IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR AMOS CRANDALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51751

FILED

APR 14 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from judgment of conviction for assault with a deadly weapon. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant raises nine arguments on appeal from a judgment convicting him of assault with a deadly weapon. We disagree with appellant on each argument and affirm the judgment of conviction.

First, appellant argues that the prosecutor's golden rule violation during closing argument warrants reversal. The record, however, shows that the district court judge interrupted the prosecutor during this argument and admonished him in the jury's presence. The prosecutor then discontinued this type of argument. In McGuire v. State, we remanded for a new trial where the prosecutor engaged in repeated misconduct, including continued golden rule violations after judicial admonishment. 100 Nev. 153, 156-59, 677 P.2d 1060, 1063-65 (1984). Given the fact that here, a single, interrupted violation occurred and the judge admonished the prosecutor in front of the jury, we conclude that the prosecutor's conduct in this case does not rise to a level that warrants reversal.

Second, appellant argues that the prosecutor failed to comply with the court's order to produce evidence supporting his race-neutral explanation for exercising a peremptory challenge against a prospective Native American juror. Here, however, the record shows that the prosecutor complied with the order by providing evidence that the prospective juror had a long criminal record. Thus, this argument lacks merit.

Third, appellant argues that the prosecutor erred by referring to appellant's status in custody. The prosecutor's reference, however, was to counter defense counsel's implication that the victim instituted divorce proceedings after the incident in order to obtain a divorce by default. Although the prosecution did not need to refer to appellant being in custody, defense counsel's line of questioning opened the door and begged the question of how the victim obtained the default divorce. Thus, we conclude that the prosecutor did not commit error.

Fourth, appellant argues that the district court erred by failing to instruct the jury on two lesser included offenses: drawing a deadly weapon in a threatening manner under NRS 202.320 and possession of a dangerous weapon under NRS 202.350(1)(a). We review a district court's decision in settling jury instructions for abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Here, the district court judge correctly stated that NRS 202.320 applies only when the accused draws the weapon in the presence of two or more persons. None of the evidence in this case suggests that the knife was drawn in front of anyone except the sole victim. Moreover, we agree with the district court's conclusion that possession of a dangerous weapon is not a lesser-included offense to assault with a deadly weapon. The

latter requires mere use rather than possession of the weapon. Furthermore, appellant's theory of defense that he found the knife in the victim's car does not support an instruction on possession. Therefore, we conclude that the district court did not abuse its discretion or commit judicial error in refusing appellant's requested instructions.

Fifth, appellant argues that the district court erred by accepting an improper sentence enhancement from the Department of Parole and Probation. This argument lacks all merit. Although the Department recommended a second consecutive sentence of 12 to 48 months as an enhancement, the record clearly shows that the prosecutor did not oppose defendant's motion in opposition to the enhancement and even helped the district court to understand the error. The district court acknowledged the error and removed the enhancement from consideration in sentencing. The single 24- to 60-month sentence imposed is well within the statutorily mandated 12-month minimum and 72-month maximum under NRS 200.471(2)(b). All of these sentencing proceedings, including the elimination of the proposed enhancement, occurred in the presence of appellant's counsel.

Sixth, appellant argues that the district court erred by preventing him from cross-examining the victim after she made her unsworn victim impact statement at the sentencing hearing. In Buschauer v. State, we held that due process requires cross-examination on victim impact statements when the victim refers to specific prior acts of defendant, but cross-examination is not required when the statement is limited to the facts of the crime, impact of the crime, and the need for restitution. 106 Nev. 890, 893-94, 804 P.2d 1046, 1048 (1990). Here, the victim testified about her feelings toward appellant, the impact of the

crime on her life, and her desire to see appellant receive the maximum sentence, as well as treatment for anger management and alcoholism. Although the victim also referred to appellant's excessive drinking throughout their relationship, these comments did not amount to specific prior bad acts. Therefore, an opportunity for cross-examination was not required.

Seventh, appellant argues that the district court erred by failing to allow appellant to maintain his innocence at allocution. However, in Echavarria v. State, we held that a defendant has no right to introduce unsworn, self-serving statements of his innocence at allocution because his guilt has already been determined. 108 Nev. 734, 744, 839 P.2d 589, 596 (1992). Thus, this argument has no merit.

Eighth, appellant argues that there was insufficient evidence to convict him for assault with a deadly weapon. A conviction is supported by sufficient evidence if "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." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Here, the victim testified that defendant pulled a knife on her and raised it in a threatening manner. The prosecutor offered several witnesses who testified that appellant ran after the victim yelling and threatening to kill the victim. These witnesses further testified that appellant repeatedly choked the victim and slammed her head into a car before he was subdued. Thus, we conclude that the prosecutor offered sufficient direct and circumstantial evidence to support the verdict.

Ninth, appellant argues that the statute defining assault with a deadly weapon is void for vagueness. "A statute is void for vagueness if

it fails to define the criminal offense with sufficient definiteness [so] that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement." Sherriff v. Burdg, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002). Assault with a deadly weapon occurs when the defendant uses a deadly weapon to intentionally place an individual in reasonable apprehension of immediate bodily harm. NRS 200.471(1)(a). We find nothing vague about this statute. We believe that an individual of ordinary intelligence recognizes that using a deadly weapon in a manner intended to unlawfully threaten bodily harm is a criminal offense. Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Richard Wagner, District Judge
Humboldt-Pershing County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk