IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHONNON FORREST MCNATT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72580

FILED

MAR 14 2018

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

ORDER OF AFFIRMANCE

Shonnon Forrest McNatt appeals from a judgment of conviction, pursuant to a jury verdict, of causing substantial bodily harm to another by driving a vehicle while under the influence of alcohol. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Trial testimony indicated that McNatt, while under the influence of alcohol, drove his car onto a sidewalk and hit a pedestrian. McNatt initially told the first responding officer arriving at the scene that he was driving the vehicle that hit the pedestrian. Also, before he was transported to jail, McNatt filled out a witness statement admitting he was driving the vehicle. Importantly, two eyewitnesses further identified McNatt as the driver of the vehicle that collided with the pedestrian. During the investigation, three officers noticed that McNatt had red, watery eyes and smelled of alcohol, and one of the officers further noted that McNatt was unsteady on his feet, had slurred speech, and failed field sobriety tests. Breathalyzer tests performed within two hours of the accident showed McNatt's blood alcohol level was at .219 and .203.

Photographs of the scene showed an open beer can and spilled liquid near McNatt's car. A jury convicted McNatt of the crime of causing substantial bodily harm to another by driving a vehicle while under the influence of alcohol, a category B felony in violation of NRS 484C.430.[1]

On appeal, McNatt argues reversal is required because (1) the district court improperly denied his motion to suppress his written statement because officers obtained it in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), (2) the district court failed to adequately answer a jury question, and (3) the prosecutor engaged in misconduct by referencing a photograph of the beer can during opening arguments. We disagree.

We review de novo the district court's determination as to whether officers obtained the defendant's statement in violation of *Miranda*. *See Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). If the district court erred, we consider whether the error was harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991). Here, the facts elicited during the evidentiary hearing on McNatt's motion to suppress the witness statement did not establish whether McNatt was in custody for purposes of *Miranda* when he wrote the statement, as it is unclear when he wrote that statement and whether the officers had probable cause to arrest McNatt at that time. *See Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding *Miranda*'s safeguards apply once the suspect's freedom is curtailed as if under arrest). However, we need not determine whether the district court improperly denied the motion to suppress McNatt's statement because,

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

even assuming the district court erred, the error was harmless. Notably, two witnesses at the scene identified McNatt as the driver, and McNatt told first responders during the initial investigation that he was driving the car that hit the pedestrian. Therefore, even if the district court erred and should have suppressed McNatt's later handwritten statement to the police that he was the driver of the vehicle, the error was harmless because overwhelming evidence established McNatt was the driver.

We next consider whether, as McNatt contends, the district court inadequately answered a question posed by the jury during deliberations regarding the instruction on substantial bodily harm. The district court originally issued an instruction defining "prolonged physical pain" over McNatt's objection. Later, after the jury deliberated and asked for additional instruction on prolonged physical pain, the district court responded to the jury's question with excerpts from Nevada law further defining "prolonged physical pain." McNatt did not object to the district court's answer to the jury. On appeal, McNatt contends the district court misinterpreted the jury's question and provided an inadequate answer under *Gonzalez v. State*, 131 Nev. ___, 366 P.3d 680 (2015).

We review the district court's actions in answering the jurors' question for an abuse of discretion. *See Jeffries v. State*, 133 Nev. ___, ___, 397 P.3d 21, 27-28 (2017). Generally, a district court may refuse to answer a jury question that is adequately covered by the jury instructions so long as those instructions are correct. *See Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). In *Gonzalez*, the supreme court created a narrow exception to this rule requiring that the district court provide an answer when the jury's question demonstrates confusion on an important element

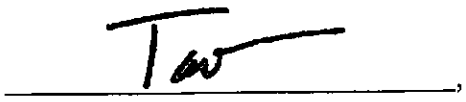
of the law and at least one of the parties offers a supplemental instruction that would have resolved this confusion. 131 Nev. at ___, 366 P.3d at 682-84; *see also Jeffries*, 133 Nev. at ___, 397 P.3d at 28. Our review of the record reveals that the jurors' question did not fall into this narrow exception. Here, the parties did not offer their own supplemental instruction, and the district court provided the jury with clarification. Both the jury instruction and the district court's answer were correct statements of law, and the record shows that the court's answer to the jurors' question resolved the jury's confusion. Therefore, we conclude the district court did not abuse its discretion.

Finally, McNatt contends the prosecutor engaged in misconduct during opening statements by telling the jury they would see a photograph of a beer can near McNatt's car. McNatt argues this was improper because defense counsel indicated immediately before opening statements that he intended to object to the admission of the photograph at trial. Because McNatt did not object to the comments during opening statements, we review for plain error. *See Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). Our review of the State's opening statement does not show error, and even assuming the prosecutor's comments constituted misconduct, we conclude McNatt has not shown prejudice and therefore has not demonstrated plain error warranting reversal. *See id.* (holding that to show plain error the appellant must show he was prejudiced by the error such that it affected his substantial rights). Importantly, the photograph

was admitted at trial[2] and overwhelming evidence supported the State's theory of the case. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Second Judicial District Court, Department 7
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[2]McNatt does not argue on appeal the photograph was improperly admitted.