IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA CRITTENDON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75845-COA

ORDER OF AFFIRMANCE

Joshua Crittendon appeals from a judgment of conviction entered pursuant to a jury verdict of an unlawful act related to human excrement or bodily fluid and battery by a prisoner. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Sufficiency of the evidence

Crittendon claims insufficient evidence supports his convictions because there was no physical evidence to support the charges and the primary witness offered inconsistent versions of the events. We review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The jury heard testimony that Crittendon was an inmate confined to a cell in the Clark County Detention Center. A corrections officer and a nurse conducted a medication pass during which they gave Crittendon medication. Crittendon bent over the toilet area of his cell with the paper cup he received with his medication and then propelled a liquid

through the cell's food port. The liquid hit the officer in the face and went into his eyes and his mouth. It caused the officer's eyes to burn, had a salty taste, and gave off a pungent aroma that was consistent with urine. Crittendon then said something like, "How do you like this?" or "How does this feel?" He later threatened to throw excrement at another corrections officer, and he bolstered his threat by stating he had done this to another officer and by displaying a document charging him with that offense.

We conclude a rational juror could reasonably infer from this evidence that Crittendon was a prisoner in lawful confinement and he intentionally propelled urine onto a corrections officer. *See* NRS 200.481(1)(a); NRS 212.189(1)(d)(1); *Zgombic v. State*, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990) (the uncorroborated testimony of a victim can support a conviction), *superseded by statute on other grounds as stated in Steese v. State,* 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports its verdict. *See Bolden v. State,* 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Advisory instruction

Crittendon claims the district court abused its discretion by denying his motion for an advisory instruction to acquit him of the unlawful-act-related-to-human-excrement-or-bodily-fluid count. He argues an advisory instruction was appropriate because the State failed to prove he was a prisoner as defined by NRS 212.1895(4)(a) and was in lawful confinement as required by NRS 212.189(3).

"The granting of an advisory instruction to acquit rests within the sound discretion of the district court." *Middleton v. State*, 114 Nev. 1089, 1105, 968 P.2d 296, 307 (1998); *see* NRS 175.381(1). Here, the record demonstrates the district court considered Crittendon's motion and decided to proceed with the trial and send the case to the jury. Thus, we conclude the district court did not abuse its discretion by denying the motion for an advisory instruction.

Jury instruction number 11

Crittendon claims the district court erred by overruling his objection to jury instruction number 11. He argues this instruction incorrectly defined "prisoner" pursuant to NRS 193.022 and NRS 208.085. And he asserts he was not in lawful confinement for purposes of NRS 212.189(3) because he had not been convicted of a crime.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal citation omitted). We review the question of whether a jury instruction is a correct statement of the law de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Instruction number 11 did not define the term "prisoner." Instead, it correctly stated the law regarding an unlawful act related to human excrement or bodily fluid by a prisoner who is in lawful confinement by accurately conveying the statutory language contained in NRS

212.189(1).[1] *See State of Nevada v. Kelly*, 1 Nev. 188, 190 (1865) (providing that an instruction in the words of a statute and pertinent to the facts of the case correctly places the law of the case before the jury). Because instruction number 11 correctly stated the law and summarized the statutory definition of a crime Crittendon was accused of having committed, we conclude the district court did not abuse its discretion by overruling Crittendon's objection to this instruction.

Proposed prisoner and lawful confinement instructions

Crittendon claims the district court abused its discretion by rejecting his proposed instructions defining "prisoner" and "lawful confinement." He argues his proposed instructions are consistent with NRS 212.1895 and NRS 212.1895 defines "prisoner" for the purposes of the crime of an unlawful act related to human excrement or bodily fluid.[2] And he

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[1]Instruction No. 11 provided, in relevant part,

> Unlawful Act Related to Human Excrement or Bodily Fluid is established if the State proves beyond a reasonable doubt that a prisoner, who is in lawful confinement, willfully uses, propels, discharges, spreads or conceals, or cause[s] to be used, propelled, discharged, spread or concealed, any human excrement or bodily fluid . . . [w]ith the intent to have the excrement or bodily fluid come into physical contact with any portion of the body of another person.

[2]To the extent Crittendon also argues the distinction between "lawful custody" in NRS 212.189(2) and "lawful confinement" in NRS 212.189(3) is unconstitutionally vague, we decline to consider his argument because he was not charged with an offense pursuant to NRS 212.189(2) and the jury was not instructed that NRS 212.189(2) is a lesser-included offense of NRS 212.189(3).

asserts he was not a prisoner in lawful confinement under these definitions because he was not serving a sentence and had not been convicted of a crime.

"A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." *Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal brackets omitted). However, a defendant is not entitled to instructions that are "misleading, inaccurate or duplicitous." *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

Crittendon's proposed instructions were misleading and inaccurate because they were based on the definition for "prisoner" provided in NRS 212.1895(4) and the Legislature has expressly limited that definition to people assigned to private facilities or institutions. *See* NRS 212.1895(1) & (4). Furthermore, the Legislature has expressly declared the definition of "prisoner" provided in NRS 208.085 applies to the statutes codified in NRS Title 16, *see* NRS 208.015, and the statute defining an unlawful act related to human excrement or bodily fluid is codified in NRS Title 16 and does not specify a different definition for "prisoner," *see* NRS 212.189. According we conclude the district court did not abuse its discretion by rejecting Crittendon's proposed "prisoner" and "lawful confinement" instructions.

Proposed adverse inference instruction

Crittendon claims the district court abused its discretion by rejecting his proposed adverse inference instruction with regard to law enforcement's failure to gather or preserve evidence pertaining to the

substance he allegedly threw onto the corrections officer.[3] However, Crittendon failed to demonstrate the evidence was exculpatory and the law enforcement officers' failure to gather it was gross negligence. *See Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001); *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Consequently, we conclude the district court did not abuse its discretion by rejecting his proposed adverse inference instruction. *See Crawford*, 121 Nev. at 748, 121 P.3d at 585.

Challenges for cause

Crittendon claims the district court erred by denying his challenges for cause during jury voir dire. He asserts that prospective jurors 261 and 663 claimed they remained neutral and would not presume Crittendon's innocence. And he argues that "[g]iven the unequivocal bias inherent in the views of these panel members, the court should have granted these challenges."

"If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." *Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014); *Blake v. State*,

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[3]To the extent Crittendon further claims the State violated *Brady* by "failing to preserve potential exculpatory physical evidence," we conclude his claim lacks merit because *Brady* does not address the preservation of physical evidence. *Brady v. Maryland*, 373 U.S. 83 (1963).

121 Nev. 779, 796, 121 P.3d 567, 578 (2005);[4] *see Sayedzada v. State*, 134 Nev., Adv. Op. 38 at *17, 419 P.3d 184, 194 (Ct. App. 2018).

Here, Crittendon used his peremptory challenges to remove prospective jurors 261 and 663 and he has not shown that any of the jurors actually empaneled were unfair or biased. Consequently, we conclude he is not entitled to relief.

Having concluded Crittendon is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Stefany Miley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[4]Crittendon suggests that we "should depart from *Blake* on this issue." However, even assuming we could so, Crittendon has failed to demonstrate such a departure is warranted.