IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGINA GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46717

FILED

AUG 0 1 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

CORRECTED ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING[1]

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of attempted murder with the use of a deadly weapon, coercion with the use of a deadly weapon, and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant Georgina Gonzalez to serve three concurrent prison terms of 24 to 60 months with equal and consecutive prison terms for use of a deadly weapon.

First, Gonzalez contends that there is insufficient evidence to sustain her convictions. In particular, Gonzalez argues that the State failed to prove the attempted murder and battery counts because there was no evidence that she had the intent to kill and no evidence rebutting her claim that she acted in self-defense after the victim, while sleepwalking, attacked her. Further, Gonzalez argues that there was insufficient evidence of coercion because the State presented no evidence that she used or threatened violence when she pulled the telephone from

[1]This corrected order is hereby issued in place of our order filed on July 10, 2006.

the wall. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[2]

In particular, the victim testified that Gonzalez, his best friend and roommate of many years, hit him over the head with a hammer while he was sleeping, then stabbed him several times with a knife, and yanked the telephone out of the wall when he attempted to call for help. The victim explained that Gonzalez always got jealous and angry when he became involved in a romantic relationship and, the night before the attack, he had argued with Gonzalez about the fact that he had a new boyfriend.

Two neighbors testified at trial that, on the morning of the attack, they observed the victim outside of the apartment crying and screaming for help. Gonzalez was described as topless, calm, and uninjured. Gonzalez went back inside her apartment and was subsequently taken out by paramedics with stab wounds to the chest.

Although Gonzalez testified at trial that the victim stabbed her and she acted in self-defense, the State adduced evidence to the contrary. Specifically, Gonzalez's treating physician testified that her wounds were consistent with self-inflicted injury and a police officer, who interviewed Gonzalez, testified that she admitted stabbing herself. The jury could reasonably infer from the evidence presented that Gonzalez battered and attempted to kill the victim with use of a deadly weapon, and also engaged in coercion by preventing the victim from calling for help by

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[2]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

yanking the telephone cord out of the wall.[3] 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.[4]

Second, Gonzalez contends that the district court abused its discretion by admitting letters she wrote to the victim because they were remote in time, irrelevant, and prejudicial. The letters, which were written in 1999 and 2001, expressed her sadness that the victim was spending time with a boyfriend instead of with her, as well as Gonzalez's despair over the termination of their friendship. The district court ruled that the letters were admissible to prove Gonzalez's "continuing obsession with the . . . relationship [with the victim] and the possible identity problem if there is a split-up." We conclude that the district court did not commit manifest error in admitting the letters. They were relevant to prove Gonzalez's motivation to attempt to kill, namely, that she was obsessed with her relationship with the victim and jealous of his new boyfriend.[5] Moreover, the letters did not contain threats or other bad acts but were merely an expression of her deep love for the victim and,

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[3]NRS 200.010; NRS 200.030(1); NRS 193.330; NRS 200.481(1)(a); NRS 193.165; NRS 207.190(1).

[4]See 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).

[5]See NRS 48.015 ("relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence").

therefore there was little danger of unfair prejudice to Gonzalez.[6] Accordingly, the district court did not err in ruling that the letters were admissible.

Third, Gonzalez argues that the district court improperly limited the direct examination of defense witness, Dr. Mark Chambers, by precluding him from explaining how he formulated his opinion that the victim was sleepwalking when he attacked Gonzalez. We conclude that Gonzalez's contention lacks merit.

The admissibility of expert testimony is within the sound discretion of the district court.[7] Our review of the direct examination of Dr. Chambers indicates that he testified extensively about the basis for his opinion. Specifically, Dr. Chambers testified that he reviewed the police reports and interviewed Gonzalez and concluded that her allegation that the victim attacked her while sleepwalking was credible given that she described behavior and circumstances associated with an incident of sleepwalking. Dr. Chambers explained specifically that sleepwalking was indicated by the following facts: the victim was sleep-deprived, the episode happened approximately thirty minutes after he fell asleep, there was a stimulus that caused his awakening, he was mumbling and violent upon awakening, and he did not remember the attack. Accordingly, we

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[6]See NRS 48.035(1) (relevant evidence is "not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury").

[7]Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

conclude that the district court did not improperly limit the expert testimony of Dr. Chambers.[8]

Fourth, Gonzalez argues that her constitutional rights to due process and fundamental fairness were violated because she was sentenced by a substitute judge who did not preside over her trial. Citing to United States v. Lane,[9] Gonzalez argues that it is unfair for a defendant to be sentenced by a substitute judge because the new judge is not as familiar with the case as the trial judge. We conclude that Gonzalez's contention lacks merit.

Generally, a criminal defendant is entitled to be sentenced by the district judge who presides over the trial.[10] However, that general principle is subject to numerous exceptions, including where "[t]he judge . . . from other cause is unavailable to act."[11] Here, Judge Brennan, who presided over the trial, was unavailable to act because he was a Senior Judge who apparently was not working on the day of the sentencing

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[8]On several occasions, the district court excluded testimony about statements Gonzalez made in the course of her interview with Dr. Chambers on the grounds that it was hearsay. Gonzalez does not expressly argue that the district court erred in ruling that the testimony was hearsay. Nonetheless, even assuming the district court erred in excluding her statements to Dr. Chambers, the error was harmless given the overwhelming evidence presented in this case. See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (recognizing that hearsay errors are subject to harmless error analysis).

[9]708 F.2d 1394 (9th Cir. 1983) (construing Federal Rule of Criminal Procedure 25(a)).

[10]See DCR 18; Jeaness v. District Court, 97 Nev. 218, 626 P.2d 272 (1981) (discussing DCR 18).

[11]DCR 18(2)(a).

hearing. Moreover, even assuming Judge Brennan was available and should have presided over the sentencing, Gonzalez has failed to show that she was prejudiced by the reassignment of her case to Judge Cherry for sentencing.[12] The record indicates that Judge Cherry familiarized himself with Gonzalez's case before imposing sentence; he reviewed the presentence investigation report, Gonzalez's sentencing memorandum, listened to the victim's impact testimony, Gonzalez's statement of allocution, and heard arguments from counsel.[13] Accordingly, Gonzalez is not entitled to a new sentencing hearing.

Fifth, Gonzalez argues that the judgment of conviction misstated the conviction and sentence. The State concedes error, providing "the Judgment of Conviction erroneously lists a conviction of the charge of coercion with use of a deadly weapon along with an erroneous corresponding sentence." We agree with the parties that there is an error in the judgment of conviction. Specifically, the judgment indicates that the sentence for the coercion count was enhanced for the use of a deadly weapon, but the jury did not find Gonzalez guilty of the deadly weapon allegation on that count. Therefore, we remand the matter to the district court with instructions to vacate the deadly weapon enhancement for the coercion offense and enter a corrected judgment of conviction. Accordingly, we

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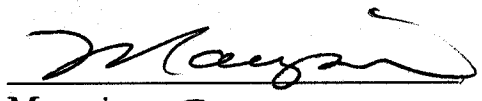
[12]See Lane, 708 F.2d at 1396-97 (error involving substitution of judges is harmless if the defendant has not been prejudiced).

[13]See U.S. v. Whitfield, 874 F.2d 591, 593 (8th Cir. 1989) ("A successor judge need only familiarize himself with the evidence and legal issues involved and exercise informed discretion in imposing sentence.").

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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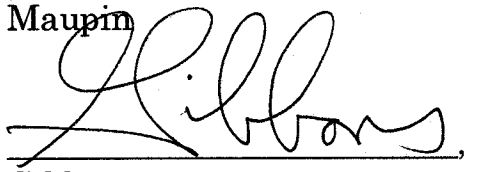

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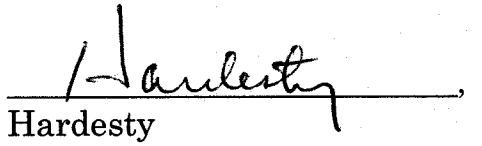

J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Karen A. Connolly
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk