

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN CHARLES CARRIGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59856

FILED

DEC 21 2012

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of child neglect or endangerment with substantial bodily harm. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant Justin Charles Carrigan contends that (1) there was insufficient evidence to support his conviction and (2) the district court committed reversible error by instructing the jury that they could convict him of child neglect or endangerment under NRS 200.508(2)(a)(2) without proving beyond a reasonable doubt that the child's physical pain or mental suffering was "a result of abuse or neglect," NRS 200.508(2), so long as "substantial bodily or mental harm results to the child," NRS 200.508(2)(a). With regard to Carrigan's sufficiency claim, we review the evidence in the light most favorable to the prosecution and determine whether 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). Because Carrigan failed to object to the jury instruction at trial, we review the jury instruction claim for plain error. "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." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "A plain error affects substantial rights if it had a prejudicial impact on the verdict when viewed in context of the trial as a whole." Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (internal quotation marks omitted).

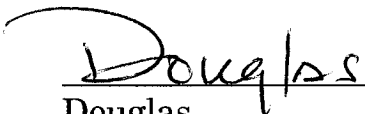
In order to sustain a conviction under NRS 200.508(2)(a)(2) there must be evidence that (1) Carrigan was a person who was responsible for the safety or welfare of his stepdaughter; (2) who permitted or allowed his stepdaughter to (a) suffer unjustifiable physical pain or mental suffering, or (b) be placed in a situation where she may suffer physical pain or mental suffering; (3) "as a result of abuse or neglect;" and (4) "substantial bodily or mental harm results to the child." See also NRS 200.508(4)(a) (defining "abuse or neglect" as negligent treatment or maltreatment of a child under the age of 18 years, as set forth in NRS 432B.140), (b) (defining "[a]llow"), (c) (defining "[p]ermit"); Smith v. State, 112 Nev. 1269, 1277, 927 P.2d 14, 18 (1996) (explaining that a defendant must know or have reason to know of the abuse or neglect yet permit or allow the child to be subject to it). Because NRS 200.508(2)(a)(2) requires the State to prove both "abuse or neglect" and "substantial bodily or mental harm," we conclude that the district court erred by listing these two elements in the disjunctive because it allowed the jury to convict Carrigan without finding an essential element of the crime. Furthermore, this error was clear from the record. Therefore, we review the context of the trial as a whole to determine whether this error had a prejudicial impact on the verdict. Miller, 121 Nev. at 99, 110 P.3d at 58.


At trial, the State alleged that Carrigan committed abuse or neglect after his stepdaughter stopped breathing by failing to seek emergency medical treatment before she suffered irreparable brain damage. Evidence was presented that when Carrigan discovered his stepdaughter lying on the floor, unconscious and not breathing, he tried to perform CPR. When that was unsuccessful, he ran to a neighbor's house to get help. According to the neighbor, it took approximately thirty seconds to run between the two houses. The neighbor's attempt to resuscitate the child was also unsuccessful and she told Carrigan to call 9-1-1. Carrigan told her that he was afraid to call 9-1-1 because he had spanked the child the night before and did not want to get blamed. After the neighbor told him three or four more times in quick succession, he called 9-1-1 and asked for an ambulance. The 9-1-1 operator gave him instructions on CPR and Carrigan made a second attempt to resuscitate his stepdaughter. The ambulance arrived five minutes after Carrigan called and paramedics immediately began performing CPR. After eight minutes and two shots of epinephrine, the child's heart started to beat again. The child was taken to the hospital and it was later learned that she suffered irreparable brain damage because of the lack of oxygen to her brain. The neighbor testified that approximately four to five minutes elapsed between the time she arrived at Carrigan's home and the time he called 9-1-1. A doctor testified that every child is different and that a healthy child's heart might stop seconds to minutes after he or she stops breathing. He further testified that the injury could have happened within the first minute or two after the child's heart stopped and within a few minutes she could have suffered irreversible brain damage. At the conclusion of the trial, a unanimous jury acquitted Carrigan of willfully

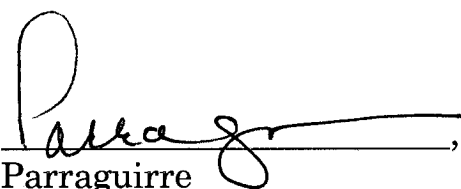
causing the injuries to the child as alleged in count one, see NRS 200.508(1)(a)(2), but found him guilty of unreasonably allowing or permitting them as alleged in count two, see NRS 200.508(2)(a)(2). Unlike count two, the jury instruction for count one did not list “abuse or neglect” and “substantial bodily or mental harm” in the disjunctive.

Although we conclude that the evidence was sufficient to support the conviction, we are not convinced that the evidence against Carrigan was so strong and convincing that the erroneous jury instruction did not affect his substantial rights. There was not overwhelming evidence that Carrigan’s four- to five-minute delay in calling 9-1-1 amounts to abuse or neglect or that the injury to his stepdaughter was a result of this delay. Therefore, we conclude that the district court’s erroneous jury instruction had a prejudicial impact on the verdict that affected Carrigan’s substantial rights. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

¹Because we reverse Carrigan’s conviction we need not address his claim that the district court erred in allowing the State to file an amended information.

cc: Hon. James Todd Russell, District Judge
Robert B. Walker
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk