IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE DAVID HUFF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46299

FILED

SEP 25 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of lewdness with a child under fourteen years of age. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Eddie David Huff to serve a prison term of life with the possibility of parole.

First, Huff contends that he was denied his right to a fair trial by an impartial jury. Huff claims that the district court erred by not sua sponte canvassing or admonishing a juror who complained to a courtroom deputy that she was "disgusted and horrified" by the way Huff was acting. And Huff argues that the evidence against him was slight, the juror's bias was clearly expressed, and because the district court failed to sua sponte investigate doubts raised about her impartiality there is no way of knowing whether actual prejudice occurred.

Huff did not raise this issue in the district court. Generally, failure to raise an issue below bars consideration on appeal.[1] However,

[1]See Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

this court may address an alleged error if it is plain and affected the defendant's substantial rights.[2] An error is plain if it "is so unmistakable that it reveals itself by a casual inspection of the record."[3] At a minimum, the error must be "clear under current law,"[4] and, "[n]ormally, a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights."[5]

The trial court's obligation to sua sponte investigate claims of juror bias is not clear under current law.[6] Huff has not demonstrated actual prejudice; he has merely raised the possibility that his jury was biased. And because Huff did not raise this issue below, this court is unable to evaluate from the record presently before us whether Huff suffered any actual prejudice. Under these circumstances, we conclude that Huff has not demonstrated that the district court's failure to sua

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[2]NRS 178.602; Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1130-31 (2001).

[3]Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted).

[4]Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (quoting U.S. v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)).

[5]Tavares, 117 Nev. at 729, 30 P.3d at 1131.

[6]See U.S. v. Owens, 426 F.3d 800, 805 (6th Cir. 2005) (the trial court's decision not to question the jury is reviewed for an abuse of discretion); Sims v. Rowland, 414 F.3d 1148, 1157 (9th Cir. 2005) (federal law does not require a trial court to sua sponte hold a hearing to investigate evidence suggesting the possibility of juror bias); Dyer v. Calderon, 151 F.3d 970, 974 (9th Cir. 1998) ("A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances.").

sponte canvass or admonish the juror constituted plain error. Therefore, we decline to consider this contention.

Second, Huff contends that he was incompetent to stand trial.[7] "[A] defendant is incompetent . . . if he either is not of sufficient mentality to be able to understand the nature of the criminal charges against him or he is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter."[8] The district court's competency findings will not be disturbed on appeal if they are supported by substantial evidence.[9]

Here, after receiving evaluations prepared by three psychologists and after both parties stated that a hearing was unnecessary, the district court found that Huff understood the proceeding, understood the nature of the charges filed against him, and was able to assist counsel. The district court's findings are supported by substantial evidence. In particular, two of the three psychologists concluded in their evaluations that Huff understood the procedure and was able to assist counsel with his defense. The remaining psychologist concluded that Huff understood everything, but was unlikely to cooperate with his attorney. Huff has not demonstrated that his competency has changed since the district court made its findings. Accordingly, the district court did not err in finding Huff competent.

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[7]See NRS 178.400(1).

[8]Calvin v. State, 122 Nev. ___, ___, 147 P.3d 1097, 1100 (2006) (internal quotation marks omitted).

[9]See Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

Third, Huff contends that the district court erred by admitting hearsay evidence. Specifically, Huff claims that over his objections, John Ferrin was allowed to testify that the victim told her mother that she "touched his turtle" and to answer the prosecutor's question as to his understanding of the victim's use of the word "turtle."

We note that the victim testified at trial and was subject to cross-examination. Nothing prevented Huff from recalling the victim as a witness and cross-examining her about the out-of-court statement. We conclude, therefore, that Ferrin's testimony was not inadmissible under Crawford v. Washington.[10] Moreover, to whatever extent the district court may have failed to analyze the reliability of the statement under NRS 51.385(1), we conclude that the record demonstrates the requisite trustworthiness and any error was harmless beyond a reasonable doubt. Further, Ferrin's testimony as to his understanding of the victim's use of the word "turtle" was not hearsay, but rather admissible opinion testimony.[11] Accordingly, Ferrin's testimony was properly admitted.

Fourth, Huff contends that the evidence presented at trial was insufficient to support his conviction because the State failed to prove the corpus delicti of the crime independent of his extrajudicial admissions. Nevada jurisprudence firmly holds that the corpus delicti of a crime must

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[10]541 U.S. 36, 68 (2004) (holding that extrajudicial testimonial statements by a witness are barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

[11]NRS 50.265.

be established independently of a defendant's extrajudicial admissions.[12] In Doyle v. State, we explained the scope of the independent evidence necessary to corroborate a defendant's admissions:

> "The independent proof may be circumstantial evidence . . . , and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. If the independent proof meets this threshold requirement, the accused's admissions may then be considered to strengthen the case on all issues."[13]

Here, the evidence independent of Huff's extrajudicial admissions satisfies the minimal showing required to permit a reasonable inference that the crime charged was committed. In particular, John Ferrin testified that when he opened the door to Huff's bedroom he saw Huff sleeping on his side and the victim standing at waist level next to him. The victim ran out of the bedroom wearing Huff's underwear. When Ferrin returned to the bedroom, Huff was standing in front of the bed, his pants below his waist level, and he appeared to be "shocked." Later, Ferrin heard the victim's mother ask the victim "Did you touch his turtle," to which she responded "yes." We conclude that this testimony sufficiently established the corpus delicti of the crime charged.

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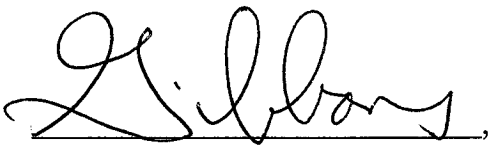
[12]See West v. State, 119 Nev. 410, 417, 75 P.3d 808, 813 (2003); Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004); Hooker v. Sheriff, 89 Nev. 89, 92, 506 P.2d 1262, 1263 (1973).

[13]112 Nev. at 892, 921 P.2d at 910 (quoting People v. Alcala, 685 P.2d 1126, 1136 (Cal. 1984)); see Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985).

Huff also contends that (1) the instruction on reasonable doubt was unconstitutional, (2) the prosecutor committed misconduct during the trial and at the sentencing hearing, and (3) the cumulative effect of his assignments of error deprived him of a fair trial. We have reviewed these contentions and determined that they either lack merit or do not constitute reversible error.

Having considered Huff's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

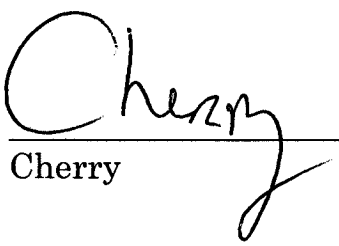


_____, J.
Gibbons

_____, J.
Saitta

CHERRY, J., dissenting:

The courtroom deputy's statement to the district court put the district court on notice that Huff's courtroom behavior may have biased a juror, and therefore the district court had a duty to resolve doubts about the juror's impartiality. Because the district court did not investigate the possible juror bias it cannot be said that Huff was convicted by an impartial jury. Accordingly, I would reverse and remand for further proceedings.



_____, J.
Cherry

cc: Hon. Jerome Polaha, District Judge
Thomas L. Qualls
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk