

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ADAM CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45057

FILED

JAN 10 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 assault with a deadly weapon, one count of driving under the influence, and one count of destruction or injury to property. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant John Adam Chavez to serve a prison term of 16 to 72 months for assault with a deadly weapon, a consecutive term of 16 to 72 months for driving under the influence, and a concurrent term of 12 months for destruction or injury to property. Chavez presents two issues for review.

First, Chavez contends that the district court improperly instructed the jury with an illegal presumption regarding driving under the influence. He specifically claims that the district court erred by instructing the jury that

If the evidence establishes beyond a reasonable doubt that the amount, by weight, of alcohol in the defendant's blood was one-tenth of one percent (0.10) or more at the time of the test as shown by a chemical analysis of his blood, you should find that the defendant was under the influence of intoxicating liquor at the time of the alleged offense.

Chavez did not preserve this claim for appeal; however, the error is plain.¹ The instruction violates NRS 47.230(2), which states that "[t]he judge shall not direct the jury to find a presumed fact against the accused." We review "improper instructions omitting, misdescribing, or presuming an element of an offense" for harmless error as long as the error is not "structural" in magnitude.² Harmless-error inquiry requires us to determine whether it is clear beyond a reasonable doubt that absent the error a rational jury would have found the defendant guilty.³

Here, the jury was instructed on the elements of the crime and the State's three theories of driving under the influence: (1) that Chavez was driving while under the influence of intoxicating liquor, (2) that Chavez was driving with a concentration of alcohol of 0.10 or more in his blood, or (3) that Chavez had a concentration of alcohol of 0.10 or more in his blood within two hours of driving. The jury was informed that it "need not unanimously agree upon a particular theory of driving under the influence. It is sufficient that each [juror] find beyond a reasonable doubt that the defendant was driving a vehicle upon a highway, or upon premises to which the public has access, under one of the three theories." And the jury was advised that "'[u]nder the influence of intoxicating liquor' means to any degree, however slight, which renders a person incapable of safely driving or exercising physical control of a vehicle."

¹NRS 178.602; Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000).

²Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000).

³Id. at 722-23, 7 P.3d at 449 (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).

Even absent the improper instruction, we have no reasonable doubt that a rational jury would have found Chavez guilty of driving while under the influence of intoxicating liquor. Police Officer Curtis English testified that he observed Chavez driving a gray jeep in the parking lot adjacent to Chavez's condominium. After Chavez parked and exited the jeep, Officer English detected a strong odor of alcohol and observed that Chavez had bloodshot watery eyes and slurred speech. Officer English subjected Chavez to a horizontal gaze nystagmus test, a field sobriety test which Chavez failed.

Second, Chavez contends that the evidence presented at trial was insufficient to support a conviction of assault with a deadly weapon.⁴ The standard of review for a challenge to the sufficiency of the evidence to support a criminal conviction is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁵

Here, Kellie Cruz testified that Chavez threatened her, came at her with an axe, and swung at her with the axe. She further testified that she was scared and that she believed that Chavez was going to kill her. Based on this testimony, the jury could reasonably infer that Chavez used his axe to intentionally place Cruz in reasonable apprehension of immediate bodily harm. It is for the jury to determine the weight and

⁴See NRS 200.471 (defining assault and providing the sentencing guideline for assault with a deadly weapon).

⁵McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).


credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁶

Having considered Chavez's contentions and concluded that they lack merit, we

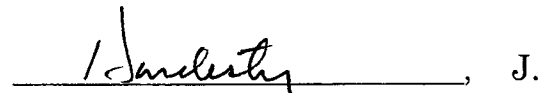
ORDER the judgment of conviction AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

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

⁶See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.