IN THE SUPREME COURT OF THE STATE OF NEVADA

EMORY LAMAR GARRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54572

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court granting in part appellant Emory Lamar Garry's post-conviction petition for a writ of habeas corpus that was filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Eighth Judicial District Court, Clark County; David B. Barker, Judge.

First, Garry contends that there was insufficient evidence to support his conviction for child abuse and neglect with the use of a deadly weapon because the State failed to prove that he willfully stabbed the victim. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Here, the jury was properly instructed on the definition of "willful." See Rice v. State, 113 Nev. 1300, 1306-07, 949 P.2d 262, 266 (1997), abrogated on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Evidence was presented that Garry, the six-year-old victim, her eight-year-old sister, and her mother were in the bedroom. Garry and the mother were arguing. Garry left the bedroom, returned with a knife, closed the bedroom door,

and resumed arguing with the mother. Garry tried to stab the mother but the knife struck the victim instead. Based on this evidence, we conclude that a rational juror could reasonably infer that Garry willfully caused a child to suffer unjustifiable physical pain or placed her in a situation where she might have suffered physical pain through neglect and with the use of a deadly weapon. See NRS 193.165(1), (6); NRS 200.508. 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. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Garry contends that the district court abused its discretion by admitting a witness's voluntary statement and her hearsay statements to a police officer into evidence. Following a bench conference, the district court overruled Garry's objection to having the witness's voluntary statement read into the record and published to the jury. Garry did not provide a record of the bench conference for our review, see Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), and therefore he has failed to overcome the presumption that the district court properly ruled on his objection, see State v. District Court, 100 Nev. 90, 102, 677 P.2d 1044, 1052 (1984). To the extent that the district court erred by admitting the evidence, see NRS 51.035; NRS 51.065, we conclude that the error was harmless because the victim had already testified that Garry was the person who stabbed her. See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (hearsay and Confrontation Clause errors are reviewed for harmless error).

Third, Garry contends that the district court abused its discretion by allowing a witness to testify that she called the police

because she was fearful that Garry would further harm the victim. Garry did not object to this testimony at trial and we conclude that it does not constitute plain error. See NRS 178.602; Browning v. State, 124 Nev. 517, 536, 188 P.3d 60, 74 (2008).

Fourth, Garry contends that the district court abused its discretion by allowing a police officer to testify as an expert regarding the nature of the victim's wound and that the officer's testimony was cumulative in nature because photographs of the wound were admitted into evidence. "A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong." Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999). The officer testified that he was trained to determine whether an injury requires medical attention and we conclude that the officer's testimony regarding the victim's wound fell within his lay experience and was properly admitted. See NRS 50.265; Meadow v. Civil Service Bd. of LVMPD, 105 Nev. 624, 625-26, 781 P.2d 772, 773 (1989). Further, the officer's testimony was not cumulative because the photographs were admitted without objection after the officer had testified.

Fifth, Garry contends that the district court abused its discretion by admitting two knives into evidence because their marginal probative value was outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Garry objected to admission of the knives, arguing that neither had been established as the weapon or possible weapon in the case and their admission would be more prejudicial than probative. The district court admitted the knives after determining the circumstances under which they were found went to the weight of the evidence and not to their admissibility. We conclude that

the district court did not abuse its discretion by admitting this evidence. See generally State v. Lewis, 50 Nev. 212, 230-31, 255 P. 1002, 1008 (1927).

Sixth, Garry contends that the district court erred by refusing to give his proposed theory of defense instruction. Garry's proposed instruction stated, "Where injury was accidental and not caused by the willful actions of the accused, the charge of battery with a deadly weapon should be dismissed." Because Garry's conviction for battery with a deadly weapon was dismissed, we conclude that this issue is moot and we decline to consider it on appeal.

Seventh, Garry contends that the prosecutor committed misconduct by misstating the burden of proof during closing argument and improperly expanding upon the definition of reasonable doubt during rebuttal argument. Garry did not object to the prosecutor's statements and we conclude that they do not constitute plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Having considered Garry's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. David B. Barker, District Judge
Bailus Cook & Kelesis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk