IN THE SUPREME COURT OF THE STATE OF NEVADA

WHITNEY WHISMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57246

FILED

OCT 01 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 battery on a health care provider. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In 2009, officers from the Las Vegas Metropolitan Police Department responded to a 911 call placed by appellant Whitney Whisman's mother, who reported that Whisman had a gun and was threatening to commit suicide. Police took Whisman into custody and turned her over for a "Legal 2000" involuntary commitment[1] at Centennial Hills Hospital. Shortly after her arrival, a struggle ensued between Whisman and hospital personnel. When Rachel Thomason, the hospital charge nurse, and other personnel attempted to secure Whisman's legs, Whisman kicked Thomason in the face. At trial, Whisman claimed that

[1]A Legal 2000 involuntary commitment is a procedure whereby mentally ill persons who appear to be a threat to themselves or others may be involuntarily committed at a health care facility for up to 72 hours. The term "Legal 2000" originates from the form that is filed to initiate this process.

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she felt threatened and violated by the hospital personnel and that she had no recollection of kicking Thomason.

On appeal, Whisman asserts that: (1) the district court abused its discretion in providing incorrect jury instructions and refusing to provide her proffered instructions; (2) the district court abused its discretion in admitting evidence of the events leading to her commitment; (3) the State did not present sufficient evidence to support her conviction; and (4) cumulative error warrants reversal of her conviction.[2]

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

Whether the district court abused its discretion in providing incorrect jury instructions and in refusing to provide Whisman's proffered instructions

Whisman argues that the district court abused its discretion in giving several incorrect jury instructions and refusing to give her proffered instructions.

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[2]Whisman also argues that (1) the district court erred in admitting expert testimony, without proper notice, through lay witnesses; (2) the district court erred in not holding an evidentiary hearing to resolve her claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963); and (3) the State committed prosecutorial misconduct during its closing argument by discussing the issue of punishment. Whisman did not properly preserve these arguments, and she has failed to demonstrate plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); see also Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (in order to properly preserve an objection, a defendant must object at trial on the same ground he or she asserts on appeal absent plain or constitutional error). Also, we have considered Whisman's remaining arguments and conclude that they are without merit.

"Traditionally, a district court has broad discretion to settle jury instructions, and we review that decision for an abuse of discretion or judicial error." Hoagland v. State, 126 Nev. ___, ___, 240 P.3d 1043, 1045 (2010). When, however, "the issue involves a question of law, this court applies de novo review." Id. Plain error review may be employed when an alleged error has not been properly preserved. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Id. The appellant bears the burden of establishing that his or her substantial rights were affected by showing "actual prejudice or a miscarriage of justice." Id.

"Reasonable force" instruction and hospital procedure instructions

Whisman first asserts that the district court abused its discretion in providing, over her objection, Jury Instruction No. 9 and rejecting her proffered instructions regarding hospital procedures. Jury Instruction No. 9 read as follows:

> Reasonable force is justifiable when committed by a public officer, or person acting under the command and in the aid of the public officer, when necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.
>
> The factors to be considered when determining whether force is reasonable are: (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; and (3) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

Whisman's proffered instructions on hospital procedures included instructions on the permissible use of mechanical restraints, informed consent, and a patient's right to information about involuntary commitment procedures.

Broadly speaking, hospital personnel are privileged to use reasonable force to prevent harm. See NRS 433.5493(1)(a)-(c) (physical force may be used on a disabled patient in an emergency in order to prevent harm to the patient or others, provided that force is "reasonable and necessary under the circumstances precipitating the use of physical restraint"). Jury Instruction No. 9 was the district court's attempt to instruct the jury on what constitutes a "reasonable" amount of force, an inherently elusive concept. Contrary to Whisman's contentions, Jury Instruction No. 9, when read as a whole, did not instruct the jury that excessive force was permissible so long as hospital personnel acted in good faith.

Finally, Whisman's arguments about her proffered instructions regarding hospital procedures fall short because the district court had already instructed the jury to consider the situation in which Whisman used force. This necessarily permitted the jury to consider the hospital personnel's allegedly unreasonable use of mechanical restraints, failure to obtain informed consent, and failure to provide Whisman information about her patient rights. See Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995) (the district court does not commit error in rejecting a defendant's proffered instruction when it is "substantially covered by other instructions"). Accordingly, we conclude that the district court did not abuse its discretion in providing Jury Instruction No. 9 or in

refusing to give Whisman's proffered instructions regarding hospital procedures.

"Injury" instruction

Whisman asserts that the district court abused its discretion in providing, over her objection, Jury Instruction No. 12, rather than her proffered self-defense instruction regarding the circumstances that justify the defensive use of force. Jury Instruction No. 12 provided:

> Actual danger is not necessary to justify self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person battering is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be injured; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself to be in like danger.

(Emphasis added.)

Whisman's proffered self-defense instruction provided, in pertinent part, as follows:

> Actual danger is not necessary to justify the lawful use of force in self-defense. A person has a right to defend from an apparent unlawful touching to the same extent as he would from an actual unlawful touching. The person asserting self-defense is justified if:
>
> 1. She is confronted by the appearance of imminent danger which arouses in her mind an honest belief and fear that she will be touched unlawfully; and

> 2. She acts solely upon these appearances and her fear and actual beliefs; and
>
> 3. A reasonable person in a similar situation would believe herself to be in like danger.

(Emphasis added; citation omitted.)

Whisman claims that Jury Instruction No. 12 misled the jury into concluding that the lawful defensive use of force is limited to situations in which the defendant fears physical injury.[3] Both parties used Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000), to support their positions.

In Runion, we set forth sample self-defense instructions for the courts of this state to consider using when a defendant asserts self-defense. 116 Nev. at 1051, 13 P.3d at 59. Among these instructions is the principle that a defendant's killing of an assailant is justified when, among other things, "there is imminent danger that the assailant will either kill him or cause him great bodily injury." Id. at 1051, 13 P.3d at 59 (emphasis added).

The problem with the extrapolation of the term "injury" in Jury Instruction No. 12 is that Runion concerned the principles of self-defense that govern murder, not battery. Battery, however, is "an offensive touching, although it inflicts no bodily harm, may nonetheless

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[3]Whisman quibbles over several other menial differences between the wording of Jury Instruction No. 12 and her proffered instruction. Her arguments in this respect are undeveloped and unsupported, and thus, we decline to consider them. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (appellants must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances." People v. Myers, 71 Cal. Rptr. 2d 518, 522 (Ct. App. 1998) (emphasis added); see also NRS 193.240 (a person may resist "an offense against his or her person"). Stated differently, reasonable force may be used to defend against an unlawful touching that does not result in a physical injury, such as lewd acts and the like. Thus, Jury Instruction No. 12 was an incorrect statement of law because it informed the jury that the use of force is limited to circumstances in which a defendant is defending against overt physical injury. Therefore, we conclude that the district court abused its discretion in providing Jury Instruction No. 12.

Nonetheless, although we agree with Whisman that the district court improperly provided this instruction, we conclude that the error was harmless. See Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003) ("This court evaluates appellate claims concerning jury instructions using a harmless error standard of review."). While Whisman had the right to resist an unlawful touching, that right only entitled her to the use of reasonable, proportional force. Stated differently, she may have had the right to resist an unlawful touching by, for example, pushing her assailants' hands away. However, delivering a kick to the face of Thomason, who Whisman concedes was not one of her alleged assailants, was excessive and unreasonable. And, even assuming that hospital personnel had attempted an unannounced catheterization prior to Thomason's arrival, as Whisman claims, from a temporal standpoint, Whisman's right to use such force had ended by the time Thomason entered the room and attempted to restrain Whisman's legs. Therefore,

we conclude that the district court's instructional error was harmless beyond a reasonable doubt.

"No duty to retreat" instruction

Whisman asserts that the district court abused its discretion in refusing to give her proffered instruction regarding the "no duty to retreat" rule. Her proposed instruction on this rule stated:

> When a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of her own free will, is attacked by an assailant, she has the right to stand his [sic] ground and not retreat when faced with the threat of force.

In Runion, we explained that "where a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, he has the right to stand his ground and need not retreat." 116 Nev. at 1051, 13 P.3d at 59. Even so, we have also explained that the jury should only "be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) (emphasis added).

Although Whisman's "no duty to retreat" instruction was an accurate statement of law, it was inapplicable. Whisman was secured to a gurney when she kicked Thomason. In other words, it was physically impossible for Whisman to retreat, and thus, there was no need to instruct the jury on the principle that there is no duty to retreat. Accordingly, we conclude that the district court did not abuse its discretion in rejecting Whisman's "no duty to retreat" instruction.

"Weight of the evidence" instruction

Whisman argues that the district court abused its discretion in refusing to give her proffered instruction that would have informed the jury that it should not evaluate guilt based upon the sheer number of witnesses presented by the State. Whisman's proffered jury instruction on this principle provided as follows:

> The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

Whisman failed to preserve her objection to the district court's rejection of her "weight of the evidence" instruction. As the district court noted during the hearing on Whisman's motion to reconstruct the record, Whisman did not make a specific argument when she proffered the instruction or lodge a specific objection when the district court declined to provide it. Rather, she simply submitted the instruction along with a stack of her other proffered instructions. Moreover, the concept contained in Whisman's proffered instruction was already covered in other instructions. The district court instructed the jury that it could disregard the testimony of any witness who lied or that it otherwise did not find credible. Thus, the court had already effectively conveyed to the jury that it was free to reject the testimony of all eight of the State's witnesses and, instead, credit Whisman's testimony. See Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Finally, even if it could be said that the district court erred in refusing to give Whisman's proffered "weight of the evidence" instruction, Whisman fails to acknowledge, much less meet, her affirmative burden to show that the error affected her substantial rights.

Accordingly, we conclude that the district court did not err in refusing to provide Whisman's "weight of the evidence" instruction.[4]

Whether the district court abused its discretion in admitting evidence of the events leading to Whisman's commitment

Whisman argues that the district court abused its discretion in denying her motion in limine to prevent the admission of evidence of certain bad acts. In particular, she contends that the district court abused its discretion in admitting evidence of her alleged suicide attempt, her possession of a gun, and her threat to commit "suicide by cop." Whisman argues that this evidence was not admissible under the res gestae doctrine.[5]

The district court's decision to admit res gestae evidence "is to be given great deference and will not be reversed absent manifest error." Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995). The res gestae doctrine is codified in NRS 48.035(3), which provides that "[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other

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[4]Lastly, Whisman asserts that the district court erred in providing Jury Instruction No. 6. Whisman did not object to this instruction at trial, and she has failed to demonstrate plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[5]Whisman also summarily argues that the State committed prosecutorial misconduct during its closing argument by using this evidence to show that she acted in conformity with her character. Whisman did not object contemporaneously to the State's closing argument, and she has failed to demonstrate plain error. See Green, 119 Nev. at 545, 80 P.3d at 95.

act or crime shall not be excluded." Under the res gestate doctrine, "[t]he State may present a full and accurate account of the crime, and such evidence is admissible even if it implicates the defendant in the commission of other uncharged acts." Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). This principle, however, "must be construed narrowly," and "a witness may only testify to another uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." Id.

Here, if the district court had not admitted evidence of Whisman's suicide attempt, gun possession, and threat to commit "suicide by cop," the jury's understanding of the crime would have been skewed. These events led directly to her commitment at Centennial Hills Hospital, and they took place just a couple of hours before Whisman was committed. Thus, if the district court had not admitted this evidence, Thomason and the other hospital personnel would not have been able to explain why they needed to restrain Whisman or even why Whisman was at Centennial Hills Hospital in the first place. Indeed, evidence of the events leading to Whisman's commitment was integral to several witnesses' testimony about the crime in question. Moreover, the district court provided an instruction that informed the jury of the limited admissible purpose of this evidence. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions."). Accordingly, we conclude that the district court did not abuse its discretion in admitting evidence of the events leading to Whisman's commitment.

Whether the State presented sufficient evidence to support Whisman's conviction

Whisman argues that the State failed to present sufficient evidence to support her conviction for battery on a healthcare provider. She does not contest that the State presented sufficient evidence to support the elements of battery on a healthcare provider, but she asserts that the State failed to present sufficient evidence to rebut her claim that she acted in self-defense. Whisman claims that the State was required to present direct evidence regarding what took place in the hospital room before Thomason entered.

In reviewing whether there is sufficient evidence to support a jury's verdict, we determine "'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)). As we have observed, it is the jury's function, not ours, to assess the weight and credibility of witnesses. Id. at 202-03, 163 P.3d at 414. Additionally, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). When a claim of self-defense is raised, however, the State bears the burden to disprove at least one of the necessary elements of self-defense beyond a reasonable doubt. See Dozier v. State, 124 Nev. 125, 130, 178 P.3d 149, 153 (2008); Barone v. State, 109 Nev. 778, 781, 858 P.2d 27, 29 (1993).

Here, Thomason testified that, despite Whisman's claims otherwise, no one was attempting to insert a Foley catheter in Whisman when Whisman kicked her. Thomason testified that a catheter was only inserted after Whisman had been restrained. Another hospital employee

testified that hospital protocol requires that a patient be apprised of the catheterization procedure before it occurs. In addition, hospital records indicated that a female nurse was the only person to attempt to insert a catheter in Whisman. Other hospital employees testified that it was always their habit to advise a patient before inserting a catheter. In short, the State presented circumstantial evidence that there was no unannounced catheterization of Whisman. The jury was entitled to rely upon this evidence in determining that Whisman did not reasonably fear Thomason. See Hernandez, 118 Nev. at 531, 50 P.3d at 1112. The jury was also entitled to reject Whisman's version of the events and instead credit the version presented by the State's witnesses. See Rose, 123 Nev. at 202-03, 163 P.3d at 414. In addition, given Thomason's testimony that she and other hospital personnel were simply trying to restrain Whisman's legs when Whisman kicked her in the face, there was sufficient evidence for the jury to conclude that Whisman's use of force was unreasonable. Accordingly, we conclude that the State presented sufficient evidence to negate Whisman's self-defense claim, and therefore, to support Whisman's conviction.

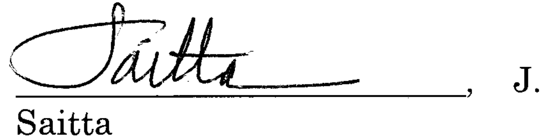
Whether cumulative error warrants reversal of Whisman's conviction

In addressing a claim of cumulative error, we consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Here, the issue of guilt is not close, as the State presented overwhelming evidence of Whisman's offense. The only arguable instance of error was harmless, and the crime with which

Whisman was charged is relatively minor. Therefore, we conclude that cumulative error does not warrant reversal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.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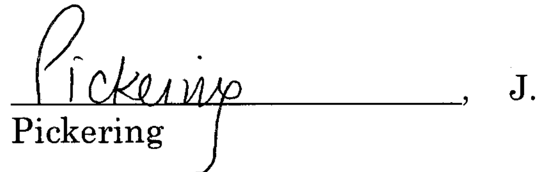
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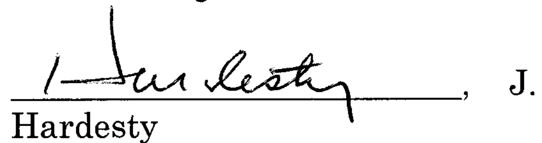
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cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk