

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS RAY BURKEYBILE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50793

FILED

JUL 23 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of theft and assault with a deadly weapon. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court adjudicated appellant Douglas Burkeybile as a habitual criminal and sentenced him to serve two concurrent terms of 5 to 20 years.

On appeal, Burkeybile argues (1) insufficient evidence supported his conviction for assault with a deadly weapon because the State failed to demonstrate that a pocketknife is a dangerous weapon under NRS 200.471(2)(b), (2) the district court erred by permitting a loss-prevention officer to testify that "most knives are dangerous," and (3) the district court erred by permitting the information to be amended after the verdict to include a count for habitual criminal adjudication. We conclude these claims lack merit.

Sufficiency of the evidence

Burkeybile claims that insufficient evidence was adduced at trial to support his conviction for assault with a deadly weapon. Specifically, Burkeybile claims that the State failed to prove beyond a reasonable doubt that a pocketknife is a dangerous weapon under NRS

200.471(2)(b). Burkeybile argues that when the use of a deadly weapon is an element of the crime, as is the case with assault, the definition of a deadly weapon includes only those weapons that are inherently dangerous. Burkeybile asserts that the pocketknife he used, which had a 2 1/2- to 3-inch blade and contained tools in addition to the blade, was not inherently dangerous and therefore not a deadly weapon as defined by this court's ruling in Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), superseded by statute as stated in Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998). We conclude this claim lacks merit.

In Zgombic, this court interpreted the meaning of deadly weapon in NRS 193.165, a sentencing enhancement provision. Id. at 573, 798 P.2d at 549. The Zgombic court defined a deadly weapon within the context of a sentence enhancement to include inherently dangerous instrumentalities. Id. at 576-77, 798 P.2d at 551. However, the Zgombic court specifically stated that its concern was with the definition of deadly weapons in the sentence enhancement statute, not statutes that define crimes, and acknowledged that the functional test remains applicable in this state when a deadly weapon is an element of a crime. Id. at 574, 798 P.2d at 549-50. Here, the use of a deadly weapon was an element of the crime and therefore the functional test was appropriate.

The functional test determines whether an instrument is a deadly weapon by reviewing whether that instrument was used in a deadly manner. Here, the loss prevention supervisor Brett Bindley testified that he approached Burkeybile, identified himself as store security, and told Burkeybile they needed to talk about merchandise that was not paid for. Burkeybile reached into his pocket, pulled out a pocketknife, opened the pocketknife to expose a knife blade, and pointed

the blade at Bindley while saying “F*** you. Do whatever the f*** you want.” Burkeybile was approximately 8 to 10 feet away from Bindley when the knife was drawn, and Burkeybile continued to walk past Bindley after the blade was exposed. Bindley testified that he stepped away from Burkeybile when he saw the knife because he thought Burkeybile would stab him if he did not get away. The knife was admitted at trial. We conclude that sufficient evidence supported the jury’s conclusion that Burkeybile used a deadly weapon to commit assault. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 572 (1992) (holding that the standard for reviewing the sufficiency of evidence in a criminal case is “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”) (internal quotation and citation omitted). Because substantial evidence supports the jury’s verdict, we affirm the conviction for assault with a deadly weapon. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Testimony by loss-prevention officer

Burkeybile claims that the district court erred by overruling his objection and permitting a loss-prevention officer to testify that “most knives are dangerous.” Burkeybile asserts that this testimony misled the jury and helped the jury to mistakenly find that his pocketknife constituted a dangerous weapon. We conclude this claim lacks merit.

“Although 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.” NRS 48.035(1). Trial courts have wide discretion in determining the relevance and admissibility of evidence, and “this court reviews that decision for an abuse of discretion

or manifest error.” Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

Bindley testified that when he saw the knife he put both of his hands up and backed away from Burkeybile to put approximately 20 feet between them, which was consistent with his training as a loss prevention officer. When asked whether his actions were consistent with other law enforcement training he had received, Bindley started to respond with an answer about a defensive tactics class he took. Burkeybile objected to the line of questioning, arguing that the questions were not relevant. The district court overruled the objection on the basis that Bindley’s training may be relevant with regard to how Bindley reacted to seeing the pocketknife. When the questioning resumed, Bindley stated that in his defensive tactics class he was “taught that most knives are dangerous within—shorter than distances of 21 feet and I was way closer than 21 feet.” Bindley’s testimony that “most knives are dangerous” was relevant to establish a “reasonable apprehension of immediate bodily harm.” NRS 200.471(1)(a). The probative value of this testimony was not outweighed by any prejudicial effect, and there is no indication that this testimony confused the issues or misled the jury. Accordingly, we conclude that the district court did not abuse its discretion by admitting this testimony.

Habitual criminal adjudication

Burkeybile claims that the district court erred by permitting the criminal information to be amended after the jury returned a verdict. Burkeybile argues that due process and simple fairness dictate that an amendment to the criminal information should be made before the jury renders a verdict. Burkeybile asserts that he did not have proper notice

that the prosecutor was seeking habitual criminal adjudication. We conclude this claim lacks merit.

NRS 207.016(2) permits the prosecutor to file a count for habitual criminal adjudication after conviction for the primary offense. However, sentence must not be imposed until 15 days after the filing of such a count. NRS 207.016(2). We have held that “before a defendant may be sentenced as a habitual criminal under NRS 207.010, the State must duly file an allegation of habitual criminality.” Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 164 (2008).

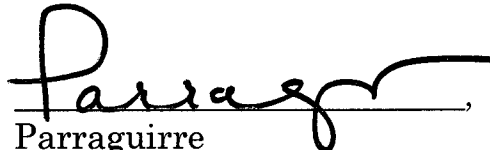
Here, the original criminal information did not include a habitual criminal count. The record reveals that on November 27, 2007, the State filed a motion seeking leave to file an amended information that included a habitual criminal count. On December 18, 2007, the day set for sentencing, the prosecutor orally renewed the motion to amend the criminal information. When questioned by the district court, defense counsel stated that he had received a copy of the motion and was prepared to go forward on the habitual criminal count. The district court granted the motion to amend the information, filed the amended information, and proceeded to sentence Burkeybile as a habitual criminal.

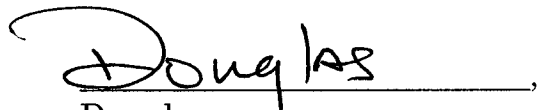
The filing of an amended information to allege a count of habitual criminality was permissible under NRS 207.016(2). However, we note that the amended information was filed on the same day as the sentencing hearing in violation of NRS 207.016(2). Because Burkeybile did not object to being sentenced as a habitual criminal on the grounds that the amended information was not filed 15 days before sentencing and has not raised this issue on appeal, we review this error for plain error. See NRS 178.602; Grey, 124 Nev. at ___, 178 P.3d at 163. We conclude

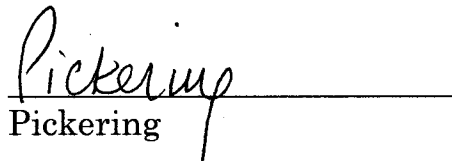
that, because Burkeybile received adequate notice that the State was going to seek habitual criminal adjudication and counsel informed the court that he was ready to proceed on the habitual criminal charge, the late filing of the amended information did not amount to plain error affecting Burkeybile's substantial rights.

Having considered Burkeybile's claims and concluded they lack merit, we

ORDER the judgment of conviction AFFIRMED.¹

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Steven P. Elliott, District Judge
Michael V. Roth
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹We have reviewed all documents that Burkeybile has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.