IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVADOR JESUS AVILA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63428

FILED

DEC 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon resulting in substantial bodily harm. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

First, appellant Salvador Jesus Avila contends that insufficient evidence was adduced to support the jury's verdict. We disagree because 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).

The victim testified that a fight began when Avila approached and struck him in the rib cage with a baseball bat. Additional trial testimony indicated that Avila's codefendant kicked the victim in the face, both perpetrators beat the victim with baseball bats, and the victim was struck in the head with a solid object after hearing Avila say, "hit him with the rock." As a result of the beating inflicted by Avila and his codefendant, the victim suffered a fractured skull and an acute subdural hematoma. At the trial more than six months after the incident, the

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victim testified that he was still suffering from migraine headaches and double vision. Due to the injury to his rib cage, the victim experienced pain and difficulty breathing for several weeks. Medical records and photographs detailing the victim's injuries were admitted as exhibits at trial.

Circumstantial evidence alone may sustain a conviction. *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). It is for the jury to determine the weight and credibility to give conflicting testimony, *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict, *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also* NRS 0.060; NRS 193.165(6)(b); NRS 200.481(1)(a); *Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009). Therefore, we conclude that Avila's contention is without merit.

Second, Avila contends that the district court erred by admitting gang-affiliation evidence at trial. "The decision to admit gang-affiliation evidence rests within the discretion of the trial court." *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004). The district court conducted a hearing on both his codefendant's motion in limine seeking to preclude the State from introducing the evidence and the State's motion seeking admission of the evidence. Avila and his defense counsel were present at the hearing, indicating that he joined in on his codefendant's motion.[1] The district court determined that the evidence was relevant to establish motive and proven by clear and convincing evidence, and that its

[1]At trial, both defendants noted for the record a continued objection prior to the gang expert's testimony during the State's case-in-chief.

probative value was not substantially outweighed by the risk of unfair prejudice. *See id.*; *see also* NRS 48.045(2); *Lara v. State*, 120 Nev. 177, 181, 87 P.3d 528, 531 (2004); *Qualls v. State*, 114 Nev. 900, 904, 961 P.2d 765, 767 (1998). We conclude that the district court did not abuse its discretion by admitting the gang-affiliation evidence.

Third, Avila contends that the prosecutor committed misconduct during the State's rebuttal closing argument by suggesting that "the witnesses lack of recall or inconsistent statements" regarding which codefendant struck the victim in the head with a rock may have been "the result of fear of retaliation" by a local gang. The prosecutor specifically queried, "Are they [the witnesses] influenced in any way out of a fear for the Rebels for retribution?" After brief arguments from counsel, the district court overruled Avila's objection to the prosecutor's comment. We agree that the prosecutor's comment was improper and the district court erred by overruling Avila's objection. Nevertheless, considering the prosecutor's comment in context, and in light of the overwhelming evidence of guilt, we conclude that Avila was not prejudiced and the error was harmless. *See Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) ("[T]his court will not reverse a conviction based on prosecutorial misconduct if it was harmless error."); *Baltazar-Monterrosa v. State*, 122 Nev. 606, 618, 137 P.3d 1137, 1145 (2006) ("[G]iven the physical evidence in this case," even if the witness intimidation testimony was improper, "any error would be harmless."); *see also Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("[P]rejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due

process." (alteration omitted) (internal quotation marks omitted)). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[2]

Pickering, C.J.

Hardesty, J.

Cherry, J.

cc: Hon. Nancy L. Porter, District Judge
Barbara W. Gallagher
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

[2]The fast track statement and response do not comply with NRAP 3C(h)(1) and NRAP 32(a)(4) because the text in the body of the briefs is not double-spaced. The fast track statement also does not comply with NRAP 3C(h)(1) and NRAP 32(a)(4) because it does not contain 1-inch margins on all four sides. The "Verification" in the fast track response does not comply with NRAP 3C(h)(3), NRAP 32(a)(8)(B), and NRAP Form 7 because the brief exceeds 10 pages and does not specify the exact number of words contained therein. Counsel for the parties are cautioned that the failure to comply with the briefing requirements in the future may result in the imposition of sanctions. *See* NRAP 3C(n).