IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD WELDON EVANS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61497

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appeal from a judgment of conviction, pursuant to a jury verdict, of resisting, obstructing, and/or delaying a public officer with a dangerous weapon; leaving the scene of an accident involving personal injury; accessory to burglary and/or attempting to obtain money by false pretenses and/or uttering a forged instrument; and conspiracy to utter a forged instrument. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

In this appeal, we reverse appellant Edward Evans' conviction for leaving the scene of the accident. This court recently held in *Clancy v. State*, 129 Nev. ___, ___, 313 P.3d 226 (2013), that such a conviction requires the State to prove that a driver had knowledge that an accident occurred. The State concedes that the jury was not instructed on that element. Accordingly, we reverse Evans' conviction of leaving the scene of an accident involving personal injury. We conclude that Evans' remaining arguments are unpersuasive, affirm the district court's judgment on the remaining counts, and remand for resentencing.

Evans and his co-defendant, James Thomas, were arrested after they fled from police following an attempt by Thomas to cash a forged check at Nevada State Bank. During their flight, a pursuing police

officer attempted to enter the vehicle Evans was driving, and Evans began to drive away with the officer halfway in the window of the vehicle. After the officer exited the vehicle, Evans proceeded down the wrong direction of a one-way street and caused a bicyclist to crash. Following his arrest and unsuccessful plea negotiations, Evans went to trial. The jury found him guilty on the four above-mentioned counts. In light of prior felony convictions, the district court adjudged Evans to be a habitual criminal and sentenced him to three concurrent life sentences with the possibility of parole.

The district court failed to instruct on an essential element for the crime of leaving the scene of an accident involving personal injury

Evans was convicted of leaving the scene of an accident involving personal injury, but the district court did not instruct the jury that the State must prove Evans had knowledge that an accident occurred. Following oral argument in this case, this court published *Clancy v. State*, 129 Nev. ___, 313 P.3d 226 (2013). In *Clancy*, we held that the State is required to prove that a driver had knowledge that an accident occurred in order to obtain a conviction for leaving the scene of an accident. *Id.* at ___, 313 P.3d at 230-31.

Evans did not object to the district court's failure to instruct the jury of this essential term. While failure to object normally precludes appellate review, we review failure to instruct the jury on an essential element of an offense for plain error and "may address any concomitant constitutional issues sua sponte." *Rossana v. State*, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997). Further, remand for a new trial may be appropriate where an instructional error occurs, *id.* at 386, 934 P.2d at 1052, but such a remedy violates the Double Jeopardy Clause where substantial evidence does not support the verdict. *Stephans v. State*, 127

Nev. ___, ___, 262 P.3d 727, 734 (2011) (noting that the Double Jeopardy Clause mandates acquittal where a conviction is reversed and there is insufficient evidence to support the verdict) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), and *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988)). In reviewing the sufficiency of the evidence in a criminal case, this court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Although the State concedes that the district court failed to instruct the jury on an essential element of the offense, we disagree that the remedy is to reverse and remand for a new trial.

The State proffers very scant evidence, either circumstantial or direct, that Evans was aware that an accident occurred. Although a "should have known" standard applies, the fact of the bicycle crash alone is not dispositive, as the accident was relatively minor and the State did not establish that the vehicle made contact with the bicycle or its rider. Furthermore, the fact that the vehicle turned immediately after the accident does not suggest knowledge of the accident where the vehicle was travelling the wrong way down a one-way street and the driver was evading police. In his statement to the police, Evans claims that he had no idea an accident occurred until he was told by the police after his arrest. Thomas, Evans' co-defendant and the State's witness, testified to the same. Therefore, we cannot conclude beyond a reasonable doubt that a reasonable juror could find that Evans had or should have had knowledge that an accident occurred. *McNair*, 108 Nev. at 56, 825 P.2d at

573. Accordingly, we reverse the conviction for leaving the scene of an accident.

The phrase "dangerous weapon" is not unconstitutionally vague

Evans argues that NRS 199.280 is unconstitutionally vague because the statute does not define what constitutes a dangerous weapon. This court reviews statutes de novo, presuming that a statute is constitutional. *State v. Castaneda*, 126 Nev. ___, ___, 245 P.3d 550, 552 (2010). The party challenging a statute's constitutionality "has the burden of making a clear showing of invalidity." *Id.* (citations and quotation marks omitted). A statute is unconstitutionally vague "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* at ___, 245 P.3d at 553 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. ___, ___, 130 S. Ct. 2705, 2718 (2010)).

In construing a statute, this court follows the canon of constitutional avoidance, which states that "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Castenada*, 126 Nev. at ___, 245 P.3d at 552 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). "Enough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a statute's words their well-settled and ordinarily understood meaning, and by looking to the common law definitions of the related term or offense." *Id.* at ___, 245 P.3d at 553-54 (internal citations and quotation marks omitted).

NRS 199.280(2) states, in relevant part:

> A person who, in any case or under any circumstances not otherwise specially provided

> for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his or her office shall be punished:
>
> . . . .
>
> 2. Where a *dangerous weapon*, other than a firearm, *is used in the course of such resistance*, obstruction or delay . . . for a category D felony as provided in NRS 193.130.

(Emphases added.)

Although this court has never addressed the definition of "dangerous weapon," the phrase conforms to a common sense definition. For example, *Black's Law Dictionary* defines a "weapon" as "[a]n instrument used or designed to be used to injure or kill someone." *Black's Law Dictionary* 1730 (9th ed. 2009). *Black's* defines "dangerous," when used as an adjective referring to a person or object, as "likely to cause serious bodily harm." *Id.* at 451. As noted by the Ninth Circuit Court of Appeals, "'whether an object constitutes a 'dangerous weapon' turns not on the object's latent capability alone, but also on the manner in which the object was used.'" *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (quoting *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982)). Accordingly, the phrase "dangerous weapon" as used in NRS 199.280 is not unconstitutionally vague. *See Castaneda*, 126 Nev. at ___, 245 P.3d at 553-54.

Failure to provide an instruction defining "dangerous weapon" did not reduce the State's burden of proof

Evans argues that by not defining the term "dangerous weapon" in the jury instructions, the State was able to convict Evans on the count without having to prove the "dangerous weapon" element beyond a reasonable doubt. Although Evans did not seek an instruction defining

the term, he argues that the district court erred by not including such an instruction. This argument is unpersuasive.

A district court has broad discretion in settling jury instructions, and this court reviews a district court's decision for an abuse of discretion. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because Evans did not seek such an instruction at trial, plain error review is appropriate. This court reviews an instructional error absent an objection for plain error. *Rossana v. State*, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In doing so, this court examines whether an error occurred, "whether the error was plain," and "whether the error affected the defendant's substantial rights." *Green*, 119 Nev. at 382, 934 P.2d at 1049. (internal quotation marks omitted). "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.*

In the present case, the district court's instruction on felony resisting or evading arrest with a dangerous weapon includes each of the requisite elements of NRS 199.280. Although the term "dangerous weapon" was not defined in the instructions to the jury, the term has an ordinarily understood meaning, and it is not readily apparent that the term requires further definition in order for a jury to find sufficient evidence to support this element. *Cf. Doyle v. State*, 112 Nev. 879, 899, 921 P.2d 901, 914 (1996) (holding that it was not plain error to fail to sua sponte define a "person" as a living person in a sexual assault case even though the definition of the term was unsettled at the time in Nevada and such an instruction would have been appropriate had it been sought), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91

P.3d 16, 29 (2004). Thus, we conclude that the failure to give an instruction defining "dangerous weapon" was not error, plain or otherwise.

The district court was not required to provide a sua sponte instruction on the lesser-included offense

Evans argues that the district court committed plain error by failing to instruct the jury on the lesser-included misdemeanor offense of resisting an officer without the use of a dangerous or deadly weapon. Because Evans neither proffered such an instruction at trial nor objected to the instruction given on that count, we review for plain error. *Green*, 119 Nev. at 545, 80 P.3d at 95.

NRS 199.280(3) provides that resisting an officer without the use of a dangerous or deadly weapon is a misdemeanor. A defendant is entitled to an instruction on a lesser-included offense where there is evidence that reasonably supports such an offense. *Rosas v. State*, 122 Nev. 1258, 1264-65, 147 P.3d 1101, 1106 (2006). We have held that where "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree," "[t]he instruction is mandatory, without request." *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

We conclude that the district court was not required to instruct the jury on the lesser-included offense because Evans did not rebut the assertion that he drove away with a police officer in the window of his vehicle, he did not argue that the car was not a dangerous weapon, and he did not proffer any evidence that would absolve him of guilt for the felony offense. *Lisby*, 82 Nev. at 188, 414 P.2d at 595.

Thus, because there is no evidence in the record to absolve Evans of guilt for the greater offense, Evans would not have been entitled to such an instruction if he had requested it at trial, much less to a sua

sponte inclusion of such an instruction. *Lisby*, 82 Nev. at 188, 414 P.2d at 595.

The State did not commit misconduct by introducing evidence of his co-defendant's guilty plea

Evans argues that the State committed misconduct by introducing evidence that Thomas pleaded guilty for the burglary charge. Again, Evans' counsel did not object to the impeachment at trial, thus plain error review appears appropriate. *Green*, 119 Nev. at 545, 80 P.3d at 95 (holding that this court has discretion to review errors not raised at trial that affect a defendant's substantial rights).

To determine if a prosecutor's misconduct was prejudicial, this court examines whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process. *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). The first step in this analysis, then, is to determine whether the prosecutor's actions constituted misconduct.

A defendant has wide latitude in cross-examining an accomplice for bias or with regard to his motives for testifying for the State. *Eckert v. State*, 96 Nev. 96, 101, 605 P.2d 617, 620 (1980). Either party is permitted to preemptively impeach its own witness. NRS 50.075.

In the present case, the State began questioning Thomas by asking if he had any prior felony convictions. Thomas later testified that he had pleaded guilty to burglary for his role in the forged check-cashing scheme. The State asked Thomas if he had received any leniency in exchange for his testimony, which Thomas testified that he had not. To the extent that Evans could have brought up Thomas's plea in order to demonstrate bias, *Eckert*, 96 Nev. at 101, 605 P.2d at 620, the State appropriately impeached its own witness to preemptively dispel the

obvious issue of bias that could have been raised on cross-examination. NRS 50.075.

At no point did the State argue that Thomas's guilty plea was proof of Evans' own guilt, and the jury was instructed that they were only there to find the guilt of Evans. Although Evans contends that the district court erred by not giving any further limiting instruction on Thomas's testimony, the district court did instruct the jury that "[t]he fact that a witness has been convicted of a felony . . . may be considered by you only for the purpose of determining the credibility of that witness." *See McConnell v. State*, 120 Nev. 1043, 1062, 102 P.3d 606, 619 (2004) (holding that this court presumes that the jury follows instructions they are given).

Accordingly, the State did not commit prosecutorial misconduct by eliciting Thomas's testimony that he had pleaded guilty to the crime of burglary, *Thomas*, 120 Nev. at 47, 83 P.3d at 825, and the district court was not required to provide a limiting instruction sua sponte. *Green*, 119 Nev. at 545, 80 P.3d at 95.

The district court did not err by refusing to allow Evans to raise certain issues during his cross-examination of the co-defendant

Evans argues that the district court violated his Sixth Amendment right to a fair trial by refusing to allow him to cross-examine Thomas. Evans further argues that this refusal constituted an infringement on his Sixth Amendment right to confront his accusers.

A district court has broad discretion over the administration of the rules of evidence, including over the extent of cross-examination, and will not be reversed absent manifest error. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006). We review de novo whether a limitation on cross-examination infringes on the constitutional

right of confrontation. *Mendoza v. State*, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006).

While the extent of cross-examination is generally left to the sound discretion of the district court, this is less so when a party seeks to expose a witness's bias. *Eckert*, 96 Nev. at 101, 605 P.2d at 620. "Great latitude is given an accused, particularly in his cross-examination of an accomplice relative to his motives for testifying." *Id.* However, this latitude is not absolute. "Generally, '[t]he only proper restriction should be those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'" *Baltazar-Monterrosa*, 122 Nev. at 619, 137 P.3d at 1146 (quoting *Lobato v. State*, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004)).

On appeal, Evans argues that he should have been able to raise the previous incident of Thomas chasing a person with a machete as evidence that Thomas was biased against Evans. According to Evans, "[p]erhaps he was jaded against Mr. Evans for being involved in this setting. Perhaps Mr. Evans acted under duress, consistently with the defense theory, because Mr. Evans knew of the violent tendencies of Mr. Thomas and did not wish to be harmed." Such explanations are sufficiently "vague, speculative, or designed merely to harass, annoy or humiliate the witness" that the district court did not abuse its discretion in barring Evans from questioning Thomas on this incident. *Baltazar-Monterrosa*, 122 Nev. at 619, 137 P.3d at 1146.[1]

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[1]The district court rejected admission of Thomas's habitual criminal enhancement on the grounds that the prior convictions upon which the enhancement was based were over ten years old and the habitual criminal status was only a penalty, not a separate criminal conviction. Accordingly,

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The teleconference was not a critical stage requiring Evans' presence

Evans argues that his right to be present at his trial was violated when the district court, the State, and his trial counsel had a conference call discussing the setting of the trial date without Evans present. This argument lacks merit as the conference call was not during trial, jury selection, or arraignment, and there is no demonstration by Evans that he was prejudiced by his absence from the conference call. *See* NRS 178.388(1) (setting forth the constitutionally protected critical stages of trial); *Rose v. State*, 123 Nev. 194, 207-08, 163 P.3d 408, 417 (2007) (holding that a defendant's constitutional due process rights are implicated "'only to the extent that a fair and just hearing would be thwarted by the defendant's absence.'" (quoting *Gallego v. State*, 117 Nev. 348, 368, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. ___, ___ n.12, 263 P.3d 235, 253 n.12 (2011) (internal quotation marks omitted)).

Jury Instruction No. 30 was not erroneous

Evans argues that Jury Instruction No. 30 infringed upon his Fifth and Fourteenth Amendment rights to due process and a fair trial.[2] This court reviews a district court's decision settling jury instructions for

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...continued
the district court acted within its discretion in not allowing Evans to cross-examine him regarding his habitual offender status. *See Baltazar-Monterrosa*, 122 Nev. at 613-14, 137 P.3d at 1142.

[2]Evans also argues that the State confessed error because it failed to address this issue in its reply brief. We are not persuaded by this argument as we conclude that Evans' underlying argument lacks merit. *See Polk v. State*, 126 Nev. ___, ___, 233 P.3d 357, 359-60 (2010) (refusing to conclude that the State confessed error where the appellant's substantive argument lacked merit).

an abuse of discretion, and legal error is reviewed de novo. *Crawford*, 121 Nev. at 748, 121 P.3d at 585.

Jury Instruction No. 30 reads in part: "Evidence of an oral admission or an oral confession of the defendant ought to be viewed with caution." According to Evans, this instruction minimized the value of Evans' statements to the police that he did not know he had hit a bicyclist during his and Thomas's escape and that he did not know Thomas was attempting to cash a forged check.

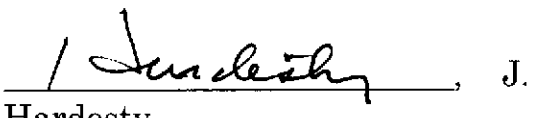
This court has addressed similarly worded instructions before, but this case presents a unique take on that issue. In contrast to the instruction in this case, this court has previously held that a district court has not committed error by rejecting a defendant's request to include a similar instruction. *Green*, 119 Nev. at 549, 80 P.3d at 97; *Ford v. State*, 99 Nev. 209, 212, 660 P.2d 992, 993 (1983); *Beasley v. State*, 81 Nev. 431, 450, 404 P.2d 911, 922 (1965). Presumably, defendants in those cases sought such an instruction because their statements to police tended to show culpability.

We conclude that Jury Instruction No. 30 did not dilute the credibility of Evans' statement as he argues on appeal. The contested language explicitly refers only to admissions and confessions by Evans, and is preceded by a lengthy discussion defining an admission and a confession. According to the jury instruction, an *admission* is a statement "which tends to prove guilt when considered with the rest of the evidence." A *confession*, according to the jury instruction, is "a statement by a defendant which discloses his or her intentional participation in the criminal act . . . and which discloses his or her guilt of that crime." This court presumes that the jury follows instructions they are given,

McConnell, 120 Nev. at 1062, 102 P.3d at 619, and the challenged instruction only requires the jury to consider *admissions* and *confessions* with caution. Thus, while this instruction was not required, *see, e.g.*, *Green*, 119 Nev. at 549, 80 P.3d at 97, it does not appear susceptible to the effect Evans claims. Accordingly, the district court did not abuse its discretion by giving the instruction. *Crawford*, 121 Nev. at 748, 121 P.3d at 585.[3]

Consistent with the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for resentencing in accordance with this order.



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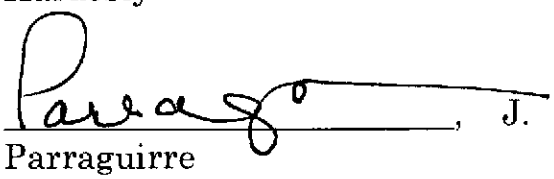

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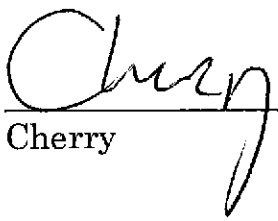

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Cherry

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[3]The only error we identified was the failure to instruct on the knowledge-of-accident element for the leaving the scene of an accident charge due to a newly decided precedent. Thus, we also reject Evans' argument that the numerous errors presented above cumulatively warrant a new trial. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Also, we need not address Evans' argument regarding his original sentence because we remand to the district court for resentencing.

cc: Hon. Connie J. Steinheimer, District Judge
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Attorney General/Carson City
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Washoe District Court Clerk