IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN CASTRO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56763

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of first-degree kidnapping with the use of a deadly weapon, two counts of robbery with the use of a deadly weapon, three counts of sexual assault with the use of a deadly weapon, two counts of battery with intent to commit sexual assault with the use of a deadly weapon, four counts of battery with the use of a deadly weapon, four counts of open or gross lewdness with the use of a deadly weapon, and one count each of conspiracy to commit robbery, burglary while in possession of a deadly weapon, conspiracy to commit sexual assault, and attempted sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Martin Castro, along with Courtney Collins, entered a house in which two females, C.B. and J.T., and two males, N.M. and D.W., were present. Castro and Collins had shotguns, and threatened the four victims. The victims testified that Castro forced them to the ground, stole property from D.W. and J.T., groped C.B. and J.T., and penetrated C.B.'s and J.T.'s vaginas digitally and with shotguns.

A struggle ensued when the victims fought against Castro and Collins, and during the fighting, Castro was shot. He was hospitalized in

the Intensive Care Unit (ICU) of the University Medical Center. Castro gave a statement to police while in custody there.

Castro now appeals, arguing that (1) the district court erred by admitting Castro's statement that he made while in the ICU because he did not voluntarily waive his Fifth Amendment rights; (2) the district court abused its discretion by declining the motion for a new jury venire because a prospective juror's statement prejudiced the jury; (3) the district court erred by denying the motion to dismiss the battery and lewdness convictions because the battery, sexual assault and lewdness convictions are redundant and violate double jeopardy; (4) the district court erred by refusing to dismiss the first-degree kidnapping charges and there was insufficient evidence to support the conviction; (5) the district court erred by allowing improper and irrelevant testimony; (6) the district court abused its discretion in providing improper instructions to the jury and rejecting Castro's proposed instructions; and (7) the district court erred by denying the motion to dismiss or impose the least severe sentence for the conviction of battery with intent to commit sexual assault with the use of a deadly weapon.[1] For the reasons set forth below, we affirm. Because the

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[1]Castro also argues that there was insufficient evidence to support the convictions of sexual assault with the use of a deadly weapon, attempted sexual assault with the use of a deadly weapon, and conspiracy to commit sexual assault. When considering a sufficiency of the evidence challenge, we determine "'whether, after viewing the evidence in the light most favorable to the prosecution, 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) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The State presented the testimony of all four victims and Castro's statement. This was enough evidence to

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parties are familiar with the facts and procedural history of this case, we do not recount them further except as is necessary for our disposition.

The district court did not err in admitting the statement Castro made while in the ICU

Before giving a statement to the police, Castro waived his Fifth Amendment rights. He argues that this waiver was not voluntary and therefore, the district court erred in admitting the statement over Castro's objection. We disagree.

A district court's voluntariness determination presents mixed questions of law and fact subject to de novo review. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (citing United States v. Pinion, 800 F.2d 976, 980 (9th Cir. 1986)). In determining voluntariness, this court considers "'[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.'" Alward

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. . . continued

allow a rational juror to convict Castro on a theory of direct commission or as a co-conspirator.

Castro further argues that the cumulative error warrants reversal. As we conclude that there was no error, there can be no cumulative error warranting reversal.

v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996) (quoting Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987)).

Castro received oxycodone and morphine prior to the interview. This court noted that "mere intoxication will not preclude the admission of a defendant's statements unless it is shown that the intoxication was so severe as to prevent the defendant from understanding his statements or his rights." Falcon v. State, 110 Nev. 530, 534, 874 P.2d 772, 775 (1994) (citing Stewart v. State, 92 Nev. 168, 170-71, 547 P.2d 320, 321 (1976)). Although Castro received the two drugs prior to the interview, the testimony at hearing on the motion to suppress Castro's statement demonstrated that Castro understood what was occurring. Further, Castro was able to correct the police detective when he misspelled Castro's name during the interview.

Castro argues that the small size of the hospital room, approximately ten feet by ten feet, created a coercive environment. However, the door to the room was open during the interview, and other courts have found that a similarly-sized room is not coercive. See U.S. v. D'Antoni, 856 F.2d 975, 981 (7th Cir. 1988) (finding a standard interview room of eight feet by twelve feet not coercive). Furthermore, the interrogation only lasted approximately one hour. In Alward, this court held that a defendant made a voluntary statement after an interrogation that lasted four to five hours. 112 Nev. at 146, 156, 912 P.2d at 247, 253.

Thus, the facts demonstrate that the detectives did not use coercive tactics and that Castro voluntarily waived his Fifth Amendment rights.

The district court did not err in denying the motion for a new jury venire

Castro contends that a prospective juror's statements in front of the jury panel prejudiced the entire jury panel and the district court should have granted the motion for a new jury venire. We disagree.

A prospective juror stated in front of the entire prospective jury panel that she "may or may not know [Castro] . . . through [her] employment." That prospective juror later mentioned that she worked at the Clark County Detention Center's law library. It is unlikely that the prospective jury members were able to connect that prospective juror's statements, as another juror spoke and the judge asked other questions between the prospective juror's first statement and second statement. Furthermore, the evidence of Castro's arrest, confession and the types of crimes charged would independently cause the jury to learn of Castro's incarceration. See, e.g., McDonald v. State, 881 So.2d 895, 903 (Miss. Ct. App. 2004) (finding that no error occurred where a prospective juror mentioned the defendant was incarcerated because it was obvious that the defendant had been arrested and would have been incarcerated at some point). Finally, the district court properly instructed the jury on the presumption of innocence. Thus, the district court did not err in denying Castro's motion for a new jury venire.

The charges are not redundant

Castro argues that counts 14 and 15 are redundant to counts 11 and 17, and that count 11 is redundant to counts 22 and 23. Castro

also contends that these counts violate the Double Jeopardy clause. We disagree.[2]

"This court utilizes the test set forth in Blockburger v. United States to determine whether multiple convictions" violate the Double Jeopardy clause. Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (citation omitted). Castro, however, does not argue the charges violate the Double Jeopardy clause, as he does not provide a Blockburger analysis; rather, he makes a redundancy argument. "While often discussed along with double jeopardy, a claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct." Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). When determining whether convictions are redundant "[t]he question is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant." State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000). "The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions." Id. at 136, 994 P.2d at 698.

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[2]We also note that count 16 is not redundant to counts 14 and 15, counts 14 and 15 are not redundant to counts 10, 12, and 13, and counts 20 and 21 are not redundant to counts 10, 12, and 13, as the counts relate to different victims.

Count 14 (battery with intent to commit sexual assault with use of a deadly weapon) and count 17 (battery with use of a deadly weapon) are not redundant, as count 14 involves spreading C.B.'s legs with a shotgun and count 17 involves hitting C.B.'s head with a shotgun. Similarly, count 15 (battery with intent to commit sexual assault with use of a deadly weapon) and count 17 are not redundant, as count 15 involves holding a shotgun to C.B.'s head or body with intent to commit sexual assault and count 17 involves hitting C.B.'s head with a shotgun.

Count 11 (attempted sexual assault with use of a deadly weapon) and counts 14 and 15 are not redundant. Count 11 involves the attempted digital penetration of C.B.'s vagina, and counts 14 and 15 involve spreading C.B.'s legs with a shotgun and holding the gun to C.B.'s head or back. Count 11 is also not redundant to counts 20 and 21 (each charging open or gross lewdness with use of a deadly weapon) as count 11 involves attempting to digitally penetrate C.B.'s vagina and counts 20 and 21 involve touching C.B.'s breasts and buttocks.

Counts 22 and 23 (each charging open or gross lewdness with use of a deadly weapon) are not redundant to counts 10, 12, and 13 (each charging sexual assault with use of a deadly weapon), as counts 22 and 23 involve touching J.T.'s breasts and buttocks, and counts 10, 12, and 13 involve either Castro or Collins penetrating J.T.'s vagina, digitally or with a shotgun.

We therefore conclude that because Castro's multiple convictions do not punish the same illegal conduct, the charges are not redundant.

The district court did not err in denying Castro's motion to dismiss the first-degree kidnapping charges and sufficient evidence supports the conviction

Castro contends that the district court erred in denying his motion to dismiss the first-degree kidnapping charges as incidental to the robbery and sexual assault charges, and that there is insufficient evidence to support the kidnapping conviction. We disagree.

The first-degree kidnapping charges are not incidental to the robbery and sexual assault charges

Although Castro is correct that he did not move the victims, and thus, the Mendoza factors that involve movement are inapplicable, Castro and Collins did restrain the victims.[3] Under the fourth and fifth Mendoza factors, we will sustain convictions for both robbery and kidnapping if the victims were restrained and such restraint substantially increased the risk of harm to the victims, or the restraint had an independent purpose or significance. Mendoza, 122 Nev. at 275, 130 P.3d at 181.

Castro and Collins repeatedly struck the victims with the shotguns and held the shotguns to the victims' backs during the course of

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[3]In Mendoza v. State, we held that to sustain convictions for both robbery and kidnapping arising from the same course of conduct (1) any movement of the victim cannot be incidental to the robbery, (2) any incidental movement of the victim must substantially increase the risk of harm to the victim over and above that necessarily present in the robbery, (3) any incidental movement of the victim must substantially exceed that required to complete the robbery, (4) the victim must be physically restrained and such restraint substantially increases the risk of harm to the victim, or (5) the movement or restraint has an independent purpose or significance. 122 Nev. 267, 275-76, 130 P.3d 176, 181 (2006) (emphasis added).

the robbery in order to restrain the victims. Castro and Collins struck the victims when they raised their heads, cried, talked, or looked up. While hitting the victims with the shotguns, the shotguns could have discharged, severely injuring or killing the victims. Further, striking the victims itself could have caused severe injury. This conduct substantially increased the risk of harm to the victims. Castro and Collins also did not need to strike the victims in order to commit the robbery and sexual assault.

Because hitting the victims with the shotguns substantially increased the risk of harm, the kidnapping charges are not incidental to the robbery and sexual assault charges. Thus, the district court did not err in denying Castro's motion to dismiss the first-degree kidnapping charges.

Sufficient evidence supports the conviction

The standard that this court uses to review sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, 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) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The testimony at trial established that Castro's and Collins's actions physically restrained the victims and that the risk of harm to the victims was more than was required to complete the robbery and sexual assault. Thus, sufficient evidence supports the first-degree kidnapping convictions.

The district court did not err in allowing the testimony of the sexual assault nurse

Castro argues that the district court abused its discretion by allowing the testimony of the sexual assault nurse regarding the frequency of sexual assault cases where the victim sustains no genital

trauma.[4] Castro contends that the nurse is not a qualified expert and her testimony is irrelevant. We disagree.

This court reviews the admission of expert testimony for an abuse of discretion. Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 659 (2010). To testify as an expert witness, the witness "must be qualified in an area of 'scientific, technical or other specialized knowledge.'" Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275). Factors this court considers in determining whether a person is properly qualified include "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." Id. at 499, 189 P.3d at 650-51 (citations omitted).

The sexual assault nurse has conducted approximately 4,000 sexual assault examinations, has completed training, and has been recognized by the district court as an expert in previous cases. Furthermore, the nurse is a college graduate and has been a nurse for 46 years. Thus, the district court did not abuse its discretion in finding that the nurse was qualified to speak on the matter.

"An expert's testimony will assist the trier of fact only when it is relevant." Id. at 500, 189 P.3d at 651. Relevant testimony is evidence "having any tendency to make the existence of any fact [in issue] . . . more

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[4]Castro also contends that the district court erred in allowing part of the police detective's testimony. However, the district court sustained Castro's objection to part of that detective's testimony and instructed the jury to disregard the question and answer. Thus, Castro's argument lacks merit. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (noting that there is a presumption that "juries follow district court orders and instructions").

or less probable than it would be without the evidence." NRS 48.015. The testimony of the sexual assault nurse helped the fact finder understand why C.B. and J.T. sustained no genital trauma, although they allege Castro sexually assaulted them. Thus, the nurse's testimony was relevant, and therefore, the district court did not abuse its discretion in admitting the testimony.

The district court acted within its discretion in giving jury instructions

Castro contends that the district court abused its discretion in giving jury instructions 5, 9, 11, 15, and 30, and in rejecting proposed instructions 3, 8, 9, 22-26, 28, and 36-39.[5] We disagree.

"The 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).

Jury Instruction 5

Castro contends that the district court abused its discretion by refusing to substitute "unless" for "until" in jury instruction 5. In Blake v. State, this court allowed the use of "until" in a jury instruction, holding

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[5]Castro also contends that the district court abused its discretion in providing instruction 29 to the jury as it contained an unwarranted assumption regarding the veracity of the complaining witness. Castro objected to this instruction in district court but failed to state the grounds and reasons for the objection. "[F]ailure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n.28, 138 P.3d 477, 485 n.28 (2006) (citing Merica v. State, 87 Nev. 457, 462, 488 P.2d 1161, 1164 (1971)). Thus, we will not review Castro's challenge to instruction 29.

that when "read as a whole," the instruction does not imply that the State will eventually prove guilt. 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Jury instruction 5, read as a whole, properly outlined the State's burden. Thus, the district court did not abuse its discretion in giving jury instruction 5.

Jury Instruction 9

Castro claims that the district court abused its discretion in rejecting his changes to jury instruction 9, as his changes would have clarified the State's burden. The district court modified jury instruction 9 to add, "[i]f the State fails to prove" at Castro's request. This change properly places the burden on the State. Thus, the district court acted within its discretion regarding jury instruction 9.

Jury Instruction 11

Castro argues that the last line of jury instruction 11 creates the possibility that the jury could find Castro liable for open and gross lewdness, even though he did not conspire to commit that offense. The jury found Castro guilty of conspiracy to commit sexual assault. Open and gross lewdness is a reasonably foreseeable further crime. Furthermore, there was sufficient evidence to convict Castro of open and gross lewdness on a theory of direct commission of the offense. Thus, the district court acted within its discretion regarding jury instruction 11.

Jury Instruction 15

Castro also argues that the district court abused its discretion by not including the last paragraph of one of Castro's proposed jury instructions in jury instruction 15. The paragraph from Castro's proposed jury instruction states, "[i]f the State does not prove beyond a reasonable doubt that a [d]efendant either [d]irectly and actively committed the act

constituting the offense or who knowingly and with the criminal intent aided and abetted in its commission, then the [d]efendant is entitled to a not guilty verdict." This paragraph repeats jury instruction 15's language. Thus, the district court acted within its discretion in rejecting Castro's proposed additional paragraph to jury instruction 15.

Jury Instruction 30

Castro contends that jury instruction 30 was vague. Instruction 30 stated:

> Open and Gross Lewdness is defined as any indecent, obscene or vulgar act of a sexual nature that:
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> > (1) is intentionally committed in a public place, even if the act is not observed; or
> >
> > (2) is committed in a private place, but in an open manner, as opposed to a secret manner, and with the intent to be offensive to the observer.
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> Open and Gross Lewdness is a general intent crime.

In Berry v. State, this court held that a jury instruction similar to jury instruction 30 was not vague. 125 Nev. 265, 283, 212 P.3d 1085, 1097-98 (2009), abrogated on other grounds by State v. Castaneda, 126 Nev. ___, ___, 245 P.3d 550, 553 (2010). In Berry, the jury instruction stated that open lewdness means "'acts which are committed in a private place, but which are nevertheless committed in an "open" as opposed to a "secret" manner.'" Id. at 283, 212 P.3d at 1097. Furthermore, the jury instruction defined gross as "'being indecent, obscene or vulgar'" and lewdness as "'any act of a sexual nature which the actor knows is likely to be observed by the victim who would be affronted by the act.'" Id. Jury instruction 30 is

nearly the same as the instruction that this court held was not vague in Berry. See id. Thus, jury instruction 30 was not vague.

Proposed Jury Instruction 3

Castro argues that the district court abused its discretion by rejecting proposed jury instruction 3 regarding two reasonable interpretations. In Bails v. State, this court held that "it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt." 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976). Here, the jury received instructions about reasonable doubt. Furthermore, the two-reasonable-interpretations instruction is not required even when all the evidence is circumstantial in character, id., and the evidence here was direct. During the jury trial, the State offered the testimony of the four victims and Castro's statement on his actions. Thus, the district court did not abuse its discretion in denying Castro's proposed instruction regarding two reasonable interpretations.

Proposed Jury Instructions 8, 9, 22-26 and 36-39

Castro contends that his proposed jury instructions accurately articulate the law and clarify the State's burden. Castro also argues that the jury instructions were not as specific as his proposed jury instructions 25-26 and 36-39.

"[T]he defense has the right to have the jury instructed on its theory of the case . . . no matter how weak or incredible that evidence may be." Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991). Furthermore, "[a] positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction." Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987). "However, the district court may refuse a jury instruction on the

defendant's theory of the case which is substantially covered by other instructions." Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

Proposed jury instructions 8, 9, 22, 23, 25-26, 28 and 36-39 cover the same information as jury instructions 9-13, 15, 16, 25-26, 30, 33, 34, 37-40. Furthermore, Castro fails to demonstrate how the proposed jury instructions support his "theory" or "position." Besides the negative wording, the only difference in Castro's proposed jury instructions was that each stated the State's burden of proof. However, several other jury instructions emphasize the State's burden. Thus, the district court did not abuse its discretion in rejecting Castro's proposed jury instructions.

The district court did not err in denying Castro's motion to dismiss or impose the least severe sentence for the convictions of battery with intent to commit sexual assault with use of a deadly weapon

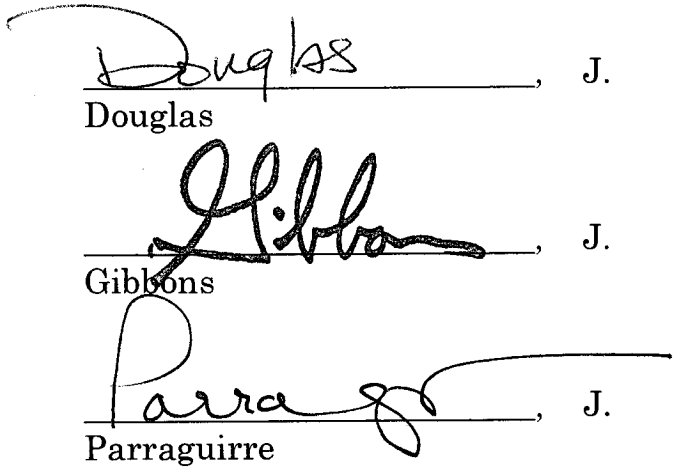
Castro argues that the district court erred in denying the motion to dismiss or impose the least severe sentence for the convictions of battery with intent to commit sexual assault with use of a deadly weapon because NRS 200.400(4)(b) is ambiguous. We disagree.

"Statutory interpretation is a question of law subject to de novo review." State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). This court attributes plain meaning to a statute that is not ambiguous. Id. "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." Id.

NRS 200.400(4)(b) provides a range in which the judge can sentence a defendant. The range is from a minimum of two years to a maximum of a life sentence with the possibility of parole. NRS 200.400(4)(b). Furthermore, NRS 176.033(1)(b) provides that "[i]f sentencing a person who has been found guilty of a felony, sentence the person to a minimum term and a maximum term of imprisonment, unless

a definite term of imprisonment is required by statute." Both the statutes are clear that a judge can sentence a defendant within the range prescribed in NRS 200.400(4)(b). Because the sentencing options are clear from a plain reading of the statute, the statute is unambiguous. Thus, the district court did not err in denying Castro's motion to dismiss or impose the least severe sentence for the convictions of battery with intent to commit sexual assault with use of a deadly weapon. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Jennifer P. Togliatti, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk