IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS E. ESPINOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48998

FILED

OCT 18 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of arson. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge. The district court sentenced appellant Jesus E. Espinoza to serve a prison term of 12 to 34 months.

Espinoza first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Specifically, Espinoza contends that there was no direct evidence presented that proved that he set the fire because there were no eyewitnesses to the crime.

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.[1] In particular, we note that the State presented testimony that Espinoza was in his cell on disciplinary lockdown, there were no other prisoners or guards on the tier that could have started the

[1]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).

fire, and the prisoners were allowed to have matches. A corrections officer testified that he saw paper forms stuffed between Espinoza's wall and cell door, and then he saw flames. Subsequent to dousing the fire, Espinoza again began to stuff paper forms between his wall and the cell door.

The jury could reasonably infer from the evidence presented that Espinoza willfully and maliciously attempted to set fire to his cell.[2] It is for the jury to determine the weight and credibility to give conflicting testimony.[3] Moreover, we note that circumstantial evidence alone may sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to support the jury's verdict.

Next, Espinoza contends that the district court violated his constitutional due process and fair trial rights by requiring him to wear a stun belt at trial. Espinoza specifically contends that the district court erred in requiring Espinoza to wear a stun belt based on his disciplinary record and his past violent convictions, rather than whether he presented a substantial security risk. Espinoza argues that there was no evidence presented that "[his] behavior in court was obstreperous or disruptive, no evidence that he engaged in emotional outbursts or uncontrollable behavior while in court, nor any evidence that he had ever threatened the judge or court staff."

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[2]NRS 205.025.

[3]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).

[4]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

We conclude that Espinoza's contention lacks merit. The district court conducted a hearing prior to trial and issued a written order in which it discussed the factors set forth in Hymon v. State.[5] Further, it is apparent from the record that Espinoza presented a substantial security risk.[6] The district court noted that Espinoza had 41 disciplinary infractions while incarcerated, and 21 were categorized as major infractions, including 3 which involved assault and/or battery. Espinoza was housed in a high custody classification, and when he was transported, he was restrained and escorted by two correctional officers.[7] Finally, the record does not demonstrate that Espinoza was prejudiced by wearing the stun belt. The stun belt was not visible to the jury, and there is no indication that Espinoza was unable to assist counsel with his defense. Accordingly, the district court did not err in requiring Espinoza to wear a stun belt.

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[5]121 Nev. 200, 209, 111 P.3d 1092, 1099 (2005) (stating that the district court should address the following issues in its order: "(1) make factual findings regarding the belt's operation, (2) address the criteria for activating the stun belt, (3) address the possibility of accidental discharge, (4) inquire into the belt's potential adverse psychological effects, and (5) consider the health of the individual defendant").

[6]Id. at 211, 111 P.3d at 1100.

[7]See McGervey v. State, 114 Nev. 460, 462-63, 958 P.2d 1203, 1205-06 (1998) (stating that the district court "has the right to take into consideration knowledge acquired outside of formal evidence offered and admitted at trial" in determining whether a defendant should be shackled).

Next, Espinoza contends that the prosecutor committed several instances of misconduct which violated his right to a fair trial. Espinoza first contends that the prosecutor committed misconduct by vouching for the credibility of the State's only witness. Specifically, the prosecutor stated during rebuttal closing that, "I think it is a testament of Officer Mullins' integrity that he said anything is possible." The prosecutor then stated in closing rebuttal argument that, "Officer Mullins was able to testify to you about what happened. He testified truthfully and I ask you to return a verdict of guilty." Espinoza further claims that the prosecutor "exacerbated the problem" and commented on the ultimate issue of the case by telling the jury, "[t]here was a fire. The fire was at Espinoza's cell. It was set by Espinoza." Finally, Espinoza claims that the prosecutor shifted the burden of proof when he stated "[w]e don't have any explanation or alternative defenses theory [sic] that Mr. Mullins did not know what he's talking about that he's guessing, that he's making this up."

Initially, we note that Espinoza did not object to the prosecutor's comments. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[8] This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.[9] We conclude that Espinoza cannot

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[8]See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).

[9]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

demonstrate that the prosecutor's comments amounted to plain error or affected his substantial rights.[10] In fact, the prosecutor's statements were made in direct response to assertions made by defense counsel during Espinoza's closing argument. Further, the jurors were instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Finally, even if the remarks were inappropriate, the State presented convincing evidence of Espinoza's guilt, and "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."[11]

Next, Espinoza contends that the district court erred when it provided the jury with instructions that included the term "Category D felony." Espinoza argues that the jury was invited to consider matters of sentencing and punishment because the jury instructions highlighted the distinction between categories of felony offenses.

Defense counsel did not object to the allegedly erroneous jury instructions. The failure to object to a jury instruction generally precludes appellate review absent plain or constitutional error.[12] We conclude that the mere labeling of an offense as a felony does not amount to plain or constitutional error. We note that there was overwhelming evidence of

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[10]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

[11]King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

[12]See Green, 119 Nev. at 545, 80 P.3d at 95.

Espinoza's guilt, and the jurors were instructed that they were not to discuss or consider the subject of punishment.[13] We presume that the jurors followed the district court's instructions.[14]

Last, Espinoza contends that the district court erred by failing to order further deliberations after a juror expressed uncertainty in the verdict during polling.[15] During the polling, the following colloquy occurred:

> CLERK: Juror Number One, is that your true and correct verdict?
>
> JUROR: Yeah, I guess.
>
> COURT: Ma'am, the answer is either yes or no. We can't take your guess. Is this—is that your true and correct verdict?
>
> JUROR: Yes.

Initially, we note that Espinoza did not object to the district court's failure to order further deliberations, and Espinoza has failed to show plain or constitutional error. Although the juror's response was initially ambiguous, she subsequently communicated to the district court

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[13]Williams v. State, 103 Nev. 106, 112, 734 P.2d 700, 704 (1987).

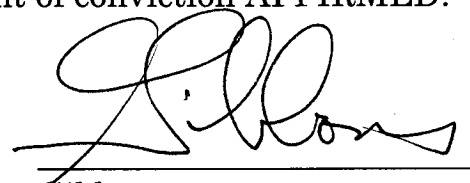
[14]See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998).

[15]See NRS 175.531 ("If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.").

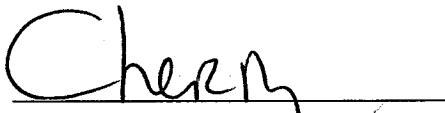
that she concurred in the verdict.[16] Accordingly the district court did not err in ordering further deliberations.

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



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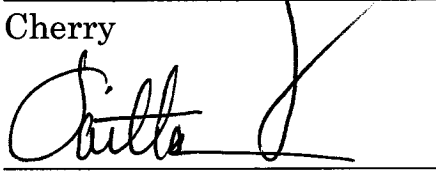
Cherry



_____, J.
Saitta

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Ely
White Pine County Clerk

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[16]See e.g., People v. Burnett, 22 Cal. Rptr. 320, 323 (Ct. App. 1962) ("although a juror at first answers evasively or in the negative, if he finally acquiesces in the verdict it must be sustained").