IN THE SUPREME COURT OF THE STATE OF NEVADA

NABOR VALDOVINOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59277

ORDER OF AFFIRMANCE

Appellant Nabor Valdovinos appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit invasion of the home, invasion of the home, conspiracy to commit burglary, burglary while in possession of a deadly weapon, battery with substantial bodily harm, and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge. Valdovinos raises four arguments on appeal.

First, Valdovinos contends that there was insufficient evidence as a matter of law to convict him of robbery because no force was used to take personal property from the victim, and, accordingly, without the robbery conviction, there is no basis for the deadly weapon enhancement. Upon an examination of the record, we conclude that this contention is without merit. Both victims testified that Valdovinos physically yanked, pulled, or pushed one victim's arm as he snatched the gun from her outstretched hands. While the degree of force used on the victim was not substantial, the degree of force is immaterial under the statute. NRS 200.380(1). In addition, one victim testified that four men forcibly entered his home, tackled him, and sprayed him with mace while

pointing a gun at his head, and the other victim testified that Valdovinos pointed his weapon at her and pulled the trigger. It is therefore axiomatic that both force and the fear of force were used to obtain the weapon, even if taking it was an afterthought. See Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976). Accordingly, both the robbery conviction and the accompanying enhancement are valid.

Second, Valdovinos argues that his right to due process was violated by the district court's failure to record all sidebar conferences. In order to demonstrate a due process violation for failure to record sidebar conferences an appellant must show (1) a missing portion of the record and (2) that the subject matter missing from the record is so significant that the appellate court cannot meaningfully review appellant's contention for errors. Daniel v. State, 119 Nev. 498, 508, 510, 78 P.3d 895, 897, 898 (2003). Of the many conferences that were not recorded Valdovinos offers two instances in which it appears that the court discussed objections to hearsay evidence regarding a co-conspirator and what he told the defendant after the incident. Valdovinos argues that these statements go to the heart of the robbery conviction and the use of force on the victim. However, Valdovinos does not claim that the district court erred in admitting the statements and fails to demonstrate how we are precluded from meaningfully reviewing his appeal without being privy to what was discussed during these conferences. A mere missing portion of the record, on its own, cannot stand as a due process violation. Id. at 510, 78 P.3d at

898. We therefore conclude that Valdovinos has failed to demonstrate that he is entitled to relief on this claim.[1]

Third, Valdovinos contends that his taped confession was inadmissible because he was in custody at the time of the interrogation and was not informed of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Valdovinos did not raise this claim in the district court; therefore, we grant relief only if there was plain error. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (plain error exists when there was error, the error was plain or clear, and the error affected the defendant's substantial rights). Considering the totality of the circumstances, we conclude that Valdovinos was not in custody when he made the statement and that there was no plain error in admitting it. See California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (holding that a person is in custody for the purposes of Miranda when under the totality of the circumstances there has been a restraint on freedom of movement of the degree associated with a formal arrest). Valdovinos agreed to speak with the detective in his unmarked squad car. The doors were unlocked and the vehicle was parked on a public street outside of Valdovinos' home. Valdovinos was told that he was not under arrest and that he was free to leave at any time. The conversation lasted between an hour and an hour and a half. Accordingly, we conclude that Valdovinos was not in custody for the purposes of Miranda and therefore no warnings were necessary.

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[1]Valdovinos invites us to revisit Daniel and place the burden upon the State to show an absence of a due process violation whenever a portion of the transcript is missing. While we note that the preferable procedure is to have all conversations in a criminal case on the record, even sidebar conferences, we are bound by Daniel.

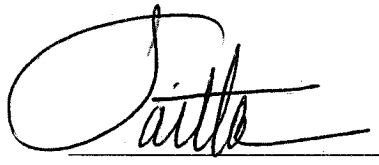
See Casteel v. State, 122 Nev. 356, 361-62, 131 P.3d 1, 4-5 (2006) (finding that a suspect was not in custody when he voluntarily agreed to speak with officers, the interrogation was short, he was not handcuffed or under arrest, and he was repeatedly told that he was free to leave); see also Rosky v. State, 121 Nev. 184, 192-93, 111 P.3d 690, 695-96 (2005) (finding that a suspect was not in custody when police used mildly deceptive questioning, was told participation was voluntary, and was not restrained).

Valdovinos also claims that his confession was involuntary because he was not informed that the conversation was being recorded and he lacks a sophisticated understanding of the English language. The district court conducted a hearing and determined Valdovinos had a clear grasp of the English language. We conclude that the district court did not err and that Valdovinos' understanding of English did not render his confession involuntary. See Casteel, 122 Nev. at 361, 131 P.3d at 4 (reviewing the district court's factual findings for clear error and its ultimate conclusion of voluntariness de novo). That Valdovinos did not know the conversation was recorded is irrelevant because something he was not aware of could not act to erode his free will. Upon a consideration of the totality of the circumstances, we conclude that Valdovinos' confession was voluntary. See Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987) (totality of the circumstances includes consideration of "the 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." (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973))).

Finally, Valdovinos argues that the prosecutor engaged in prejudicial misconduct during his closing argument by confusing the jury as to the State's burden of proof, warranting reversal of his convictions. Because Valdovinos failed to object to this statement at trial, we review this claim for plain error. Anderson, 121 Nev. at 516, 118 P.3d at 187. During his closing argument, the prosecutor said, "Was there any doubt in either of the [victims'] minds what the defendant had just attempted to do?" We conclude that any alleged error was not prejudicial. Valdovinos was acquitted of four charges, including the attempted murder charge that the prosecutor was referencing when he made the comment. We can therefore say without reservation that the prosecutor's innocuous comment did not affect Valdovinos' substantial rights. Id.

Having considered Valdovinos' arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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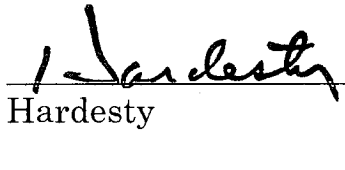
Pickering



_____, J.
Hardesty

cc: Hon. Doug Smith, District Judge
Hon. Elizabeth Goff Gonzalez, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk