

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORBERTO SOTO-SOLORZANO A/K/A
NORBERTO SOTOSOLORZANO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44369

FILED

JUN 01 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Norberto Soto-Solorzano to serve two consecutive prison terms of 24-96 months.

First, Soto-Solorzano contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of attempted murder with the use of a deadly weapon. Soto-Solorzano argues that because the victim was a trained boxer and "the initial aggressor," he knew that he was "no match" and therefore "only meant to protect himself" when he stabbed the victim several times with a knife. We disagree with Soto-Solorzano's contention.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹ In particular, we note that Soto-Solorzano and the victim

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

had a brief altercation inside Soto-Solorzano's apartment. After the victim knocked Soto-Solorzano down with a punch, the victim asked Soto-Solorzano if he wanted to take the fight outside. At that point, the victim turned away from Soto-Solorzano and exited the apartment. The victim "took a good five steps out the door" and was then stabbed in the lower spine area by Soto-Solorzano. The victim turned and faced Soto-Solorzano, and Soto-Solorzano stabbed the victim twice in the chest. The knife was recovered and described as having a long blade. The victim was not armed. A paramedic testified that upon arriving at the scene he found the victim lying on the sidewalk with significant blood loss. The paramedic described the injuries as "obviously life-threatening" and noted that the victim's "intestines [were] hanging out." The victim spent more than three weeks in the hospital recovering from the attack.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Soto-Solorzano committed the crime of attempted murder with the use of a deadly weapon.² It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.³ We also note that circumstantial evidence alone may sustain a conviction.⁴

²See NRS 200.010; NRS 200.030; NRS 193.330(1); NRS 193.165; see also Sharma v. State, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002).

³See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁴See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Soto-Solorzano contends that the prosecutor committed misconduct during closing arguments by impermissibly shifting the burden of proof. Soto-Solorzano argues that the following statement, made at the end of the State's closing argument, amounted to misconduct:

THE STATE: So, thank you very much for your time and attention. The Public Defender is going to have an opportunity to speak to you because, well, obviously they get to put on a defense. [Emphasis added.]

DEFENSE COUNSEL: Judge, could we approach?

THE STATE: Sorry.

Soto-Solorzano claims that the prosecutor's statement implied that the defense had the burden of proof. After an unrecorded bench conference, the prosecutor continued:

THE STATE: So, summarizing up again, you've heard the State's evidence of why the defendant should be convicted of both counts. You'll have an opportunity to hear from Defense counsel as to why you should hold the defendant not guilty, and then because it's the State's burden of proof, we have the opportunity to come back and rebut any final comments and again try to persuade you that the defendant should be found guilty of both counts. So, thank you very much for your time and attention.

We conclude that Soto-Solorzano's assignment of error is without merit. Soto-Solorzano has failed to demonstrate how the State's comment – "obviously they get to put on a defense" – actually prejudiced

his defense,⁵ let alone shifted the burden of proof. Also, the jury was instructed prior to deliberations that it was the State's burden to prove guilt beyond a reasonable doubt.

Additionally, this court has stated that "[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt."⁶ "If the issue of guilt or innocence is close, [and] if the state's case is not strong, prosecutor[ial] misconduct will probably be considered prejudicial."⁷ In this case, the State presented overwhelming evidence of Soto-Solorzano's guilt. Therefore, in light of the above, we conclude that the prosecutor's misconduct, if any, amounted to harmless error.⁸

Finally, Soto-Solorzano contends that the district court erred by allowing the admission of a photograph of the victim's blood-soaked underwear. Soto-Solorzano objected to the proposed exhibit during the

⁵See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 118-19 (2002); Gallego v. State, 117 Nev. 348, 365-66, 23 P.3d 227, 239 (2001).

⁶Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998).

⁷Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

⁸See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error"); Skiba v. State, 114 Nev. 612, 614-15, 959 P.2d 959, 960-61 (1998) (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant's guilt); Rippo v. State, 113 Nev. 1239, 1254-55, 946 P.2d 1017, 1026-27 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).

trial, and argues on appeal that the photograph was unduly prejudicial, highly inflammatory, and cumulative.⁹ We disagree.

“The district court has discretion to admit or to exclude evidence after balancing the prejudicial effect against the probative value.”¹⁰ “We will not disturb a district court’s decision to admit photographic evidence unless the district court abused its discretion.”¹¹ This court has stated that “[d]espite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime, . . . and when it reflects the severity of wounds and the manner of their infliction.”¹²

We conclude that the district court did not abuse its discretion in overruling Soto-Solorzano’s objection and admitting the photograph. The photograph corroborated the victim’s testimony that he was only

⁹NRS 48.035 provides in part:

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

¹⁰Elvik v. State, 114 Nev. 883, 897, 965 P.2d 281, 290 (1998) (citations omitted).


¹¹West v. State, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003).

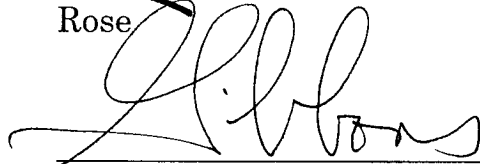
¹²Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976) (citations omitted), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995).

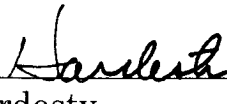
wearing boxer shorts and briefs at the time of the incident and was therefore unarmed. The photograph also illustrated the extent of the victim's wounds and the loss of blood. We also note that the district court sustained Soto-Solorzano's objection to three other photographs which showed pooled blood due to their redundancy. Accordingly, we conclude that the photograph of the victim's blood-soaked underwear was properly admitted.

Therefore, having considered Soto-Solorzano's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Valorie Vega, 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