

IN THE SUPREME COURT OF THE STATE OF NEVADA

DJUAN SANDOZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43595

FILED

MAR 23 2006

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, upon a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The district court adjudicated appellant Djuan Sandoz a habitual criminal and sentenced him to three concurrent terms of imprisonment: (1) twelve to forty-eight months for conspiracy to commit robbery, (2) ten to twenty-five years for burglary while in possession of a firearm, and (3) ten years to life imprisonment for robbery with use of a deadly weapon.

Sandoz and his brother Anthony were tried together for allegedly using a BB gun to rob a drugstore in Las Vegas, Nevada. Because he had two prior convictions for second-degree robbery in California, Sandoz potentially faced adjudication as a habitual felon and a maximum sentence of life imprisonment without the possibility of parole under NRS 207.012. As a result, Sandoz requested eight peremptory challenges at trial instead of four, but the district court denied his motion.

At the same time, the State sought to amend the original information to conform with evidence presented at the preliminary hearing. Specifically, the State sought to name Sandoz as the gunman

during the incident and Anthony as the lookout, instead of vice versa. The State also sought to replace references to "firearm" in the original information with the term "deadly weapon." The district court denied the State's motions because the prosecutors had already announced that they were ready for calendar call.

After a jury returned a guilty verdict against his client, Sandoz's counsel raised concerns about Sandoz's competence to face sentencing and ordered an evaluation. The court continued sentencing so that Sandoz could be reevaluated.

After being sentenced, Sandoz appealed, challenging the following aspects of his trial and sentencing: (1) his adjudication of habitual criminality, (2) jury selection, (3) the information, (4) jury instructions, and (5) his mental competency to face sentencing.

Issues relating to adjudication of habitual criminality

Sandoz argues that he was denied due process, equal protection, and a right to a trial by a fair and impartial jury in four ways: (a) the district court denied him four additional peremptory challenges; (b) the State failed to provide him with proper notice that it would seek adjudication under NRS 207.012, the habitual felon statute; (c) the district court refused to place the issue of habitual criminality before the jury; and (d) the district court refused to conduct a fact-finding hearing regarding his prior convictions.

Peremptory challenges

Sandoz argues that the district court violated due process and equal protection by denying him eight peremptory challenges and allowing him only four.

Due process

Because it allowed him only four peremptory challenges, Sandoz argues that the district court violated his right to due process. Sandoz contends that he was entitled to a total of eight peremptory challenges under NRS 175.051 because he faced a maximum possible punishment of life imprisonment without the possibility of parole under NRS 207.012. We disagree. In Schneider v. State, this court held that the “offense charged,” not the habitual offender proceeding, controlled the number of peremptory challenges allowed.¹ Schneider’s holding applies here.² Because none of the underlying charged offenses is punishable by death or life imprisonment,³ we conclude that the district court did not violate due process by allowing Sandoz only four peremptory challenges.

Equal protection

Sandoz argues that because peremptory challenges protect a defendant’s fundamental right to a trial by a fair and impartial jury, the State must have a compelling state interest in order to prohibit him from receiving the eight peremptory challenges allowed by NRS 175.051. However, peremptory challenges are not constitutionally protected

¹Schneider v. State, 97 Nev. 573, 574-75, 635 P.2d 304, 304-05 (1981).

²We have considered Sandoz’s attempts to distinguish our holding in Schneider, but conclude that they lack merit.

³See NRS 199.480(1)(a) (conspiracy to commit robbery punishable by imprisonment for one year to six years); NRS 205.060(4) (burglary while in possession of a firearm punishable by imprisonment for two to fifteen years); NRS 200.380(2) (robbery punishable by imprisonment for two to fifteen years); and NRS 193.165(1) (use of a deadly weapon in the commission of a crime is punishable by a term equal to and in addition to the term of imprisonment prescribed by statute for the crime).

fundamental rights; rather, they are “one state-created means to the constitutional end of an impartial jury and a fair trial.”⁴ Thus, statutes not infringing upon fundamental rights are reviewed using the rational basis standard,⁵ and we conclude that this is the appropriate standard to be applied here.

In anticipation of this conclusion, Sandoz argues that even under the rational basis standard, equal protection is violated because there is no rational basis for giving eight peremptory challenges to defendants facing a life sentence for crimes such as murder, while providing only four to defendants facing a life sentence under habitual criminal statutes. We disagree. We perceive no irrationality on the part of the Nevada State Legislature by granting additional procedural protections for defendants facing the most serious charges like murder, while affording fewer peremptory challenges for defendants facing charges of lesser crimes, such as burglary and robbery, but still subject to similar penalties due to habitual offender sentence enhancements.⁶ Thus, we

⁴Georgia v. McCollum, 505 U.S. 42, 57 (1992) (holding that the Constitution prohibits a criminal defendant from engaging in purposeful race-based discrimination when exercising peremptory challenges); see also Anderson v. State, 81 Nev. 477, 480, 406 P.2d 532, 533 (1965) (“There is nothing in either the Constitution of the United States or the Nevada Constitution which requires Congress or the state Legislature to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.”).

⁵Williams v. State, 118 Nev. 536, 542, 50 P.3d 1116, 1120 (2002) (citing Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000)).

⁶See People v. Turley, 18 P.3d 802, 805 (Colo. Ct. App. 2000) (perceiving no irrationality in legislature affording defendants charged with the most serious offenses greater procedural protections than those charged with lesser felonies even though the latter may face similar

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conclude that the district court did not violate equal protection when it denied Sandoz four additional peremptory challenges.

Notice

Sandoz makes two main arguments regarding the interplay between notice and the adjudication of habitual criminality. Sandoz first argues that due process requires the State to file the notice to seek habitual felon adjudication prior to trial, rather than after the verdict as allowed by NRS 207.016. Sandoz contends that pretrial notice of habitual felon adjudication is necessary to determine the maximum possible penalty because this in turn determines the number of peremptory challenges the defendant is accorded during jury selection. However, as noted above, it is the punishment for the underlying offense charged exclusive of enhancements, not the maximum possible punishment inclusive of enhancements, that determines the number of peremptory challenges.⁷ The Supreme Court of the United States itself has held that notice to seek habitual felon adjudication may be filed after conviction.⁸ Thus, we conclude that Sandoz's first argument lacks merit.

Sandoz makes a second argument: NRS 207.012(2) and NRS 207.016(2) contradict each other as to when the prosecutor may file the notice of intent to seek habitual offender adjudication and any ambiguity should be resolved in his favor. However, our de novo review of the

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penalties due to habitual criminal adjudication, a sentence enhancing circumstance).

⁷See Schneider, 97 Nev. at 574-75, 635 P.2d at 304-05.

⁸See Almendarez-Torres v. United States, 523 U.S. 224, 243-44 (1998); Oyler v. Boles, 368 U.S. 448, 452 (1962).

statute⁹ reveals that there is no conflict when construing the provisions as a whole.¹⁰ The titles of the statutes indicate that the Legislature intended that NRS 207.012 generally addresses the topic of habitual felons, while NRS 207.016 specifically addresses the procedure for filing the notice to seek habitual felon adjudication.¹¹ Thus, the latter takes precedence with respect to procedure.¹² NRS 207.016(2) also specifically permits notice either in the charging information or a post-conviction filing. Thus, we conclude that Sandoz's arguments lack merit and that the State did not provide improper notice of habitual felon adjudication to Sandoz.

Jury question

In a recent series of cases, the Supreme Court of the United States has held that, with the exception of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable

⁹Mineral County v. State, Bd. Equalization, 121 Nev. ___, ___, 119 P.3d 706, 707 (2005) ("Construction of a statute is a question of law, which this court reviews de novo.").

¹⁰See id. ("Potentially conflicting statutes are harmonized whenever possible."); Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) ("Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results."); Gaines, 116 Nev. at 365, 998 P.2d at 169 (holding that legislative provisions are to be construed as a whole).

¹¹See Coast Hotels v. State, Labor Comm'n, 117 Nev. 835, 841-42, 34 P.3d 546, 551 (2001) (holding that the title of a statute may be considered in determining legislative intent).

¹²Gaines, 116 Nev. at 365, 998 P.2d at 170 (holding that specific statutes take precedence over general statutes).

doubt, otherwise due process and the Sixth Amendment are violated.¹³ Sandoz asserts that the exception for prior convictions is due to be overturned in the near future, and as such, he should have been entitled to a jury determination on whether he qualified as a habitual felon. However, the Supreme Court has yet to overturn the exception,¹⁴ and we decline to step outside the veil of stare decisis and part ways with the Court. We conclude that the district court did not err in denying Sandoz a jury determination as to his adjudication as a habitual felon.¹⁵

Fact-finding hearing

Sandoz argues that at a minimum, he was entitled to a judicial fact-finding determination on whether his prior California convictions fit within the NRS and whether they were proven beyond a reasonable doubt.¹⁶ Because the sentencing court made no such findings nor indicated that the State met this standard of proof at sentencing, Sandoz argues that due process was violated. We disagree. Pursuant to NRS 207.012, prior convictions for purposes of habitual felon adjudication

¹³See United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

¹⁴See Shepard v. United States, 544 U.S. 13, ___, 125 S.Ct. 1254, 1264 (2005) (Thomas, J., concurring) (acknowledging that the Almendarez-Torres exception has not yet been reconsidered).

¹⁵We have also considered Sandoz's arguments with respect to Aftercare of Clark County v. Justice Ct., 120 Nev. 1, 82 P.3d 931 (2004), and Cheung v. Dist. Ct., 121 Nev. ___, 124 P.3d 550 (2005), but conclude that they are without merit.

¹⁶See Hymon v. State, 121 Nev. ___, ___, 111 P.3d 1092, 1103 (2005) ("For the defendant to be sentenced as a habitual criminal, the State must prove the defendant's prior convictions beyond a reasonable doubt.").

may include “any crime which under the law of the situs of the crime or of this state would be a felony,” such as robbery under NRS 200.380. Sandoz was twice convicted in California for second-degree robbery, and there is no material difference between the California and Nevada definitions of robbery.¹⁷ Furthermore, the State presented copies of the certified abstracts of judgments of conviction for second-degree robbery in 1993 and 1997, and these constituted proof of Sandoz’s prior convictions beyond a reasonable doubt.¹⁸ Thus, we conclude that the district court’s refusal to conduct a fact-finding hearing did not deprive Sandoz of due process.

Jury selection

Sandoz argues that due process was violated and he was prejudiced because the district court did not select alternate jurors independently of the regular jurors, which allegedly allowed him to waste a peremptory challenge. We disagree. “Failure to object during trial generally results in a waiver thereby precluding appellate consideration of the issue.”¹⁹ Absent an objection, we have the discretion to review plain error that affects a defendant’s substantial rights.²⁰ In order to establish

¹⁷Compare Cal. Penal Code § 211 (defining robbery as “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”) with NRS 200.380 (defining robbery as “the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property.”).

¹⁸NRS 207.016(5) (“For the purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony.”).

¹⁹Moore v. State, 122 Nev. ___, ___, 126 P.3d 508, 514 (2006).

²⁰Id.

that a plain error affected substantial rights, the defendant must show that an error was prejudicial.²¹ “When a defendant claims prejudice based on a ‘wasted’ peremptory challenge, the claim must focus on whether the impaneled jury was impartial. If the impaneled jury is impartial, the defendant cannot prove prejudice.”²² Here, Sandoz failed to object to the trial court’s method of jury selection and also failed to demonstrate how the impaneled jury was anything but impartial. Therefore, we conclude that Sandoz failed to substantiate his claim of prejudice and the district court’s process of jury selection did not violate due process.

Information

Sandoz argues that due process was violated because the district court allowed the State to proceed to trial with an amended information that lacked sufficient facts to support the charges and failed to state who had the firearm. We disagree. Our de novo review²³ of the charging document reveals that it conformed to constitutional requirements and provided adequate notice to Sandoz so that he was not prejudiced.²⁴ References in the information to the relevant statutes and

²¹Id.

²²Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (internal citation omitted).

²³See West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003) (stating that this court reviews de novo whether a charging document conforms to constitutional requirements).

²⁴See Koza v. State, 104 Nev. 262, 264, 756 P.2d 1184, 1186 (1988) (holding that a conviction will not be reversed where a defendant has not been prejudiced by the charging instrument’s inadequacy); Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979) (stating that the concern is whether the information provides adequate notice to the accused).

crimes,²⁵ along with factual references to the drugstore, its location, and the stolen items, provided Sandoz with adequate notice of the facts constituting the offenses charged. References to a firearm and deadly weapon in the headings of Sandoz's information adequately specified the means by which the charged offenses were accomplished and, coupled with evidence presented at the preliminary hearing, provided Sandoz with adequate notice that he was being charged as the gunman. Thus, we conclude that the information did not violate due process.²⁶

Jury instructions

Sandoz argues that despite the district court's denial of the State's motion to amend the information by replacing references to "firearm" with "deadly weapon," the district court erred by giving jury instructions that effectively incorporated the amendments sought by the State. We agree. We review the district court's decision in settling jury instructions for an abuse of discretion or judicial error;²⁷ these occur if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.²⁸

Here, Jury Instruction No. 15 changes the charged crime in the information from burglary while in possession of a "firearm" to

²⁵See United States v. Ruelas, 106 F.3d 1416, 1419 (9th Cir. 1997) (holding that an indictment's headings and references to statutes can provide notice to defendants).

²⁶We have also considered Sandoz's argument that the information did not give a complete statement of the facts for the aiding and abetting theory, but conclude that it is without merit.

²⁷Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005).

²⁸Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

burglary while in possession of a “weapon.” However, a firearm is legally distinct from a weapon. A BB gun does not qualify as a “firearm” because the BBs are not projected by explosion or combustion.²⁹ However, a BB gun does qualify as a “deadly weapon” because it expels ball bearings or pellets by means of compressed gas³⁰ and/or is readily capable of causing substantial bodily harm.³¹ The switch in terms occurs without any legal justification and glosses over that legal distinction. The jury instructions further bury the distinction because they define “deadly weapon,” but not “firearm.” Thus, the subtle switch from “firearm” to “weapon” evaded the district court’s denial of the State’s motion to amend the information on the morning of the trial and effectively incorporated the substance of the State’s motion into the instructions. Because the offered burglary instruction differed from the charge in the information, we conclude that the district court exceeded the bounds of law and reason and abused its discretion. Sandoz’s burglary conviction should be reversed and remanded.³² Because of our conclusion, we need not reach the balance of

²⁹See NRS 202.253(2).

³⁰See NRS 193.165(5)(c) and NRS 202.265(4)(a)(2).

³¹See NRS 193.165(5)(a).

³²The State’s citation to Manning v. State, 107 Nev. 337, 810 P.2d 1216 (1991), is inapposite because it interprets a previous version of NRS 202.253 that has since been amended. Our review of the jury instructions regarding Sandoz’s robbery convictions yields no error. We have also considered Sandoz’s argument that the district court erred by permitting other jury instructions that purportedly allowed the State to argue that either Sandoz or Anthony was the gunman, but we conclude that it also lacks merit.

Sandoz's arguments on appeal relating to the erroneous burglary instruction.

Sentencing

Sandoz argues that the sentencing court violated his right to due process when it refused to continue his sentencing hearing for further evaluations of his competency. Sandoz's argument lacks merit. A court's denial of continuance is reviewed for an abuse of discretion.³³ If the court finds that the defendant is competent, judgment may be pronounced.³⁴ Here, two licensed psychologists individually evaluated Sandoz and both deemed him competent. We conclude that the district court did not abuse its discretion in finding Sandoz competent, pronouncing judgment, and sentencing him.

CONCLUSION

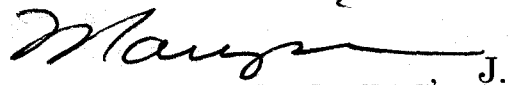
Having considered Sandoz's numerous contentions of error, we conclude that one has merit. The district court erred in settling a burglary instruction that differed from the burglary charge in the information. While the information charged Sandoz with burglary while in possession of a "firearm," the jury was instructed on burglary while in possession of a "weapon." Because the jury instructions switch these terms, but ignore the legal distinction between a firearm and a deadly weapon, and also because the jury instructions failed to define "firearm" for the jury, we

³³Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (stating that the decision of whether to grant a continuance is within the discretion of the district court); see also United States v. Lewis, 991 F.2d 524, 528 (9th Cir. 1993); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1051 (9th Cir. 1990).

³⁴NRS 178.420.

conclude that Sandoz's conviction for burglary while in possession of a firearm should be overturned. All of Sandoz's other contentions of error lack merit.³⁵ Accordingly, we

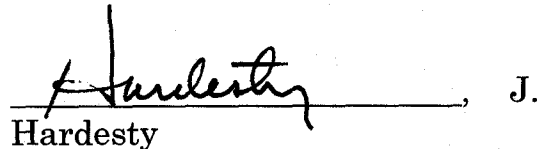
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

³⁵We note that the judgment of conviction does not specify that the district court adjudicated Sandoz as a habitual criminal. On remand, we direct the district court to enter an amended judgment of conviction correcting this clerical omission.