

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICARDO VIZCARRA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45496 **FILED**

FEB 09 2006

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon causing substantial bodily harm. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. Appellant Ricardo Vizcarra was sentenced to a prison term of 30 to 90 months. Vizcarra asserts four issues on appeal.

First, Vizcarra contends the State presented insufficient evidence to support a conviction of battery with use of a deadly weapon with substantial bodily harm. Specifically, he argues that the State presented no medical evidence connecting the victim's symptoms to the events of December 16, 2004, and that the victim's failure to testify to "prolonged physical pain" failed to meet the statutory requirements.¹

Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt. When reviewing

¹NRS 0.060.

the sufficiency of the evidence, this Court considers "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."² The jury could reasonably infer from the evidence presented that the victim did in fact suffer substantial bodily harm and experience prolonged physical pain. Additionally, there is no statutory requirement that medical or expert testimony is required to prove substantial bodily harm.

The victim testified to being struck in the back of a head with a hammer. She also testified to having a scar in the back of her head where the hair had not grown back. Additionally, she explained she was in enough pain from her injuries that she was unable to work for three weeks. She testified to experiencing dizziness, shakiness and nausea so severe she could not use her right hand. 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, substantial evidence supports the verdict.³

Next, Vizcarra contends that NRS 0.060 is unconstitutionally overbroad and vague because "prolonged physical pain" is an amorphous definition upon which to base a conviction for substantial bodily harm. A

²Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)(quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

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).

law is unconstitutionally vague in violation of due process if it "fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement."⁴ "It is settled that statutes are clothed with the presumption of validity and the burden is on those attacking them to show their unconstitutionality."⁵

We are not persuaded that persons of ordinary intelligence will have to guess as to what a term such as "prolonged physical pain" actually means. The statute places a person on notice that he will face a longer potential sentence if he causes pain of a physical nature that is of a lasting duration to another.⁶

Next, Vizcarra asserts that statements made by the prosecution during closing constituted prosecutorial misconduct. Vizcarra failed to make a timely objection to the remarks at trial. "[T]he failure to make timely objections [to prosecutorial misconduct] and to seek corrective instructions during trial [precludes appellate consideration]."⁷ None of Vizcarra's allegations rise to the level of plain error.⁸

⁴Sheriff v. Vlasak, 111 Nev. 59, 61, 888 P.2d 441, 443 (1995) (quoting State v. Richard, 108 Nev. 626, 629, 836 P.2d 622, 624 (1992)).

⁵Id. at 61-62, 888 P.2d at 443.

⁶NRS 200.481(e)(2).

⁷Rowland v. State, 118 Nev. 31, 38, 39 P.2d 114, 118 (2002) (quoting Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998)).

⁸NRS 178.602.

Finally, Vizcarra asserts that the district court erred by denying his motion for substitute counsel. "We review the denial of a motion for substitution of counsel for abuse of discretion."⁹ Factors to be considered are "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion."¹⁰

Vizcarra claimed he could not "recall" discussing his case with his attorney and was unaware of counsel's name. These are not sufficient reasons to constitute a conflict requiring dismissal of counsel. Furthermore, in terms of timeliness, Vizcarra's waiting until after the verdict was pronounced to complain of the conflict is suggestive of a dilatory motive. At the hearing, the district court heard from Vizcarra and gave defense counsel an opportunity to address the court. Given the untimeliness and the reasons given by Vizcarra for the motion, the court made an adequate inquiry before denying his request.

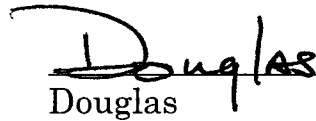
Having considered Vizcarra's contentions and concluded that they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Vizcarra was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Vizcarra was convicted pursuant to a jury verdict. We therefore


⁹Young v. State, 120 Nev. ___, ___, 102 P.3d 572, 576 (2004) (citing Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 237 (2001)).

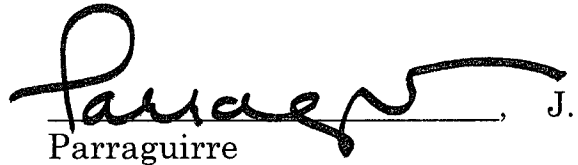
¹⁰Id. (quoting U.S. v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

conclude that this matter should be remanded to the district court for correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, 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