

IN THE SUPREME COURT OF THE STATE OF NEVADA

SERGIO CONTRERAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44985

FILED

JAN 30 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF 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 robbery with the use of a deadly weapon (count 1), two counts of battery with the use of a deadly weapon (counts 2 and 3), and two counts of malicious destruction of private property (counts 4 and 5). Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced Contreras as follows: Count 1, 35-156 months in prison, plus an equal and consecutive term of 35-156 months for use of a deadly weapon; Count 2, 24-60 months in prison consecutive to count 1; Count 3, 24-60 months concurrent to counts 1 and 2; Count 4, 12 months to run concurrently with counts 1, 2, 3, and 4; Count 5, 12 months to run concurrently with counts 1, 2, 3, and 4.

On appeal, Contreras asserts his constitutional rights were violated when the defense was prohibited from arguing voluntary intoxication. Furthermore, Contreras asserts the court's refusal to give jury instructions related to voluntary intoxication and specific intent violated the aforementioned rights as well.

Evidence of voluntary intoxication is a viable defense to a specific intent crime.¹ It is not in dispute that robbery is a general intent crime.² Therefore, voluntary intoxication would not have been a defense. Further, this court has held that malicious destruction of property is not a specific intent crime.³

Battery has no specific intent element. It is unlawful for anyone to willfully and unlawfully use force or violence on the person of another. Words in a statute defining a statute, such as "willfully," "maliciously," "feloniously," are words that may indicate a general intent crime.⁴ Because none of the crimes charged against Contreras required specific intent, a voluntary intoxication instruction was not warranted. Moreover, the district court did not err when it instructed witnesses and counsel to refrain from testifying about Contreras's conduct, which was offered to prove his intoxication.

Contreras next contends that his convictions for two counts of battery with use of a deadly weapon and one count of robbery with a deadly weapon violate the Double Jeopardy Clause. Additionally, Contreras asserts that even if the convictions do not run afoul of the

¹Ewish v. State, 110 Nev. 221, 871 P.2d 306 (1994) (emphasis added).

²Litteral v. State, 97 Nev. 503, 634 P.2d 1226 (1981) (disapproved on other grounds by Taloncon v. State, 102 Nev. 294, 721 P.2d 764 (1986)).

³Ewish, 110 Nev. at 229 n.4, 871 P.2d at 311-12, n.4; (citing State v. Cantrell, 673 P.2d 1147 (Kan. 1983)).

⁴Fullerton v. State, 116 Nev. 435, 439, 997 P.2d 807, 810 (2000); Rice v. State, 113 Nev. 1300, 1307, 949 P.2d 262, 266 (1997).

Double Jeopardy Clause, they are redundant convictions that do not comport with legislative intent.

This Court decided long ago that battery and robbery each "requires proof of a fact which the other does not and there is no double jeopardy problem under Blockburger."⁵ Contreras's contention that he was convicted in violation of the Double Jeopardy Clause is therefore without merit.

The test for redundancy was established by this Court as follows:

"Redundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act."⁶ The 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.⁷

Contreras was convicted of robbery for taking the vehicle; the two battery counts were for striking the victim in the face with a firearm and later stabbing the victim. All the counts were separate criminal acts for which Contreras was properly convicted.

⁵Zgombic v. State, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990) (superceded by statute as stated in Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998)).

⁶State of Nevada v. District Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000) (quoting Skiba v. State, 114 Nev. 612, 616 n.4, 959 P.2d 959, 961 n.4 (1998)).

⁷Id. at 136, 994 P.2d at 698.

Contreras further asserts that his Confrontation Clause rights were violated. He first argues that he should have been allowed to elicit testimony regarding his behavior to show intoxication. As previously discussed however, such evidence was not relevant. The determination of whether evidence is relevant lies within the sound discretion of the trial judge.⁸ That decision will not be disturbed on appeal "absent a clear abuse of that discretion."⁹ We conclude that the district court did not err.

