

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. BURTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51367

FILED

ORDER OF AFFIRMANCE

MAY 05 2009
TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of child abuse and neglect and one count of battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Michael Burton was sentenced to a maximum of 60 months in jail with a minimum parole eligibility of 24 months for child abuse and neglect, and a maximum of 96 months with a minimum parole eligibility of 38 months for battery with the use of a deadly weapon, to run consecutively.

Burton raises five issues on appeal. For the reasons set forth below, we conclude that Burton's contentions fail and, therefore, affirm the judgment of conviction.

On August 28, 2006, Nikki Burns and her mother, Lora Shafter, as well as Shafter's sister, Rachel Sbardella, were standing outside Burns' and Shafter's apartment. The women were watching Shafter's and Sbardella's children, ages four to fourteen, play outside when they heard gun shots.

Several men fired repeatedly at a Cadillac parked at the apartment complex. Burns and Sbardella saw the men shooting and

identified Burton as one of the shooters. They both testified that he had a gun and was shooting.

Following the shooting, Shafter and Sbardella were upset and got into an argument with two women in a car parked nearby. One of the women got out of the car and, after arguing with Sbardella, ended up hitting Shafter. Burton walked up and broke up the fight by hitting Sbardella in the head with his gun.

Sbardella, Shafter, and Burns all identified Burton from a photograph array as an individual involved in the event. Sbardella and Burns testified that Burton was the individual who hit Sbardella with a gun following the gunfire. Shafter testified that Burton came running up to the car but she did not see him hit her sister, she did not see a gun, and she did not see who was shooting earlier.

Israel Bello, who was in the Cadillac during the shooting, refused to testify at trial so his testimony from the preliminary hearing was read into evidence. He also identified Burton from a photograph array as an individual involved in the shooting and noted that "his name is Mike B." According to Bello, Burton had a gun but did not shoot.

First, Burton contends that the conviction for child abuse and neglect must be reversed because he was not a parent, guardian, or custodian of any child who was allegedly abused or neglected and the record was barren of any evidence that would sustain the charge.

Statutory interpretation is a question of law that this court reviews de novo. Leven v. Frey, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). We interpret statutes in accordance with their plain meaning and generally do not look beyond the plain language of the statute absent ambiguity. Seput v. Lacayo, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006),

abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. ___, ___, 181 P.3d 670, 672 n. 6 (2008). “It is well established that when a statute’s language is plain and unambiguous, and the statute’s meaning clear and unmistakable, the courts are not permitted to look beyond the statute for a different or expansive meaning or construction.” DeStefano v. Berkus, 121 Nev. 627, 629, 119 P.3d 1238, 1239-40 (2005).

Burton was charged under NRS 200.508(1), which defines abuse, neglect, or endangerment of a child, and states:

A person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect.

NRS 200.508(1) uses the word “person” in defining abuse, neglect, or endangerment of a child. In contrast, NRS 200.508(2) uses the phrase “[a] person who is responsible for the safety or welfare of a child.” By comparing these two subsections, it is clear NRS 200.508(1) applies to all people, while NRS 200.508(2) only applies to a parent or guardian of the child. Therefore, it does not matter that Burton was not a parent or guardian of the children who were playing outside the apartment complex when the gunshots were fired, he was correctly charged and convicted of child abuse and neglect pursuant to NRS 200.508(1).

Second, Burton challenges the sufficiency of the evidence, arguing the record was barren of any evidence that would sustain the charge of child abuse and neglect. “A reviewing court will not disturb a verdict on appeal if it is supported by sufficient evidence.” Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998). “There is sufficient

evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.” Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

Pursuant to NRS 200.508(1), Burton must have willingly caused a child under 18 to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect, or to be placed in a situation where the child might suffer physical pain or mental suffering as the result of abuse or neglect. Burns and Sbardella testified that the children playing outside at the time of the gunfire ranged in age from four to fourteen. They also testified they saw Burton shooting a gun. From this evidence, a rational jury could conclude beyond a reasonable doubt that Burton willfully placed the children in a situation where they might suffer physical pain or mental suffering as the result of abuse or neglect.

Additionally, Burton argues that there was insufficient evidence to support his conviction because the witnesses gave inconsistent and contradictory testimony and the physical evidence did not support the testimony. Burton points out discrepancies between Burns’, Shafter’s, and Sbardella’s testimony, between their testimony and the physical evidence, and inconsistencies within their statements and testimony.

“It is well established in this state that it is the function of the jury to weigh the credibility of the identifying witness.” Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979). In this case, while there were inconsistencies in the testimony of the identifying witnesses, there was sufficient evidence for a rational trier of fact to find the essential elements of child abuse and neglect and battery with the use of a deadly weapon. As stated above, a rational trier of fact could have concluded

beyond a reasonable doubt that Burton had a gun and participated in the shooting at the apartment complex while there were children playing in the area. Burns and Sbardella both testified that they saw Burton shooting a gun, and Bello saw Burton with a gun. Accordingly, there was also sufficient evidence for a rational trier of fact to find that Burton hit Sbardella in the head with that same gun because Burns testified that was what she saw.

Third, Burton argues the pretrial identification was impermissibly suggestive because the background of his photograph was brighter than the other photographs and he was older than the other individuals in the photograph array.

“[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Simmons v. United States, 390 U.S. 377, 384 (1968). “Considering the totality of the circumstances, the test is whether ‘the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law.’” Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)) (alteration in original).

After a review of the photograph array in the record, we conclude that the district court did not err by admitting the eyewitness identifications of Burton. The facts indicate Sbardella, Shafter, and Burns had all seen Burton around the apartment complex before the incident. Bello had also seen Burton at the apartment complex and he knew Burton

was called Mike B. They all identified Burton as a participant in the shooting from the group of six photographs. Of this group, the background of Burton's photograph is somewhat lighter than the other photographs. In addition, Burton's argument that he was older than the other individuals pictured is without merit. All the men depicted appear to be in the same age range, with no person standing out as significantly older than the rest. Under these circumstances, this procedure was not "impermissibly suggestive." Simmons, 390 U.S. at 384. Moreover, each witness made independent, positive and unequivocal in court identifications of Burton at the preliminary hearing or at trial which were sufficient to render any possible error in the photographic identification procedure harmless. Frisaura v. State, 96 Nev. 13, 16, 604 P.2d 350, 352 (1980). We conclude that Burton's argument lacks merit.

Fourth, Burton contends that the deadly-weapon jury instruction was incorrect because it instructed the jury to find that the gun was a deadly weapon as a matter of law.

This court has held that "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

The district court's deadly weapon instruction read as follows:

A "deadly weapon" is any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon.

The district court's deadly weapon instruction is based on the definitions provided in NRS 193.165(6), Nevada's deadly weapon enhancement statute. Under NRS 193.165(6), deadly weapon means:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

In the present case, the district court instructed the jury that a gun is a deadly weapon. Contrary to Burton's argument, an instrument may be considered a deadly weapon under the inherently dangerous test (section (a)), the functionality test (section (b)), or as defined by statute (section (c)). A firearm is specifically described in NRS 202.265(5)(b) and "includes any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force." Thus, a firearm is a deadly weapon as defined by statute and the district court did not abuse its discretion in instructing the jury as such.

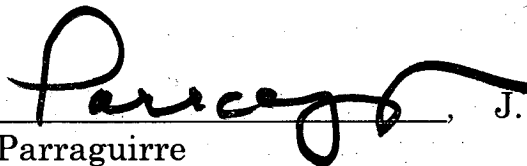
Fifth, Burton argues the deadly weapon jury instruction violated Apprendi v. New Jersey, 530 U.S. 466 (2000). We disagree.

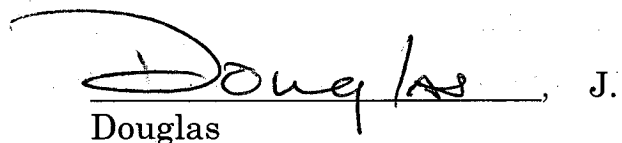
In Apprendi, the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved

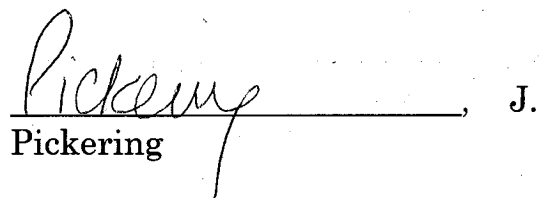
beyond a reasonable doubt. Id. at 490. “Thus, under Apprendi, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury.” Abrego v. State, 118 Nev. 54, 57, 38 P.3d 868, 869-70 (2002) (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

The jury was correctly instructed that a firearm was a deadly weapon under NRS 193.165(6) and 202.265(5)(b). Furthermore, the instruction did not remove from the jury’s consideration the factual issue of whether or not Burton had a gun that day and used it to hit Sbardella. Therefore, there was no Apprendi violation and Burton’s argument is without merit. Accordingly we,

ORDER the judgment of the district court AFFIRMED.


Parraguirre J.


Douglas J.


Pickering J.

cc: Hon. Valorie Vega, District Judge
Robert E. Glennen III
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Eighth District Court Clerk