IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID JAY DIAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70990

FILED

AUG 22 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

David Jay Diaz appeals from a judgment of conviction, pursuant to a jury verdict, for domestic battery;[1] preventing or dissuading a victim from reporting a crime, commencing prosecution, or causing arrest; false imprisonment; assault with use of a deadly weapon; attempted robbery; and coercion. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Diaz was convicted for crimes involving an altercation with his girlfriend where he hit her, forcibly grabbed her to prevent her from leaving the apartment, took her bag, broke her phone, threatened her with a bat, and demanded that she pay him $200 in order to leave the apartment.[2] On appeal, Diaz asserts (1) the district court failed to instruct the jury regarding the specific intent element of attempted robbery, (2) the district court failed to instruct the jury regarding the proper test for coercion, (3) there was insufficient evidence to support his conviction for preventing a victim from reporting a crime, and (4) the district court erred by denying's

[1]During closing arguments at trial, Diaz conceded that he committed domestic battery and asked the jury to convict him on this charge rather than the greater offense of domestic battery by strangulation.

[2]We do not recount the facts except as necessary to our disposition.

Diaz's motion for a mistrial based on his girlfriend's comment during trial regarding rape. We conclude the majority of Diaz's arguments are unpersuasive and, while we agree the district court erred in its instructions regarding attempted robbery, we conclude this error does not warrant reversing Diaz's conviction.[3]

Because Diaz failed to object to the district court's attempted robbery instruction at trial, we review for plain error. *See* NRS 178.602; *Flores v. State,* 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (2005). The district court instructed the jury that a conviction for attempted robbery requires that Diaz "did willfully and unlawfully attempt to take personal property of [his girlfriend] against her will and by means of force or violence." In another instruction, the district court defined "willfully" as "simply a purpose or willingness to commit the act. . . The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage." This is a general intent instruction. *See Childers v. State,* 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984). Although robbery is a general intent crime, attempted robbery is a specific intent crime. *See* NRS 193.330; *Curry v. State,* 106 Nev. 317, 319, 792 P.2d 396, 397 (1990).

Because the district court erred in instructing the jury, we must determine whether this error affected Diaz's substantial rights. *Green v. State,* 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); *see also People v. Booth,* 243 P.2d 872, 874 (Cal. Ct. App. 1952) (concluding that there was no prejudicial error where the nature of the criminal acts "was such as to preclude the belief they were committed without criminal intent"). Here, the jury was

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[3]Diaz also argues cumulative error warrants reversal. Because Diaz failed to show multiple errors, cumulative error does not apply. *United States v. Sager,* 227 F.3d 1138, 1149 (9th Cir. 2000).

twice instructed that attempted robbery requires the use of "force or violence" or threats to take or retain the personal property of the victim "against her will." The jury was presented with uncontroverted evidence that, in the midst of the domestic battery to which Diaz admitted, Diaz took his girlfriend's bag against her will, knowing there was likely money inside, and "started coming after" her when she tried to get it back, forcing her to retreat and leave the bag in his possession. Based on this evidence, Diaz was not acting inadvertently and he formed the necessary specific criminal intent to attempt robbery. Therefore, we cannot say that this error, standing alone, "had a prejudicial impact on the verdict when viewed in context of the trial as a whole." *Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005). Accordingly, we conclude that Diaz has not established plain error. *See Green*, 119 Nev. at 545, 80 P.3d at 95.

We next conclude the district court did not err in instructing the jury on coercion. We also review this jury instruction for plain error, as Diaz failed to object at trial. *See Flores*, 121 Nev. at 722, 120 P.3d at 1180-81. The district court instructed the jury that coercion requires that Diaz "use[d] violence, cause[d] injury, or threaten[ed] to use violence or cause injury" with the intent to compel his girlfriend to pay him $200 before leaving the apartment. Diaz argues the district court should have instructed the jury that, "in determining whether a defendant has made an immediate threat of physical force under NRS 207.190, the inquiry must focus on the viewpoint of a reasonable person," citing *Santana v. State*, 122 Nev. 1458, 1462, 148 P.3d 741, 744 (2006). However, in this case the jury was presented with overwhelming evidence that Diaz used actual force against his girlfriend to coerce her. In addition to hitting her and covering her mouth so she could not call for help, Diaz grabbed his girlfriend multiple

times to prevent her leaving the apartment before demanding that she pay him $200 in order to leave. The issue of how a reasonable person would interpret a threat is immaterial in this case. Therefore, we conclude the district court did not plainly err in instructing the jury regarding coercion.

In addition, our review of the record reflects that the State produced sufficient evidence of preventing a victim from reporting a crime to uphold Diaz's conviction. This crime occurs when an individual "hinders or delays" a victim from reporting a crime through threats or intimidation. NRS 199.305. Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted)). So long as the victim testifies with some particularity regarding the incident, the victim's testimony alone is sufficient to uphold a conviction. *Rose*, 123 Nev. at 203, 163 P.3d at 414.

In this case, Diaz's girlfriend testified that she never had a chance to call the police or otherwise obtain help during the altercation because Diaz prevented her from leaving the apartment, muffled her screams with his hands, and broke a phone laying in the kitchen. A rational trier of fact could find that breaking his girlfriend's phone was part of a pattern Diaz established to cut off her contact with anyone who could help her. Therefore, reversal is not warranted on this basis.

Finally, the district court properly denied Diaz's motion for mistrial. We will not disturb the district court's decision absent a clear showing of abuse of discretion. *Parker v. State*, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). Though Diaz's girlfriend improperly speculated that Diaz was going to rape her, "a witness's spontaneous or inadvertent

references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." *Rose*, 123 Nev. at 207, 163 P.3d at 417 (quoting *Ledbetter v. State*, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006)). Here, the State did not illicit the inflammatory statement, and we conclude that the district court's admonishment to the jury, that the statement should be disregarded in its entirety and not enter into deliberations in any way, was sufficient to cure any prejudice. Therefore, we conclude that the district court did not abuse its discretion by denying the motion for mistrial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring:

Among other contentions, Diaz asserts that he should be found not guilty of the crime of attempted robbery by reason of his intoxication during the crime. Because Diaz didn't ask for a "voluntary intoxication" jury instruction to be given, and the jury was entitled to disbelieve that he

was drunk anyway, I agree that reversal is not warranted. But his argument unwittingly underlines a larger question within our jurisprudence:

Why is the crime of "attempt" as codified in NRS 193.330 classified by courts as one of specific, rather than general, intent? To me, the instant appeal suggests that perhaps we ought to reconsider whether that classification makes sense.

*I.*

Every first-year criminal law student learns the truism that "voluntary intoxication is a defense to specific intent crimes but not to general intent crimes." Since 1911, Nevada has codified this principle in NRS 193.220:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

The Nevada Supreme Court has held—not via statutory mandate imposed by the Legislature but rather through the exercise of judicial powers—that the crime of "attempt" to commit another crime under NRS 193.330 is itself a "specific intent" crime. *See Curry v. State*, 106 Nev. 317, 319, 792 P.2d 396, 397 (1990) ("The accused must formulate a specific intent to commit the crime attempted."); *Keys v. State,* 104 Nev. 736, 740, 766 P.2d 270, 273 (1988) (quoting *Ramos v. State*, 95 Nev. 251, 253, 592 P.2d 950, 951 (1979)) ("[T]here 'is no such criminal offense as an attempt to achieve an unintended result.'").

But labelling an attempt to commit another crime as one requiring proof of specific intent sometimes leads to tortured results, as in the case at hand. Here, Diaz severely beat his then-girlfriend and demanded that she pay him $200. Because she didn't have any money on her, she couldn't pay, which means that Diaz never completed the crime of robbery (which is a crime of general intent under NRS 200.380, *see Litteral v. State*, 97 Nev. 503, 506, 634 P.2d 1226, 1228 (1981)). Since Diaz never took any money from the victim, he could only be convicted instead of the crime of attempted robbery (which is a specific-intent crime).

Had Diaz received money, his intoxication would have been irrelevant to the crime. But because the victim had no money to hand over, his intoxication became not only legally relevant, but if believed provided a complete defense. With all other facts of the crime being identical, it seems more than a little odd to me that the question of Diaz's guilt or innocence—and the importance or unimportance of his being drunk—turns on the one thing that was entirely out of Diaz's control when he began the savage beating: the happenstance of whether the victim had money on her or not at the moment of the attack.

*II.*

I'm far from the first to notice this strange paradox. Various courts have noted that "the artificial distinction we have established between general and specific intent, with only specific intent crimes warranting additional defenses such as voluntary intoxication, often leads to incongruous and harsh results." *Frey v. State*, 708 So.2d 918, 921 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part). *See United States v. Sneezer*, 900 F.2d 177, 180 (9th Cir. 1990) ("[I]t seems strange to permit Sneezer a defense of voluntary intoxication for his attempt when he seemed so unequivocally committed to the completion of a crime for which

his intoxication would not have been a defense."); *State v. Stasio*, 396 A.2d 1129, 1133-34 (N.J. 1979) ("[D]istinguishing between specific and general intent gives rise to incongruous results by irrationally allowing intoxication to excuse some crimes but not others."); *People v. Hood*, 462 P.2d 370, 377-78 (Cal. 1969).

Others have commented on its oddity too. *See* Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know For Sure*, 13 Ohio St. J. Crim. L. 521 (2016); Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245, 2307 (1992); Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: the Model Penal Code and Beyond*, 35 Stanford L. Rev. 681, 688-89 (1983); William Roth, *General vs. Specific Intent: A Time for Terminological Understanding in California*, 7 Pepp. L. Rev. 67, 77-78 (1979); Jerome Hall, *Intoxication and Criminal Responsibility*, 57 Harvard L. Rev. 1045, 1066 (1944); *see also* 1 Wayne R. LaFave & Austin Scott, Jr., Criminal Law § 4.10 (2d ed. 1986).

Indeed, for this very reason, the Model Penal Code has gravitated away from using the terms "general" and "specific" intent to determine what potential defenses to the crime are available. *See* Model Penal Code § 2.02 comments (Am. L. Inst., Proposed Official Draft 1962); *see generally Liparota v. U.S.*, 471 U.S. 419, 423 n. 5 (1985) ("[T]he mental element in criminal law encompasses more than the two possibilities of 'specific' and 'general' intent.").

*III.*

One might assume that idea of labeling offenses as either "general intent" or "specific intent" crimes arises from an established and time-honored legal tradition designed to serve noble policy goals, and

therefore the disparity noted here represents a small price to pay in order to achieve those higher and larger purposes. That would be incorrect.

In point of fact, classifying crimes as either requiring "general" or "specific" intent actually serves only one narrow purpose: solely to deal with the problem of the intoxicated defendant. *See Hood*, 462 P.2d at 377-78 ("The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender.").

> That problem is to reconcile two competing theories of what is just in the treatment of those who commit crimes while intoxicated. On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences.

*Id.* The terms "general" and "specific" intent were merely the labels that judges invented to classify when the defense of voluntary intoxication is available to be asserted, and when it is not. At their root, the terms are "a device, conceived at common law, to achieve a certain result rather than reflecting a coherent theory." Paul Robinson, *Criminal Law Defenses* § 65(e) (1984). Those particular terms were chosen to reflect, more or less, the kind of impairment that psychologists believed alcohol created within the human brain: it was thought that while drunk people could engage in very simple-minded planning for short term gain (so-called "general intent" to satisfy an immediate impulse), they were incapable of planning anything complicated or that required long-term vision and persistence (so-called "specific intent" to achieve a future consequence). Thus, whether a crime is one of general or specific intent is frequently determined "by the presence or absence of words describing psychological phenomena—'intent' or 'malice,' for

example—in the statutory language defining the crime." *Hood*, 462 P.2d at 378. Indeed, over the years an elaborate judicial edifice of analytical tests employing pseudo-psychological lingo has been concocted to assess whether one crime or another requires proof of specific or general intent. *Cf. Keys*, 104 Nev. 736, 766 P.2d 270 and cases cited therein. But, in the end, although couched in the language of quasi-psychology, the ultimate inquiry was entirely legal: simply whether judges thought that a particular crime should be excused if the perpetrator were drunk.

In practice, though, it's frequently difficult to utilize those pop-psychological tests in a meaningful or objective way.[4] *See Hood*, 462 P.2d at 377 ("Specific and general intent have been notoriously difficult terms to define and apply . . . ."); *see also* Johnson, *supra*, at 521 ("Judges and scholars alike long have criticized the terminology of 'general intent' and 'specific intent' as confusing and perhaps incoherent." (footnote omitted)). The confusion worsened over time as new "diminished capacity" defenses were created and shoehorned into the dichotomy. The bottom line is that labelling any crime as one or the other is effectively a goal-oriented task: the outcome is largely whatever one wants it to be, coming down in the end to just whether one wants alcohol to play a role in deciding guilt or not. *See*

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[4]To add to the confusion, courts don't typically instruct juries using the words "general" or "specific" intent, usually employing other words like "willfully" or "deliberately" instead, just as happened at Diaz's trial. *See* Johnson, *supra*, at 522 ("Nor do judges use the terms 'general intent' and 'specific intent' in instructing juries on the elements of criminal offenses."); Roth, *supra*, at 77-78 ("Since the terms do not clearly delineate for the jury (or anyone else) what blameworthy state of mind must exist in any given situation, it would seem senseless to instruct a jury in these amorphous terms.").

Robinson & Grall, *supra*, at 688-89; Hall, *supra*, at 1066; *see also* LaFave & Scott, *supra* § 4.10.

*IV.*

The idea that being drunk might excuse committing a crime isn't one with a particularly long historical pedigree. It wasn't recognized under English common law and it didn't exist in the United States until well into the nineteenth century. *See Montana v. Egelhoff*, 518 U.S. 37, 44-50 (1996) (tracing history of intoxication defense). Quite to the contrary, at common law, intoxication was viewed "as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour." 4 W. Blackstone, Commentaries *25-*26. This was the view for much of early American legal history as well. *United States v. Cornell*, 25 F. Cas. 650, 658 (C.C. D. R. I. 1820) ("Drunkenness is a gross vice . . . so far from its being in law and excuse for murder, it is rather an aggravation of its malignity"). As late as 1878, some state courts still refused to recognize intoxication as a defense to specific-intent crimes. *See Egelhoff*, 518 U.S. at 47 (citing *State v. Tatro*, 50 Vt. 483, 487 (1878)). Thus, the U.S. Supreme Court has concluded that the defense is not one "deeply rooted" in our nation's history and traditions. *Id.*

Indeed, far from being a universally established rule, in recent decades a number of states have abolished the defense. *See* John Gibeaut, *Sobering Thoughts*, 83 A.B.A. J., 58-59 (May 1997); *see generally Egelhoff*, 518 U.S. 37 (Montana can constitutionally abolish the voluntary intoxication defense by statute because the due process clause does not require any state to recognize the defense).

Moreover, a close study of the history of the defense, and how courts test for it by assessing the defendant's so-called "intent," reveals that the entire concept rests on a rather shaky foundation. The dichotomy

between "general" and "specific" intent was invented during an era of American law in which serious thinkers believed that law could ultimately be turned into a science and cases resolved on scientific principles. As explained in *The Verdict of History: Haynes v. LaPeer Circuit Judge: Eugenics in Michigan*, 88 Michigan B. J. S9 (Jan. 2009):

> The great scientific and technological changes that transformed the United States into an urban and industrial nation had a deep impact on American thought, and on American law. During the period from 1870 to 1930, many influential teachers of law, judges, and lawyers wanted to turn law into a science with the same power and prestige as the natural sciences.

Judicial decisions from that era are rife with pop-scientific language. *See, e.g., Abrams v. U.S.*, 250 U.S. 616, 629 (1919) (Holmes, J. dissenting) ("Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper[.]"). "Feeblemindedness" was an actual legal classification that could result in incarceration, and leading physicians of the time described mental ability using labels like "idiot," "moron," and "imbecile." *See* Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck*, 32-33 (Penguin 2016). Not coincidentally, that era also marked the high-water mark of the nation's fascination with eugenics and other now-discredited theories of social improvement through science. *See Buck v. Bell*, 274 U.S. 200 (1927); *see also* Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress For the Victims of a Shameful Era in United States History*, 72 Geo. Wash. L. Rev. 862, 865 (2004) (describing the era's fascination with "scientifically trained experts who sought to apply rational principles to solving the problems of anti-social and problematic behavior by seeking out the cause").

If the very idea of law as science has long been discredited (along with its darker manifestations), then I wonder why we're still stuck more than a century later with a pseudo-psychological remnant from the same historical era that asserts that the entire spectrum of human thought and intention can be accurately divided into two states of mind, each mutually exclusive of the other—and with one somehow immune from the effects of alcohol and the other not.

*V.*

So what we have here is this. Based upon doctrines of relatively recent historical vintage that courts and commentators across the country have questioned for some time, the Nevada Supreme Court has decided that "attempted robbery" is a crime of specific rather than general intent. Because of that classification, Diaz was entitled to present a trial defense based on voluntary intoxication even though his crime was vanishingly close to (and not a whit less violent than) a completed robbery to which his intoxication would have been irrelevant.

There may exist factual circumstances in which the difference between an attempted crime and a completed crime is substantial enough that a voluntary intoxication defense ought to excuse one but not the other. But this doesn't seem like one of those to me. Consequently, I wonder if perhaps it might be time, in a proper case, to reconsider how and when the defense may be asserted in Nevada and whether all "attempt" crimes under NRS 193.330 ought to be uniformly characterized this way.

Tao, J.

Tao

cc: Hon. Jerome M. Polaha, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk