IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY LEE JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55970

FILED

APR 06 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of an unlawful act related to human excrement or bodily fluid. First Judicial District Court, Carson City; James E. Wilson, Judge.

First, appellant Johnny Lee Jones contends that insufficient evidence supports his conviction because no physical evidence was collected and correctional officers gave inconsistent testimony. We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

The parties stipulated that on the day of the incident Jones was a prisoner in the lawful custody of the Nevada Department of Corrections. The jury heard testimony from the victim, a correctional officer, that she was escorting Jones to a cell. Jones was upset because he had just been placed on suicide watch. Jones cursed at her and told her she was "going to pay for this." He cleared his throat and spit at the victim, hitting the side of her face. After Jones was placed in his cell, he yelled at the victim that she was lucky he had been in handcuffs because

he would have done more than spit in her face. A few years after the incident, Jones apologized to the victim "for spitting in her face." Another correctional officer, who had also been escorting Jones, testified that as they were walking, Jones turned his head and spat "a fairly substantial amount" on the victim's face. From this evidence a rational trier of fact could reasonably infer that Jones committed an unlawful act related to bodily fluid. See NRS 212.189(1)(d). It is for the finder of fact to determine the weight and credibility to give to conflicting testimony, and the 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, Jones contends that the district court erred by failing to conduct a hearing and make a judicial determination before a stun belt was placed on his body, and by failing to consider the appropriate factors once the hearing was held. We agree. See Hymon v. State, 121 Nev. 200, 209, 111 P.3d 1092, 1099-100 (2005). However, we also conclude that the error was harmless beyond a reasonable doubt because it does not appear from the record, and Jones does not allege, that the jury ever learned about the presence of the stun belt, and Jones' conviction is supported by substantial evidence of guilt. See id. at 210, 111 P.3d at 1099 (reviewing failure to conduct a hearing before application of a stun belt for harmless error); Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 477 (2008) (defining constitutional harmless error standard).

Third, Jones contends that the district court erred by denying his motion for substitution of counsel. The district court's denial of a motion for substitution of counsel is reviewed for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004).

This court considers three factors when reviewing the denial of a motion for substitution of counsel: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." Id. (internal quotation marks omitted). Here, Jones originally entered a plea of not guilty by reason of insanity with the assistance of his prior public defender. On the first day of trial, Jones's new public defender changed Jones's plea to not guilty despite Jones's wish to present an insanity defense. Because the final authority to assert a defense of insanity rested with Jones and not his counsel, see Johnson v. State, 117 Nev. 153, 161-63, 17 P.3d 1008, 1014-15 (2001); see also Faretta v. California, 422 U.S. 806, 819-820 (1975), counsel's refusal to present the defense presented a clear and irreconcilable conflict, cf. Johnson, 117 Nev. at 163, 17 P.3d at 1015 ("The forced imposition of the insanity defense over the express objections of the defendant is structural error requiring reversal."). The district court conducted an inquiry into counsel's reasons for refusing to present the defense but made no effort to determine whether counsel had an obligation to abide by Jones' desire to pursue an insanity defense. As to the third factor, we are unable to determine from the record whether Jones' motion, made on the first day of trial, was timely under the circumstances.[1] Balancing these factors, we conclude that the district

[1]The district court held a hearing after trial concluded to review its denial of Jones' motion. There, Jones indicated that he only learned of his counsel's refusal to present the insanity defense on the morning trial began. Trial counsel, however, testified that he first told Jones he would not be pursuing the defense over a month before the start of trial. The district court did not make any factual finding regarding these conflicting assertions.

court abused its discretion by denying Jones' motion,[2] and the error requires reversal. See Young, 120 Nev. at 972, 102 P.3d at 578. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. James E. Wilson, District Judge
Kay Ellen Armstrong
State Public Defender/Carson City
Attorney General/Carson City
Carson City Clerk

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[2]Because we reverse the judgment of conviction on this ground we do not address Jones' contention that the district court erred by denying his motion for a continuance.

[3]We note that the fast track statement does not comply with the Nevada Rules of Appellate Procedure because it does not contain citations to the page numbers of the appendix that support each assertion. See NRAP 3C(e)(1)(C). Counsel for Jones is cautioned that future failure to comply with the briefing requirements may result in the imposition of sanctions. See NRAP 3C(n).