

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ENRIQUE MICHEL CAMPOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72687

FILED

DEC 29 2017

ORDER OF AFFIRMANCE

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

Enrique Campos appeals from a judgment of conviction for battery by a prisoner. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

While Campos and Jacob Gubka were incarcerated at Humboldt County Detention Center in Winnemucca, Nevada, Gubka made a derogatory comment to Campos in the jail dayroom, and Campos then struck Gubka in the face. Campos was charged with battery by a prisoner. At trial, Campos argued that the court should instruct the jury on self-defense. He also argued that Gubka was incompetent to testify, and that the State failed to prove that Campos was in lawful custody for criminal conduct. The court effectively denied all of these arguments, and the jury found Campos guilty.¹

On appeal, Campos asserts that: 1) the district court erred in refusing to instruct the jury on self-defense; 2) the district court erred in allowing Gubka to testify because he was incompetent; 3) the State presented insufficient evidence to sustain a conviction for the crime of

¹We do not recount the facts except as necessary to our disposition.

battery by a prisoner, specifically contending that the State failed to produce any evidence that Campos was in lawful custody for criminal conduct; and, 4) cumulative error below warrants the granting of a new trial.²

First, we consider whether the district court erred in refusing to instruct the jury on self-defense. District courts have broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A defendant is entitled to a jury instruction on his theory of the case when there is evidence to support it, "regardless of whether the evidence is weak, inconsistent, believable, or incredible." *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010). However, the district court is not required to instruct the jury on a defense when the evidence is legally insufficient to sustain an element of the defense. *Id.* The Nevada Supreme Court articulated the basic elements of self-defense—"justifiable battery" in the context of a battery offense:

²Though we reach the merits of Campos' appeal in this Order, we note that Campos failed to produce an adequate record for review, and we are able to reach the merits of his claims only because the State provided additional trial testimony in its own appendix. See NRAP 30(b)(3); *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (citations omitted) ("It is appellant's responsibility to make an adequate appellate record. [This court] cannot properly consider matters not appearing in that record."); *but see Thomas v. State*, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) ("Additionally, counsel failed to include many necessary parts of the record in the Appellant's Appendix. We are able to address the merits of a number of claims only because the State provided a seven-volume appendix that includes necessary parts of the record.").

[J]ustifiable battery is the battery of a human being, which does not result in death and is necessary for self-defense against one who manifestly intends to commit a felony by using violence or surprise, or when there is reasonable ground to apprehend a design on the part of the person injured to do some great personal injury to the person inflicting the injury.

Davis v. State, 130 Nev. 136, 145, 321 P.3d 867, 873-74 (2014) (citing NRS 200.120; NRS 200.275).

At trial, the jury heard testimony from Gubka and a fellow inmate who observed the incident. Gubka testified that he was trying to make friends with Campos but made a remark to which Campos may have taken offense. Gubka's fellow inmate further testified that everyone in the jail's dayroom at that time was joking around and saying "derogatory" things to one another, including Campos and Gubka, and that he saw Campos hit Gubka. After all of the witnesses in the case were heard, Campos' counsel requested that the district court instruct the jury on self-defense. The district court refused, noting that there was not sufficient evidence that Campos' use of force was justified.

Campos claims that the district court's refusal to instruct the jury on self-defense usurped the role of the jury, precluded the jury from considering Campos' theory of the case, and shifted the burden to Campos to prove self-defense. But these arguments are unpersuasive. The supreme court has noted that "[w]hether [self-defense] instructions are appropriate in any given case depends upon the testimony and evidence of that case." *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 58-59 (2000). And when the evidence is legally insufficient to sustain an element of the defense, the district court is not required to instruct the jury on that defense. *Hoagland*, 126 Nev. at 386, 240 P.3d at 1047; see also *Williams v.*

State, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975) (holding that a “[self-defense] instruction should not be given if there is no supportive evidence”).

Here, the district court neither usurped the jury’s role nor improperly precluded the jury from considering Campos’ theory of the case because the only evidence supporting a theory of self-defense in this case is legally insufficient to establish an element of justifiable battery; specifically, mere derogatory words alone cannot give rise to a reasonable apprehension of an intent to inflict great personal injury. *See Davis*, 130 Nev. at ___, 321 P.3d at 873-74 (requiring the batterer to reasonably apprehend a design on the part of the individual battered to inflict great personal injury); 2 Wharton’s Criminal Law § 190 (15th ed.) (“[M]ere words or gestures by the victim, however abusive or insulting, are no defense to a battery prosecution.”). Consequently, we conclude that the district court did not abuse its discretion in refusing to instruct the jury on self-defense.

Next, we consider whether the district court erred in allowing Gubka to testify. This court will not disturb a finding of competency to testify absent an abuse of discretion. *Evans v. State*, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. ___, ___, 351 P.3d 725, 732 (2015). “With certain exceptions[,] every person is competent to be a witness.” *Hall v. State*, 89 Nev. 366, 369, 513 P.2d 1244, 1246 (1973) (citing NRS 50.015 (“Every person is competent to be a witness except as otherwise provided in this title.”)). However, the issue of a witness’ competency to testify is barred from appellate review when the appellant failed to request a voir dire examination of the witness

and failed to raise an objection as to competency at trial. *Lincoln v. State*, 115 Nev. 317, 322, 988 P.2d 305, 308 (1999).

At trial, Campos' counsel objected to Gubka's competency to testify, but he subsequently waived the objection when he expressly declined the district court's invitation to voir dire the witness outside the presence of the jury and instead opted to cross examine Gubka on the topic of his mental condition. The record on appeal does not show that Campos ever requested a final ruling on Gubka's competence following cross examination. Accordingly, we conclude that Campos waived his objection with respect to Gubka's competence, and we decline to consider this issue on appeal. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) (holding that a party's failure to request a ruling on a previous objection that the district court had not yet ruled on constituted waiver of the objection and precluded appellate review).

Next, we consider whether the State presented sufficient evidence that Campos was in lawful custody for criminal conduct to sustain a conviction for the crime of battery by a prisoner. Reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact 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)) (internal quotation marks omitted). The jury weighs the evidence and the credibility of the witnesses and determines whether these are sufficient to meet the elements of the crime, and this court will not disturb a verdict that is supported by substantial evidence. *Id.*

NRS 200.481(2)(f) provides that a person convicted of a battery shall be punished for a category B felony “[i]f the battery is committed by a . . . prisoner who is in lawful custody or confinement” For purposes of NRS 200.481(2)(f), “prisoner” is defined as it is in NRS 193.022, which “includes any person held in custody under process of law, or under lawful arrest.” *State v. Javier C.*, 128 Nev. 536, 539, 289 P.3d 1194, 1195 (2012). The term only applies to “individuals in custody for criminal conduct.” *Id.* at 539, 289 P.3d at 1196 (quoting *Robinson v. State*, 117 Nev. 97, 98, 17 P.3d 420, 421 (2001)) (internal quotation marks omitted).

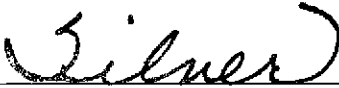
At trial, the jury heard testimony from a deputy at the jail, who testified that Campos was an “inmate that was in the cell next to [Gubka]” during the time in which the battery occurred. Further, another deputy testified that Campos had asked her “if he could be an inmate worker” a few days after the battery, and yet another deputy testified that Campos was housed in a cell in the booking area of the jail at that time. Finally, a fellow inmate testified that he, Campos, and Gubka were in a dayroom area near everyone’s cells when the battery occurred. Consequently, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could have determined that Campos was in lawful custody for criminal conduct.

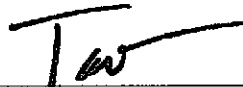
Finally, we consider whether cumulative error warrants granting a new trial. Cumulative error applies where individually harmless errors, viewed collectively, nevertheless violate the defendant’s right to a fair trial and warrant reversal. *See Valdez v. Valdez*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). In reviewing claims of cumulative error, we consider “(1) whether the issue of guilt is close, (2)


the quantity and character of the error, and (3) the gravity of the crime charged.” *Id.* (internal quotation marks omitted). Here, we conclude there was no cumulative error warranting reversal. The issue of guilt was not close on the charge for which Campos was convicted. Further, we conclude that the district court did not commit any error. Thus, we need not consider whether cumulative error below warrants the granting of a new trial.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Montero, District Judge
Pershing County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk