IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA ISSAC NICHOLAS A/K/A JOSHUA ISSAC NICHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47515

FILED

NOV 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of assault with a deadly weapon, one count of resisting a public officer using a dangerous weapon, one count of battery on a police officer, and one count of possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Joshua Nicholas raises several constitutional and other challenges to his conviction. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we affirm.

Redundant convictions

Nicholas argues that his convictions for assault and resisting a public officer are unconstitutionally redundant because they punish identical conduct. In the past, this court has made clear that we "will reverse redundant convictions that do not comport with legislative intent."[1] "While often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the

[1]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (internal quotations omitted).

conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct."[2]

In applying a "redundant convictions" analysis, "'[t]he issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions.'"[3] Thus, "'[t]he question is whether the material or significant part of each charge is the same even if the offenses are not the same . . . . [W]here a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.'"[4] "[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act."[5]

After the facts are ascertained, an analysis of whether multiple convictions are improperly redundant "begins with an examination of the statute."[6] This case involves two statutes: NRS 200.471, which defines assault, and NRS 199.280, which defines resisting a public officer. Under NRS 200.471(1)(a), assault "means intentionally placing another person in reasonable apprehension of immediate bodily

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[2]Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005).

[3]Salazar, 119 Nev. at 227, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

[4]Id. at 227-28, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. at 136, 994 P.2d at 698).

[5]Id. at 227, 70 P.3d at 751 (quoting Skiba v. State, 114 Nev. 612, 616, n.4, 959 P.2d 959, 961 n.4 (1998)).

[6]Wilson, 121 Nev. at 356, 114 P.3d at 293.

harm." In addition, the use of a "deadly weapon" increases the severity of the crime from a misdemeanor to a felony.[7] On the other hand, NRS 199.280 punishes "[a] person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office." The penalty for resisting a public officer increases "[w]here a dangerous weapon is used in the course of such resistance, obstruction or delay. . . ."[8]

We conclude that the plain language of these statutes demonstrates different purposes: NRS 200.471 punishes assaults while NRS 199.280 punishes conduct that interferes with a public officer's discharge of his or her duties, regardless of whether an assault occurs. Moreover, the gravamen of Nicholas's crimes are not the same: the gravamen of Nicholas's conviction for resisting a public officer is his interference with official duties; the gravamen of Nicholas's assault offense is his conduct causing a reasonable apprehension of immediate bodily harm. Although both crimes arise from the same course of conduct, we conclude that they punish separate and distinct acts; therefore, Nicholas's convictions are not redundant.

Constitutionality of the phrase "dangerous weapon"

Nicholas contends that NRS 199.280(1), which punishes resisting a public officer using a "dangerous weapon," is unconstitutionally vague. A statute's constitutionality is a question of law, which this court

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[7]NRS 200.471(2)(b).

[8]NRS 199.280(1).

reviews de novo.[9] This court presumes that statutes are valid, and a person challenging a statute's validity bears the burden of overcoming that presumption by showing its unconstitutionality.[10] "In order to meet that burden, the challenger must make a clear showing of invalidity."[11]

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'"[12] Thus, "[a] statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[13] We conclude that Nicholas fails to meet his burden under either prong of this test.

Notice of prohibited conduct

Where First Amendment concerns are not implicated, the notice to citizens that a statute provides is insufficient only if the "statute

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[9]Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

[10]Id.

[11]Id.

[12]Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

[13]Silvar, 122 Nev. at 293, 129 P.3d at 685.

is so imprecise, and vagueness so permeates its text, that persons of ordinary intelligence cannot understand what conduct is prohibited . . . ."[14]

For example, in Bradvica v. State, this court concluded that the phrase "dangerous knife" was unconstitutionally vague.[15] The statute at issue in Bradvica prohibited "the concealed possession of a dirk, dagger, or 'dangerous knife.'"[16] After noting that the defendant's knife "no more resemble[d] a dagger or stabbing weapon than a penknife carried by a Boy Scout," the Bradvica court concluded that the defendant's "conviction [could not] stand upon the term 'dangerous knife' [because] . . . [t]he term is so clearly vague that individuals must guess as to its meaning without any objective, guiding factors."[17]

Despite certain similarities between this case and Bradvica (most notably the statutory use of the adjective "dangerous" without further explanation), we conclude that the phrase "dangerous weapon" is not unconstitutionally vague. According to Black's Law Dictionary, the phrase "dangerous weapon" means "[a]n object or device that, because of the way it is used, is capable of causing serious bodily injury."[18] In light of this definition, we conclude that a person of average intelligence would understand the phrase "dangerous weapon" to encompass any object, such

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[14]City of Las Vegas v. Dist. Ct., 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

[15]104 Nev. 475, 477, 760 P.2d 139, 141 (1988).

[16]Id.

[17]Id.

[18]Black's Law Dictionary 764 (2d pocket ed. 2001).

as Nicholas's vehicle, that poses a danger of bodily injury because of the way it is used.

In this case, Nicholas drove his vehicle with two police officers hanging onto its sides. In our view, NRS 199.280(1) and the "dangerous weapon" terminology are designed to punish this exact type of conduct. Thus, although the phrase "dangerous weapon" is somewhat broad, it satisfies the first prong of the vagueness test.

Existence of specific standards

Under the second prong of the vagueness test, a statute is unconstitutional if it "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[19] In this case, the phrase "dangerous weapon" has an understood, well-settled meaning and it does not allow for arbitrary or capricious enforcement. Accordingly, Nicholas has failed to meet his burden under the second prong of the vagueness test.

Jury selection

Nicholas argues that the district court violated the Equal Protection Clause and principles of procedural due process when it offered race-neutral explanations for the State's peremptory challenges without first requiring the State to set forth its own race-neutral explanations.

Although the State is ordinarily entitled to exercise peremptory challenges for any reason, the Supreme Court recognized in

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[19]Silvar, 122 Nev. at 293, 129 P.3d at 685.

Batson v. Kentucky that the Equal Protection Clause forbids the elimination of potential jurors solely based on their race.[20]

Under Batson, a three-step analysis applies: (1) the defendant must make out a prima facie case of discrimination, (2) the production burden then shifts to the State to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the defendant has proved purposeful discrimination.[21] "The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal."[22]

In this case, Nicholas contends that the district court never required the State to offer race-neutral explanations for its peremptory challenges under the second prong of the Batson test. Our review of the record demonstrates that after the State excluded a second minority from the prospective jury panel (and Nicholas made his Batson objection), the district court quickly pointed out that both excluded jurors had recently been arrested. In light of the district court's comments, the State used the recent arrest theory as the basis for its race-neutral explanation for their exclusion. According to Nicholas, because the district court's comments seemed to relieve the State of its burden to provide race-neutral explanations under the second prong of Batson, the comments violated procedural due process and the Equal Protection Clause.

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[20]476 U.S. 79, 89 (1986).

[21]Ford v. State, 122 Nev. 398, ___, 132 P.3d 574, 577 (2006).

[22]Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997). (quoting Hernandez v. New York, 500 U.S. 352, 364 (1991)).

"Under step two [of Batson], the State's neutral reasons for its peremptory challenges need not be persuasive or even plausible."[23] In fact, "[w]here a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral."[24] While "[a]n implausible or fantastic justification by the State may, and probably will, be found to be pretext for intentional discrimination," the ultimate question (posed by step three of Batson) is "whether the opponent of the peremptory challenge has met the burden of proving purposeful discrimination."[25]

Here, the district court probably should have required the State to offer its own race-neutral explanations for the exclusion of the jurors in question. However, we conclude that any error was harmless because Nicholas failed to meet his ultimate burden of demonstrating purposeful discrimination. As the definitive burden to prove discriminatory intent always remains on the party objecting to the peremptory challenge, no Batson violation occurred in this case. This is especially true given that (1) this court accords great deference to Batson decisions made by the district court and (2) the jury that eventually convicted Nicholas included four minority jurors.[26]

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[23]Ford, 122 Nev. 398, 403, 132 P.3d 574, 577-78.

[24]Id.

[25]Id. at 404, 132 P.3d at 578.

[26]See Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) (concluding that the court may look at characteristics shared by a stricken juror and seated jurors to determine whether a challenge was discriminatory).

Jury instructions

Nicholas raises two arguments with respect to the jury instructions used at trial. First, Nicholas contends that the district court failed to instruct the jury that assault is a specific intent crime. Second, Nicholas asserts that the court failed to instruct the jury on the "dangerous weapon" element of his resisting conviction. Notably, however, Nicholas failed to object to any of the instructions in question at trial. In fact, the parties settled the instructions in open court and Nicholas's only concerns at that time were with those instructions pertaining to attempted murder. Because Nicholas failed to request additional jury instructions and did not object to the instructions at issue, we conclude that he waived his right to challenge the jury instructions on appeal.[27]

Sufficiency of the evidence

Nicholas asserts that the evidence presented at trial does not support his convictions for assault with a deadly weapon or resisting a public officer using a dangerous weapon. In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier

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[27]See McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998) (concluding that "[f]ailure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial").

Separately, we note that Nicholas's arguments fail under our harmless error standard of review applicable to jury instructions. Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). In addition, Nicholas has failed to demonstrate plain error, i.e., (1) a clear error in instructions, and (2) that his substantial rights were prejudiced. See NRS 178.602.

of fact could have found the essential elements of the crime beyond a reasonable doubt.' "[28] Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[29]

Assault with a deadly weapon

With respect to his two convictions for assault with a deadly weapon, Nicholas argues that the State failed to prove that he (1) acted with, and had, the intent to kill, or (2) used a deadly weapon. However, a defendant need not have "intent to kill" in order to be found guilty of assault with a deadly weapon.[30] Moreover, Nicholas's vehicle qualifies as a "deadly weapon" under NRS 193.165(5)(b).[31] Thus, the evidence supports Nicholas's convictions for assault with a deadly weapon.

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[28]Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

[29]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[30]See NRS 200.471(1)(a); NRS 200.471(2)(b). Nicholas contends that the State was required to prove that he had "intent to kill" the officers because it used that terminology in the pleadings and in the jury instructions. While the pleadings and jury instructions mention that the assault occurred during an "attempt to kill" the officers, there is no mention of a required "intent to kill" regarding the assault charges. In fact, the specific instruction on assault with a deadly weapon merely repeated the statutory definition set forth above. Moreover, Nicholas was charged with attempted murder, which explains why the State used the "attempt to kill" language when describing the assault charge. This language did not change the elements of Nicholas's crimes. Therefore, his argument is without merit.

[31]NRS 193.165(b) defines a "deadly weapon" as "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used . . . is readily capable of causing substantial bodily

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Resisting a public officer using a dangerous weapon

With respect to his conviction for resisting a public officer, Nicholas contends that his vehicle does not qualify as a "dangerous weapon." As mentioned above, Black's Law Dictionary defines the phrase "dangerous weapon" as "[a]n object or device that, because of the way it is used, is capable of causing serious bodily injury."[32] When Nicholas drove away from the gas station with two officers hanging to the sides of his vehicle, the vehicle qualified as an object capable of causing serious bodily injury. Accordingly, we conclude that the evidence supports Nicholas's conviction for resisting a public officer using a dangerous weapon.

Conclusion

After having considered each of Nicholas's arguments on appeal, we conclude that they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

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Douglas

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harm or death." In Nicholas's view, his convictions for assault with a deadly weapon cannot stand because he never aimed, pointed or drove his vehicle at or towards either officer. However, this argument fails because the vehicle was "readily capable of causing substantial bodily harm" when Nicholas drove it with both officers hanging onto its sides.

[32]Black's Law Dictionary at 764.

cc: Eighth Judicial District Court Dept. 6, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk