

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD HULSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59725

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Anderson*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder and battery causing substantial bodily harm. Second Judicial District Court, Washoe County; David A. Hardy, Judge. Appellant Ronald Hulsey raises two arguments on appeal.

First, Hulsey argues that there is insufficient evidence to support his second-degree murder conviction because the State's only eyewitness testimony was unreliable and contradicted by the evidence. When reviewing a challenge to the sufficiency of the evidence, we consider "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)). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Here, John Clymer testified that Hulsey kicked the victim, Carolyn Faircloth, in the side of the head after she was beaten by a codefendant. Faircloth died shortly thereafter. While none of Faircloth's blood was discovered on Hulsey's clothing, a footprint on Faircloth's head

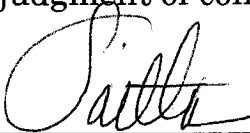
was consistent with the treading on Hulsey's Vans brand shoes. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 198 Nev. at 56, 82 P.2d at 573.

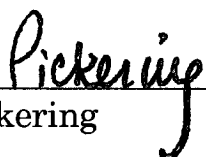
Second, Hulsey argues that the court abused its discretion by failing to declare a mistrial or otherwise conduct a thorough inquiry, sua sponte, when it learned that jurors had been discussing the testimony and evidence prior to deliberation, contrary to their instructions. When juror misconduct is revealed during trial, courts have considerable discretion to remedy the situation. See United States v. Moore, 580 F.2d 360, 365 (9th Cir. 1978) (holding that a court did not abuse its discretion in, sua sponte, failing to question jurors individually about their attentiveness when the defense failed to object (internal quotations omitted)). In this case, not only did the trial counsel for the defense fail to object to the court's failure to inquire further, he actively pushed the court to only issue an instruction and cannot now complain the court abused its discretion. See Moore, 580 F.2d at 365 (“[D]efense counsel, fully aware of the existence of the problem that is now pressed upon us, deliberately chose to proceed with the original jury to create a no-lose situation: either a not guilty verdict would be returned or an arguably tainted guilty verdict would provide a basis for appeal.” (quoting United States v. Kopel, 552 F.2d 1265 at 1275-1276 (7th Cir. 1977))). Accordingly, we conclude that the trial court did not abuse its discretion in failing to declare a mistrial absent a defense objection. See Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000

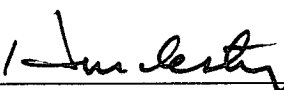
(2001) (stating that a district court abuses its discretion when its decision is “arbitrary or capricious or if it exceeds the bounds of law or reason”).

Having considered Hulsey’s contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. David A. Hardy, District Judge
Ian E. Silverberg
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk