

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC DAMIAN FRAIDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44807

FILED

JAN 24 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Marc Damian Fraide to serve two consecutive prison terms of 10-25 years and ordered him to pay \$9,670.00 in restitution.

First, Fraide contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of using a deadly weapon. Fraide was wearing steel-toed boots when he admittedly "stomped on [the victim's] head with his foot." Fraide asks this court to vacate the deadly weapon sentence enhancement. Specifically, Fraide claims that the "evidence could not establish whether the death was caused by a blow from a fist, a fall to concrete resulting from a blow by a fist, or by crushing of the head with a foot." We disagree with Fraide'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 a witness testifying at trial saw Fraide and the victim, his ex-girlfriend, arguing. The witness testified that she tried to stop Fraide from hitting the victim, but that Fraide then began “kicking her and stomping on her.” The witness described the victim’s face, after the stomping, as being “flattened” and “mashed.” A friend of Fraide’s testified that Fraide visited immediately after the attack and stated that he “stomped” on the victim and “was worried that the stomping on her head had caused, because he knew that she was out of it, whether she had woken up or not, and he thought that maybe he had put her in a coma.” After his arrest, Fraide admitted that he “stomped” and kicked the victim in the head, and that during the attack, he was wearing steel-toed boots. The victim was eventually taken to a hospital where she remained on life-support until dying 25 days later.

Dr. Alane Olson, a forensic pathologist, testified at trial that the victim died from “injuries to the head and skull due to blunt force trauma.” Dr. Olson stated that the victim’s head injuries “required too much force to be the result of a punch,” and were not consistent with trauma from a fall, but were, instead, consistent with “being kicked in the head or being stomped in the head.” Dr. Olson further stated that “[t]he fact that [Fraide] was wearing boots . . . suggests to me that if, in fact, the

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)).

mechanism that caused the injury was a kick or a stomp, he would have been able to deliver a good amount of force.”

NRS 193.165(5)(b) defines a “deadly weapon” as “[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, . . . is readily capable of causing substantial bodily harm or death.” (Emphasis added.) Therefore, based on the above, we conclude that the jury could reasonably infer from the evidence presented that Fraide used a deadly weapon, his steel-toed boots. 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.² Moreover, we note that circumstantial evidence alone may sustain a conviction.³ Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Fraide contends that NRS 193.165, the deadly weapon statute, is unconstitutional. Specifically, Fraide claims that the statute is unconstitutionally vague because “it would not permit a person of ordinary intelligence to understand that the coincidental wearing of work boots when engaging in an unplanned affray which results in a death” would result in a sentence enhancement in the event of a conviction. We disagree.

²See 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).

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

“This court reviews the constitutionality of statutes de novo. The burden is on the challenger to make a clear showing of the unconstitutionality of a statute.”⁴ The Due Process Clause does not require impractical levels of precision in a criminal statute, and “a statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute.”⁵ However, “[a] statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited and fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement.”⁶ Statutes challenged for vagueness are evaluated on an as-applied basis where, as here, First Amendment interests are not implicated.⁷

In 1995, the legislature amended NRS 193.165 to provide, in part, that a “deadly weapon” may be –

(a) Any instrument which, if used in the ordinary manner contemplated by its design and

⁴Sanders v. State, 119 Nev. 135, 138, 67 P.3d 323, 326 (2003) (footnote omitted).

⁵Williams v. State, 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002).

⁶Hernandez v. State, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002); see also Kolender v. Lawson, 461 U.S. 352, 357 (1983).

⁷See Lyons v. State, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989), modified in part on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. 859, 59 P.3d 477 (2002); see also U.S. Const. amend I.

construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.⁸

As a result of the amendment, weapons meeting the “functional test,” subsection (b), which may include the deadly use of ordinary household items, as well as weapons meeting the “inherently dangerous test,” subsection (a), fit the definition of “deadly weapon.” In Hernandez v. State, this court acknowledged that “NRS 193.165(5)(b) is broad, but that is clearly the Legislature’s intent.”⁹ The court also noted that the “functional test” for a deadly weapon “is not without limit” because the State must still show that the instrument used is “‘readily capable’ of causing death,” not simply that the instrument caused death in the instant matter.¹⁰ As applied in the instant case, we conclude that NRS 193.165(5)(b) sufficiently put Fraide on notice that the use of steel-toed boots in the kicking and stomping to death of a victim would subject him

⁸1995 Nev. Stat., ch. 455, § 1, at 1431.


⁹Hernandez, 118 Nev. at 528, 50 P.3d at 1110.

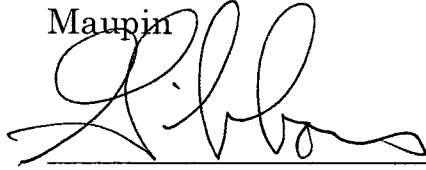
¹⁰Id.

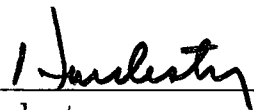
to a deadly weapon enhancement.¹¹ Therefore, we conclude that Fraide has failed to demonstrate that NRS 193.165 is unconstitutional.

Having considered Fraide's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹¹See generally People v. Aguilar, 945 P.2d 1204, 1211 (Cal. 1997) (“There can be no doubt that some footwear, such as . . . steel-toed boots, are capable of being wielded in a way likely to produce death or serious injury, and as such may constitute [deadly] weapons.”); State v. Mummey, 871 P.2d 868, 871 (Mont. 1994) (noting that numerous jurisdictions have held that shod feet, depending on the manner of use, may be regarded as deadly weapons).