IN THE SUPREME COURT OF THE STATE OF NEVADA

SABINO PENA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59474

FILED

JUL 25 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted invasion of the home and possession of burglary tools. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

First, appellant Sabino Pena contends that insufficient evidence was adduced to support the jury's verdicts. Specifically, he argues that the State failed to show that he attempted to break into the house or that he brought or used the crowbar discovered at the house. We disagree and conclude that 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); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Trial testimony indicated that the victim called the police because Pena was at the home. She heard something metal hitting the door and heard a window break. The police arrived and saw Pena approaching from the west side of the home. They searched the area and found a crowbar close to where Pena had been. The window was broken and the door looked like someone had tried to pry it open. The victim

testified that none of this damage was there before Pena arrived. Pena's nephew gave conflicting evidence about the crime, but weighing and determining the credibility of conflicting testimony is the jury's duty and we will not disturb their determination where, as here, substantial evidence supports the verdict. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

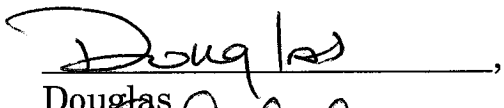
Second, Pena contends that testimony that he beat his girlfriend was improperly admitted as prior bad act evidence and that the district court erred by failing to strike the evidence or declaring a mistrial sua sponte. While we agree that the testimony was an improper reference to a prior bad act, see Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281-82 (1992), we conclude that the error was harmless, see Valdez v. State, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008), because it was unsolicited by the prosecution, defense counsel did not elect to have the jury admonished, see Stickney v. State, 93 Nev. 285, 287, 564 P.2d 604, 605 (1977), the reference was brief, and substantial evidence supported the verdict, see Rice, 108 Nev. at 44-45, 824 P.2d at 282; Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998).

Third, Pena contends that the district court erred by overruling his objection to two 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). Here, jury instruction 21 stated, "[t]he defendant is presumed innocent until the contrary is proven" and instruction 26 stated, in part, "[y]our duty is confined to the determination of the guilt or innocence of the defendant." We conclude that the district court did not abuse its discretion by giving

those instructions because, when read as a whole, instruction 21 does not minimize the presumption of innocence and instruction 26 contemplates that a defendant's guilt must be proven and accurately reflects the law. See NRS 175.191; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005) (rejecting challenge to use of the word "until" in instruction); Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992) (upholding an instruction similar to instruction 26 on the jury's role in determining guilt or innocence).

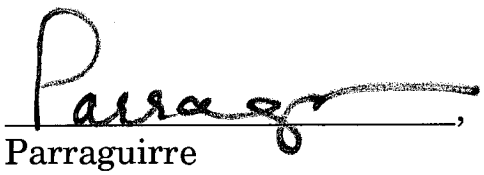
Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons



_____, J.
Parraguirre

cc: Chief Judge, Eighth Judicial District Court
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk