IN THE SUPREME COURT OF THE STATE OF NEVADA

WILSON OLSON PETERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57168

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with the use of a deadly weapon and one count of assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

A jury convicted appellant Wilson Peters of battery and assault, both with the use of a deadly weapon, for which the district court imposed two concurrent sentences of ten years to life pursuant to the large habitual criminal statute.

On appeal, Peters raises eleven arguments: (1) Do the convictions for assault and battery violate double jeopardy and/or the Nevada redundancy doctrine? (2) Did reference to the complaining witness as the "victim" violate appellant's due process rights? (3) Did the district court abuse its discretion by admitting bad act evidence? (4) Did the district court abuse its discretion by admitting hearsay evidence? (5) Did the district court give improper or misleading jury instructions? (6) Did the district court fail to make specific findings regarding prior convictions used to adjudicate appellant a habitual criminal? (7) Should the district court have submitted the habitual criminal allegation to the jury? (8) Did the district court abuse its discretion in adjudging Peters to

be a habitual criminal? (9) Do the sentences in this case constitute cruel and unusual punishment? (10) Did the State present sufficient evidence to support the jury's verdict? (11) Does cumulative error warrant reversal of the judgment of conviction? We reject Peters's arguments and affirm.

Relevant Facts

The convictions underlying this appeal grow out of a fight between Peters, and Stewart Gibson at a neighborhood barbecue. The fight started when Gibson refused to give Peters a cigarette, then escalated after Peters left briefly and returned brandishing a steak knife. Gibson called 911. When Peters realized that Gibson had summoned the police, he attacked Gibson with the knife. Peters stabbed at Gibson's body several times and cut Gibson in the forearm and hip. Gibson escaped to a neighbor's home and Peters left.

The police arrived minutes later. While the police were taking statements, Peters returned to the apartment complex. Because Peters matched Gibson's description of his assailant, police officers questioned Peters and conducted a one-on-one identification. After Gibson positively identified Peters, police placed Peters in custody and moved him toward a patrol vehicle. Along the way, Peters struggled with the officers and attempted to escape. Peters also screamed various things, including a threat "when I get out, Stewart, I'm going to kill you."

Double jeopardy and redundancy

Peters argues that his convictions for battery and assault violate double jeopardy and are redundant because they are based on the same conduct. We disagree.

The Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same offense. U.S. Const. amend. V; Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). Nevada

utilizes the test set forth in Blockburger v. United States, 284 U.S. 299 (1932), to determine the constitutionality of multiple convictions for the same act or transaction. Salazar, 119 Nev. at 227, 70 P.3d at 751. Under the Blockburger test, "'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.'" Id. (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002)).

Nevada's redundancy doctrine addresses the situation where "'a defendant is convicted of [multiple] offenses that, as charged, punish the exact same illegal act.'" Salazar, 119 Nev. at 227-28, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)). In determining if two convictions are redundant, this court considers "whether the material or significant part of each charge is the same even if the offenses are not the same." Id.

NRS 200.481 provides that a person commits the crime of battery by using willful and unlawful force or violence upon the person of another. By comparison, assault, as defined by NRS 200.471, is the unlawful attempt to use physical force against another person or an action that intentionally places another person in reasonable apprehension of immediate bodily harm. Because assault and battery require different elements and seek to punish different harms, convictions for both crimes do not violate the Double Jeopardy Clause. See State v. Carter, 79 Nev. 146, 149 n.3, 379 P.2d 945, 947 n.3 (1963) (". . . the charge of assault with a deadly weapon does not necessarily include a battery . . .").

Similarly, assault and battery are not redundant. The gravamen of assault is inducing fear or apprehension of bodily harm,

while the gravamen of battery is causing actual bodily contact through force or violence. Even if the same course of conduct is the basis for both convictions, this does not make the convictions redundant. Salazar, 119 Nev. at 227, 70 P.3d at 751. Here, the State charged Peters with battery for the three times that he actually stabbed Gibson, whereas the assault charge was based on the one or two times that Peters swung at Gibson but did not make bodily contact. Although both actions occurred during the same attack, Peters engaged in two separate illegal acts. Thus, his convictions are not redundant.

Use of the word "victim"

Peters next complains that the district court improperly denied his motion in limine to prevent the State from using the term "victim." He argues that the word "victim" implies that Peters perpetrated the charged crimes and unconstitutionally lightens the State's burden of proof. He also argues that the State improperly injected its personal beliefs into the case by referring to Gibson as a victim.

This court reviews a district court's ruling on a motion in limine for an abuse of discretion, Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005), and we find none in this instance. NRS 217.070 defines a victim as someone who is "physically injured or killed as the direct result of a criminal act." In this case, Gibson sustained lacerations; to that extent, he was a victim. Even accepting the criminal connotation Peters attaches to "victim," the word does not imply that Peters committed the crime or explain how the injury occurred. Moreover, the district court properly issued presumption-of-innocence instructions so that the State's burden was well established. Therefore, the district court did not abuse its discretion in denying Peters's motion.

Bad acts

Peters contends that testimony about his combativeness with the police, efforts to escape custody, and refusal to provide his name amounted to impermissible bad act evidence that should have been excluded.[1] This evidence was not used to prove character, as prohibited by NRS 48.045(2), but to show consciousness of guilt and absence of mistake. Because Peters did not properly object below, plain error review obtains, see Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, ___ n.12, 263 P.3d 235, 253 n.12 (2011), McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998), and none occurred here.

Hearsay

Next, Peters claims that the trial court abused its discretion when it overruled his hearsay objection to witness Joe Brown's testimony that he told police that Gibson told him "[Peters] stabbed me." See NRS 51.035; Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (a district court's decision to admit or exclude evidence is reviewed for abuse of discretion). The district court did not abuse its discretion because two hearsay exceptions applied. First, the statement was admissible under NRS 51.125 because it was a past recollection recorded that Brown used to refresh his memory. Specifically, when Mr. Brown was unable to remember the full content of his voluntary statement to the police the

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[1]Peters also argues that Gibson improperly testified about death threats Peters made. The district court properly admonished Gibson and instructed the jurors to disregard the testimony. Jurors are presumed to follow the court's instructions, McConnell v. State, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004), and the testimony was an isolated occurrence. We therefore reject Peters's argument that this constitutes a basis for reversal in this case.

district court allowed the State to read Mr. Brown's statement and admit it as a past recollection recorded. Second, the statement qualified as an excited utterance that Gibson made in the moments after a startling physical attack. Thus, the district court did not abuse its discretion in allowing the testimony under NRS 51.095.

Jury instructions

"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).

Peters challenges the district court's failure to give numerous instructions that he proposed: (1) negatively worded assault with a deadly weapon and battery with a deadly weapon instructions, (2) breach of the peace, (3) two reasonable interpretations, (4) reverse flight, (5) presumption of innocence, and (6) substantial bodily harm. We conclude that the district court did not abuse its discretion in failing to give these instructions.

First, Peters contends that the district court abused its discretion by failing to provide the jury with negatively worded instructions on assault with the use of a deadly weapon and battery with the use of a deadly weapon. Although Peters's proposed instructions correctly stated the law, the same legal principles were "fully, accurately, and expressly stated in the other instructions." Crawford, 121 Nev. at 754, 121 P.3d at 589. Thus, refusal to give the requested instructions did not amount to an abuse of discretion. See id. at 748, 121 P.3d at 585.

Second, Peters argues that the district court abused its discretion by refusing to instruct the jury on the lesser-related offense of breach of the peace. Defendants in Nevada are not entitled to jury instructions on lesser-related, as distinguished from lesser-included, offenses. Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Thus, the district court was not obligated to give the requested instruction.

Third, Peters argues that the district court abused its discretion by rejecting a proposed jury instruction regarding "two reasonable interpretations" of the evidence. In Bails v. State, this court held that "it is not error to refuse to give the [two reasonable interpretations] instruction if the jury is properly instructed regarding reasonable doubt." 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976). Here, the jury received proper instructions about reasonable doubt, and thus, the district court acted within its discretion in denying Peters's proposed instruction.

Fourth, Peters claims that he was entitled to a reverse flight instruction because the instruction supported his theory of the case, namely, that his return to the barbeque showed a refusal to flee and implied his innocence. Although the defense may request instructions to support its theory of the case, the district court did not abuse its discretion because Peters was already cloaked with a presumption of innocence and the district court informed the jurors of the State's burden of proof.

Fifth, Peters claims the district court erroneously issued a jury instruction that read "[t]he defendant is presumed innocent until the contrary is proved" instead of an instruction that read "the defendant is

presumed innocent unless the contrary is proved." Peters continues that the instruction undermined the State's burden of proof because the word "until" implies it was inevitable that he would be convicted. We disagree. This court approved this exact jury instruction in Blake v. State, because the language mirrored NRS 175.211. 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Here, as in Blake, the district court's jury instruction complied with Nevada law.

Sixth, Peters claims that the district court abused its discretion in denying his proposed instruction defining substantial bodily harm because the definition was critical to the jury's determination of whether the steak knife constituted a deadly weapon. This argument lacks merit because a defendant is not entitled to instructions that are misleading, inaccurate or duplicative. Crawford 121 Nev. at 754, 121 P.3d at 589. Here, the State did not have to prove substantial bodily harm and the district court appropriately instructed the jury on the deadly weapon enhancement. Thus, the district court did not abuse its discretion in denying the requested instruction.

Habitual criminal statute

Peters argues that the district court violated his constitutional rights by adjudicating him a habitual criminal. He alleges several different errors.

First, Peters argues that the district court erred by adjudicating him a habitual criminal without making specific findings. We require "a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal." Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000); see also Clark v.

State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993); NRS 207.010(2). There is no requirement, however, that the district court "utter specific phrases or make 'particularized findings' that it is 'just and proper' to adjudicate a defendant as a habitual criminal." Hughes, 116 Nev. at 333, 996 P.2d at 893; see also O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007). Because the record indicates that the district court properly heard oral arguments and exercised its discretion in adjudicating Peters a habitual criminal, this claim lacks merit. See Hughes, 116 Nev. at 333, 996 P.2d at 893-94.

Second, Peters claims that the district court did not assess his previous convictions properly. He reasons that the court should not have considered the three felonies that were more than 20 years old. He also claims that the convictions for home invasion and intimidating a witness involved a single victim and should only count as one prior conviction. Finally, he argues that failure to register as a sex offender should not count because it is a non-violent offense. See Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990) (holding that stale, non-violent priors should not be used for habitual criminal enhancement).

These arguments fail. The age of the convictions does not eliminate them from potential consideration; rather, the statute leaves the matter to the district court's discretion. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992); see also NRS 207.010(1)(a) & (b). And a defendant does not get a "free" felony because he victimized the same person more than once.

Peters's third argument—that the habitual criminal finding is a sentence enhancement that must be made by a jury—also fails. A habitual criminal determination is only an adjudication of status, not

guilt, and so the right to a jury trial does not attach. See Parkerson v. State, 100 Nev. 222, 224, 678 P.2d 1155, 1156 (1984). Moreover, in Apprendi v. New Jersey, 530 U.S. 466, 481-82 (2000), on which Peters bases this argument, the Supreme Court explicitly held that the right to a jury does not extend to habitual criminal adjudications. Thus, the district court could adjudicate Peters a habitual criminal without an antecedent jury finding.

Fourth, Peters insists that his sentences amount to cruel and unusual punishment. This court will not disturb a sentence on appeal absent an abuse of discretion. Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). And in Nevada no abuse of judicial discretion occurs when a sentence falls within statutory guidelines and the district court did not rely on impalpable or suspect evidence in imposing it. Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Peters was sentenced under NRS 207.010, which explicitly authorizes a sentence of life with parole after ten years where a felon has been convicted of at least three prior felony convictions. Here, the district court did not abuse its discretion because it based its sentence on certified judgments of conviction that showed Peters perpetrated several crimes, including five felonies, over the course of 29 years.

Sufficiency of the evidence

In reviewing the sufficiency of the evidence, we must decide "'whether, 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.'" Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)).

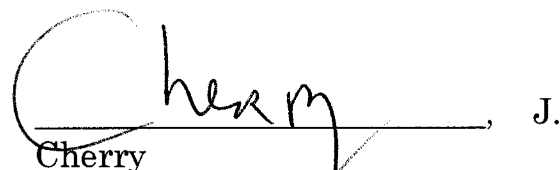
Peters insists that the State failed to present sufficient evidence to sustain his convictions but does not elaborate, other than briefly stating that the State's case hinged on the testimony of a combative complainant who was inebriated when the attack occurred. Peters's credibility argument is not persuasive because it is for the jury to assess the witnesses' credibility and determine the weight to give their testimony. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The State presented testimony from Gibson, as well as others who witnessed the attack, and the police officers who described Gibson's wounds. The record contains sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.

Cumulative error

Finally, Peters contends that the effect of cumulative error warrants reversal of his conviction. This claim fails, as we find no error on the part of the district court, much less cumulative error.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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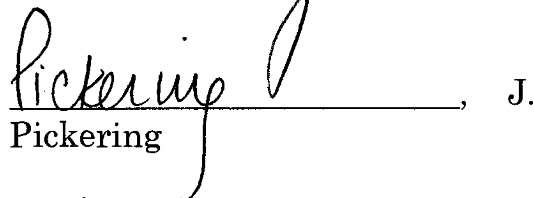

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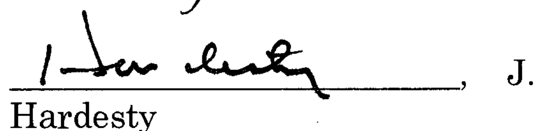

_______________, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk