

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK CLAYTON HOLLAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69883

FILED

FEB 24 2017

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery resulting in substantial bodily harm to a victim 60 years of age or older. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Appellant Mark Holland was arrested for striking James Kemp, who was 63 years old at the time of the incident.¹ On appeal, Holland asserts (1) there was insufficient evidence to support his conviction, (2) the State committed prosecutorial misconduct by referencing Holland's failure to testify and continually gesturing to Kemp during closing arguments, (3) the district court erred by rejecting Holland's proposed jury instructions, (4) the district court erred by admitting prejudicial and inflammatory evidence regarding the medical condition of Kemp's wife, and (5) the district court erred by denying Holland's for-cause challenge of a potential juror. We disagree.

Evidence is sufficient to support a verdict if "any rational trier of fact could have found the essential elements of the crime beyond a

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

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)). Here, a reasonable jury could find Holland guilty of battery resulting in substantial bodily harm with a victim at least 60 years of age based on the evidence presented at trial. Kemp testified regarding his age, the fact that Holland struck him, and the prolonged pain he felt following the incident, fulfilling the elements of NRS 193.167(1) and 200.481(2)(b). While Holland argues there was not substantial evidence regarding Kemp's injury and whether Holland acted in self-defense, we conclude the State adduced sufficient evidence at trial by way of the victim's testimony and the casino surveillance video. Expert witnesses are not required to prove Kemp suffered prolonged physical pain. See NRS 0.060 (defining substantial bodily harm); *Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009) (holding "prolonged physical pain" under NRS 0.060 "has a well-settled and ordinarily understood meaning."). Furthermore, Kemp's testimony and surveillance video rebutted Holland's contention that he was acting in self-defense. See *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) (defining the necessary conditions for self-defense to apply).

Next, we consider whether the district erred by rejecting Holland's proposed jury instructions. We review the district court's decision in settling jury instructions for abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The district court does not err by refusing to give an instruction that is adequately covered by another instruction. *Rose*, 123 Nev. at 205, 163 P.3d at 415-16. Holland argues that the district court erred by not including a jury instruction stating Kemp's failure to seek medical

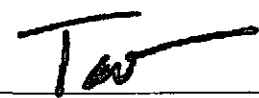
treatment could be an intervening cause in his prolonged pain and that the district court erred by including a fear-of-death requirement in the jury instructions regarding self-defense. We disagree. The district court properly found that an instruction stating Kemp's failure to seek medical treatment could be an intervening cause of his prolonged pain was adequately covered by another instruction directing the jury to convict only if they concluded Holland's actions caused Kemp's pain. The district court also did not abuse its discretion in choosing to follow the Nevada Supreme Court's mandated instructions as outlined in *Runion* while also "tailor[ing] instructions to the facts and circumstances of [the] case" by removing the word "kill" and de-emphasizing a fear of death. *Runion*, 116 Nev. at 1051, 13 P.3d at 59.

Finally, we review whether the district court improperly admitted evidence regarding Kemp's wife's health. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). We conclude the district court acted within its discretion in ruling that Holland opened the door to this evidence. In his opening, Holland asserted that Kemp's failure to seek medical treatment for pain indicated that Kemp did not incur a substantial physical injury. As a result, the State was entitled to rebut Holland's argument by eliciting testimony from Kemp that he feared taking strong pain medication as it would have adversely affected his ability to care for his handicapped wife. See *Cordova v. State*, 116 Nev. 664, 670, 6 P.3d 481, 485 (2000) (explaining

that a defendant may open the door, permitting the State to introduce evidence that it could not otherwise offer).² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

²Having carefully considered the remaining arguments, we conclude they are without merit. And, we note that even if the State engaged in prosecutorial misconduct during argument, the overwhelming weight of evidence against Holland rendered any alleged errors to be harmless beyond a reasonable doubt. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). Further, the district court instructed the jury that they could not infer guilt from the fact that Holland chose to not testify, and juries are presumed to follow instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

Additionally, even if the district court erred by denying Holland's for-cause challenge, the error is not reversible because the potential juror was never empaneled and Holland fails to argue that any seated juror was biased. *See Preciado v. State*, 130 Nev. ___, ___, 318 P.3d 176, 178-79 (2014) ("[a] district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury."; *Jitnan v. Oliver*, 127 Nev. 424, 434, 254 P.3d 623, 630 (2011) (a party's constitutional right is not violated if the jury actually seated is impartial).

cc: Hon. Richard Scotti, District Judge
Clark County Public Defender
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