

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY DANIEL DUFOUR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53633

FILED

DEC 09 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 entered pursuant to a jury verdict of one count of propelling a bodily fluid by an inmate in lawful custody. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Gregory Daniel Dufour to serve a prison term of 24 to 62 months.

Sufficiency of the Evidence

Dufour contends that there was insufficient evidence to support his conviction because the State failed to prove that the substance that he spat onto the correctional officer was in fact a human bodily fluid. However, our review of the record reveals sufficient evidence to establish Dufour's guilt beyond a reasonable doubt as determined by a rational trier of fact. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

In particular, we note that the jury was instructed "[a] bodily fluid is defined as a liquid that is produced by the human body," and "that saliva is a bodily fluid." Correctional Officer Rod Lightsey testified that when he arrived at Dufour's cell, Dufour was very vocal, speaking in a raised voice, and did not appear to have anything concealed in his mouth. Officer Lightsey placed Dufour in wrist and leg restraints and escorted

him to the back of the cell while Officer Rick Brown searched Dufour's belongings. Dufour spat, striking Officer Lightsey on the right side of his face. Officer Lightsey observed that spit stuck to his face and did not run off like water and that it looked like saliva when he wiped it off. Officer Brown testified that he had chewed tobacco for years, knew what spit looks like, and the substance that dripped down Officer Lightsey's cheek looked like spit. Neither correctional officer saw Dufour go near the sink during this period.

We conclude that a rational juror could infer from this evidence that the substance that Dufour spat onto the correctional officer was a human bodily fluid. See NRS 212.189(1)(d). It is for the jury to determine the weight and credibility to give conflicting testimony. And the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Adequacy of Instructions

Dufour also contends that the district court erred by refusing to instruct the jury that it had to determine whether the substance at issue was in fact a human bodily fluid. Dufour claims that his theory of the case was that he spit water he obtained from the sink onto Officer Lightsey and therefore did not propel a human bodily fluid. Dufour argues that the district court should have instructed the jury to determine whether the substance that he spit was indeed saliva. And Dufour

appears to argue that the district court erred in rejecting his proposed instruction on his theory of the case.¹

The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed. Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005). If requested, the district court must provide instructions on the significance of findings that are relative to the defense's theory of the case. Carter v. State, 121 Nev. 759, 767, 121 P.3d 592, 597 (2005); Crawford, 121 Nev. at 753-54, 121 P.3d at 588-89. "If [a] proposed [defense] instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court." Carter, 121 Nev. at 765, 121 P.3d at 596 (alterations in original) (quoting Honeycutt v. State, 118 Nev. 660, 677-78, 56 P.3d 362, 373-74 (2002) (Rose, J., dissenting)). The defense is not entitled to instructions that are "misleading, inaccurate or duplicitous." Id.; Crawford, 121 Nev. at 754, 121 P.3d at 589.

Here, the district court erred by not instructing the jury on the significance of findings relative to the defense's theory of the case. However, the substance of Dufour's proffered instruction was generally

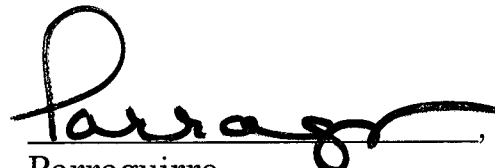
¹Dufour's proposed instruction stated,

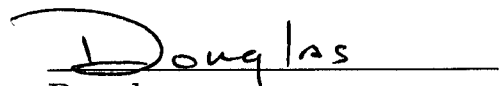
A bodily fluid is defined as a liquid that is produced by the human body. The mere fact, if established, that a substance was propelled from Mr. Dufour's mouth is insufficient to show that Mr. Dufour propelled a bodily fluid. If you have a reasonable doubt as to whether or not the substance that was propelled from Mr. Dufour's mouth was a bodily fluid, you must acquit Mr. Dufour of the charge of Propelling a Bodily Fluid by a Prisoner in Lawful Custody or Confinement.

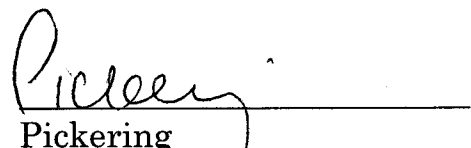
covered by other instructions and the evidence presented at trial overwhelmingly established that Dufour spat saliva onto the correctional officer. Under these circumstances, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless." Crawford, 121 Nev. at 756, 121 P.3d at 590.

Having considered Dufour's contentions and concluded that they are without merit or do not constitute reversible error, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

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