that the prosecutor committed misconduct on two separate occasions during his closing argument. The proper standard for evaluating an allegation of prosecutorial misconduct is whether the comments were so unfair as to deprive the defendant of due

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[6]See Garner v. State, 116 Nev. 770, 6 P.3d 1013 (2000).

[7]See id. at 786, 6 P.3d at 1023-24.

[8]Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

process.[9] A conviction will not be reversed where the comments were harmless beyond a reasonable doubt.[10]

First, Pellegrino contends that the prosecutor committed misconduct when he informed the jury that assault is a general intent crime to which the defense of voluntary intoxication is inapplicable.[11] Pellegrino did not object to this misstatement during trial, and although erroneous, we conclude that it did not constitute plain error.[12]

Contrary to the prosecutor's assertion, assault is a specific intent crime to which the defense of voluntary intoxication is applicable.[13] However, as discussed above, Pellegrino failed to demonstrate that he was entitled to a jury instruction concerning voluntary intoxication, and the prosecutor's inaccurate comments were therefore harmless.

Second, Pellegrino argues that the prosecutor impermissibly urged the jury to ignore the jury instruction concerning voluntary

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[9]Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 897 (1996).

[10]Id.

[11]Specifically, the prosecutor stated:

> The last three counts, assault with a deadly weapon, are what we call general intent crimes. The instruction informs you that in a general intent crime voluntary intoxication is not relevant. So whether or not defendant is drunk or not on the assault with a deadly weapon is absolutely irrelevant and you shouldn't consider it.

[12]See NRS 178.602.

[13]See NRS 200.471(1)(a) (defining assault as "intentionally placing another person in reasonable apprehension of immediate bodily harm"); 193.220.

intoxication.[14] We conclude that the prosecutor's comments were not so unfair as to deprive Pellegrino of due process. Moreover, even assuming the comments constituted misconduct, they were harmless in light of Pellegrino's failure to demonstrate that he was entitled to a jury instruction concerning voluntary intoxication.

Lastly, Pellegrino contends that his convictions for attempted burglary while in possession of a deadly weapon and attempted home invasion while in possession of a deadly weapon are impermissibly redundant because they punish the same illegal conduct. We agree.

This court has previously noted that convictions for both burglary and home invasion do not violate double jeopardy.[15] Nevertheless, this court will reverse redundant convictions that are not in accordance with legislative intent.[16] "The issue is whether the gravamen of the charged offenses is the same such that it can be said that the

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[14]Pellegrino objected to the following argument:

> As for the voluntary intoxication of the first, the attempt burglary and attempt home invasion, the instruction says that you may consider it. And that's the operative word. That you may consider it. That's a policy determination and one that you should make. The defendant having testified that he chose to drink ten beers, it was early in the afternoon, he's the one that started drinking should you consider whether or not that lessens his culpability.

[15]Servin v. State, 117 Nev. 775, 788-89, 32 P.3d 1277, 1287 (2001); see also NRS 205.060(1); 205.067(1).

[16]Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987).

legislature did not intend multiple convictions."[17] In resolving whether convictions are redundant, "[t]he question is whether the material or significant part of each charge is the same, even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant."[18]

In the instant case, the gravamen of the charged offense of attempted burglary while in possession of a deadly weapon was that Pellegrino attempted to enter the victims' apartment with the intent to commit a felony while in possession of a knife. The gravamen of the charged offense of attempted home invasion while in possession of a deadly weapon was that Pellegrino attempted to forcibly enter the victims' apartment while in possession of a knife. We conclude that the gravamen of both offenses was the same conduct, and Pellegrino's conviction for attempted home invasion while in possession of a deadly weapon must therefore be reversed.[19]

Based on the foregoing, we affirm Pellegrino's conviction for attempted burglary while in possession of a deadly weapon and three counts of assault with a deadly weapon. We reverse the conviction for

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[17]State v. District Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000).

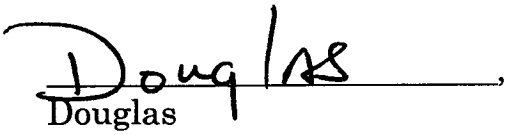
[18]Id.

[19]We are not persuaded by the State's argument that Pellegrino's attempted home invasion conviction was based on his act of kicking the door, and his attempted burglary conviction was based on his act of stabbing the door with a knife, as the State failed to present this distinction prior to the instant appeal.

attempted home invasion while in possession of a deadly weapon and remand the matter to the district court to amend the judgment of conviction accordingly.[20]

It is so ORDERED.

_____, J.
Maupin



_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[20]In light of our resolution of this appeal, we decline to consider Pellegrino's claim that the district court erred in refusing to instruct the jury on the crime of injury to property as a lesser included offense of attempted home invasion.