Contreras also challenges the admission of the repair estimates on confrontation clause grounds. However, Contreras failed to object to the admissions of the repair estimate, and failure to object precludes appellate review.¹⁰ Moreover, Contreras has not demonstrated plain error.¹¹

Contreras asserts numerous issues that he contends amount to cumulative error requiring reversal. The first is that he was in handcuffs at one point when the panel entered the courtroom. It appears from the record, however, that none of the jurors saw the handcuffs, and Contreras was therefore not prejudiced.¹²

Contreras also contends that the district court's decision denying his suppression motion was in error. Here, the district court found that the police officers entered the apartment under exigent

⁸Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

⁹Id.

¹⁰Todd v. State, 113 Nev. 18, 21-22, 931 P.2d 721, 723 (1997).

¹¹Gallego v. State, 117 Nev. 348, 365, 23 P.2d 227, 239 (2001); see NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.")

¹²Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980).

circumstances, specifically, that a life could be in peril. The court also found that the evidence discovered lay in plain view and thus the suppression motion was denied. Contreras has not demonstrated that the district court's findings are not supported by substantial evidence.¹³

Contreras next contends that the victim's testimony about a stereo missing from his truck the next day was so prejudicial that a mistrial was warranted. We conclude the district court adequately cured the prejudicial effects of the witness remarks by directing the jury to disregard the remarks.¹⁴ Further, the remarks were not the result of prosecutorial misconduct.¹⁵ The district court did not therefore, abuse its discretion when it denied Contreras's motions for mistrial¹⁶

Contreras additionally maintains his 60 day right to speedy trial was violated. Counsel for Contreras agreed to an extension of time after negotiations fell through. Dismissal is discretionary with the court.¹⁷

¹³Rice v. State, 113 Nev. 425, 427, 936 P.2d 319, 320 (1997) (citing Tomarchio v. State, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983)).

¹⁴See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983).

¹⁵See Parker v. State, 109 Nev. 383, 389, 849 P.2d 1062, 1066 (1993) (where the prosecution has solicited the prejudicial statement, the district court's denial of a motion for a mistrial will be deemed harmless error if the prejudicial effect of the statement is not strong and there is otherwise strong evidence of the defendant's guilt).

¹⁶See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

¹⁷NRS 178.556, see Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988).

Contreras's speedy trial claim fails all four prongs elaborated upon by the United States Supreme Court when an assertion that a defendant's Sixth Amendment right to a speedy trial were violated.¹⁸

Contreras further claims the district court's refusal to substitute new counsel violated his right to effective assistance of counsel. This court recently addressed the issue of the district court's denial of a motion to substitute counsel.¹⁹ Young v. State, set forth three factors to consider when reviewing a district court's denial of a motion for substitution of counsel. The three factors are: (1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints. The court, in its brief inquiry into Contreras's motion to substitute counsel, revealed no conflict. Counsel explained he had in fact given all discovery to the defendant, despite Contreras's claims to the contrary. Based upon the record of the case, it does not appear the district court abused its discretion by denying Contreras's motion. Contreras fails to satisfy the first and most important prong of Young, as the record indicates no significant and complete breakdown in communications between counsel and Contreras. While the inquiry into the purported conflict was brief, we conclude there was no abuse of discretion by the district court.


¹⁸Barker v. Wingo, 407 U.S. 514, (1972) (among the factors which courts should assess in determining whether a particular defendant has been deprived of his right are length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant).

¹⁹Young v. State, 120 Nev. 98, 102 P.3d 572 (2004).

Finally, Contreras contends his presentence incarceration credit was improperly awarded. He has been awarded 343 days credit, but that was only applied against counts 4 and 5 in the judgment of conviction, rather than against the entire sentence as ordered at sentencing. Therefore, we remand this matter to the district court to clarify its sentence as to Contreras receiving 343 days credit toward his entire sentence. Accordingly, we

ORDER the judgment of conviction 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. Michael A. Cherry, 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