

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE ANTONIO GOMEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78917-COA

FILED

FEB 04 2021

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

ORDER OF AFFIRMANCE

Jose Antonio Gomez appeals from a judgment of conviction, pursuant to a jury verdict, for battery with the use of a deadly weapon resulting in substantial bodily harm, mayhem with the use of a deadly weapon, and first-degree arson. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Michael McDaniel temporarily became homeless after losing his job as a motel manager.¹ Early one morning, while searching for a place to sleep, he encountered a large, pried-open Conex shipping container behind a motel.² The container had several holes that one could slip a hose through. When he approached the Conex container, he saw Gomez inside the container cooking on a barbecue pit. After a verbal argument, Gomez left the container and McDaniel started cooking with the barbecue pit that Gomez left behind. Shortly after, McDaniel saw Gomez peeking through a hole in the container for over a minute before retreating. McDaniel heard Gomez ask him if he needed a light, felt someone dousing him with a liquid, and suddenly felt flames engulf him.

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

²McDaniel did not testify at trial because the State could not find him. The parties agreed to play a video recording of his prior testimony at the preliminary hearing.

Police Officers Daniel Nicolini and Shawn Manning soon responded to a dispatch call and found McDaniel walking towards them covered with burns and with part of his skin falling off. The police officers photographed him, and asked him if he knew who burned him. McDaniel initially struggled to answer but eventually told the officers that “Jose” got out of jail that day, doused him in gasoline, and lit him on fire. The police officers called an ambulance to take McDaniel to the hospital and Officer Nicolini followed him there.

Officer Manning checked to see if a “Jose” got out of jail that day, and was told that Jose Antonio Gomez was the only “Jose” released from jail that day. When Manning went behind the motel, he found the container still on fire.

An hour and a half before the police officers responded to the dispatch call, Isa King, a cashier at a nearby gas station, saw Gomez enter the gas station with a portable gas container and purchase gasoline with cash. She remembered that no one else came in that morning to purchase gas with a portable container. The gas station’s surveillance video corroborated King’s testimony and showed Gomez wearing the same clothing while purchasing gas that he was wearing when police officers arrested him.

Fire Inspector John Beck investigated the scene the next day and concluded that the fire was not incendiary—meaning accidentally/naturally caused—but rather arson. Fire inspectors also tested McDaniel’s clothing for accelerants and found gasoline residue on his tank top.

The State charged Gomez with attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in

substantial bodily harm, mayhem with the use of a deadly weapon, and first-degree arson. During a pretrial hearing, the State sought by motion to introduce a video at trial of a police interrogation conducted shortly after Gomez's arrest. The video depicted Gomez in chains but Gomez did not object. The court asked Gomez if he was sure that he would not object to the video, warning that introducing the video "is harming the case law." Despite those warnings, Gomez and his counsel both stated that the video interview helped his case and therefore did not object to its admission. In the video, Gomez discussed some of his prior drug history to show his relationship with McDaniel. The State introduced the video at trial, also without objection. Before playing the video, the district court instructed the jury to consider the statements to show only Gomez's relationship with McDaniel, and not for any character purposes.

Gomez testified at trial that he had a physical confrontation with McDaniel before the fire started. According to Gomez, McDaniel forced him to leave the container and kicked him in the head as he was leaving.

After closing arguments, the district court gave the jury the following instruction:

If you find that before this trial the defendant made false or deliberately misleading statements concerning the charge upon which he is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt but it is not sufficient of itself to prove guilt. The weight to be given to such circumstance and its significance, if any, are matters for your determination.

The jury convicted Gomez on all charges except attempted murder with the use of a deadly weapon.

On appeal, Gomez makes a number of arguments, only some of which we need address at length.³ First, he claims that the jury could not

³Gomez makes several arguments that we need not discuss in detail. First, Gomez asks that we overrule *Jackson v. State*, 128 Nev. 598, 291 P.3d 1274 (2012), because multiple enhancements for a single action violates the Double Jeopardy Clause. However, he does not provide any cogent argument or legal authority for why we should do so. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). The Nevada Supreme Court has determined that crimes with different elements do not violate the Double Jeopardy Clause, and the separate enhancements in this case contain different elements. See *Jackson*, 128 Nev. at 605-07, 291 P.3d at 1278-80. Additionally, we cannot overrule precedent established by the Nevada Supreme Court. See *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (2007), *as modified* (Aug. 15, 2007) (“The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court.” (quotation marks and internal punctuation omitted)).

Second, Gomez argues that Fire Inspector Beck should not have testified about whether someone started the fire maliciously, but Gomez invited the discussion by extensively questioning Beck about the subject, and thus he cannot complain of an error he invited. See *Rhyne v. State*, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002).

Third, Gomez claims that the district court erred in admitting his interview with the police showing him in shackles and discussing his drug use. However, Gomez invited the alleged error by stipulating to the video’s admission for his own benefit. *Sidote v. State*, 94 Nev. 762, 762-63, 587 P.2d 1317, 1318 (1978) (holding that appellant cannot invite error perceived as favorable to him, then argue it was error on appeal). The district court warned Gomez that the video could prejudice him during trial, and Gomez told the district court judge that he would not object to it because he believed the video would help his case.

Finally, Gomez argues that “[a] review of the errors which occurred herein demonstrates that reversal of the conviction and the granting of a new trial is mandated.” Cumulative error applies where individually harmless errors, viewed collectively, violate a defendant’s right to a fair trial

convict him of arson because the container was not a structure under NRS 205.010(1). Second, he claims that there was insufficient evidence of malice for the arson conviction and to add a deadly weapon enhancement to the mayhem charge. Third, he claims that the district court should have sua sponte issued a jury instruction indicating that the State had to prove beyond a reasonable doubt that the fire was not an accident. Fourth, he argues that the district court erred by providing a “consciousness of guilt” jury instruction. Fifth, he argues that the State needed to provide Gomez notice in the charging document that he may have to pay restitution.

NRS 205.010

Gomez argues that the facts of the case do not amount to the crime of first-degree arson because the Conex container was not a structure as required by the arson statute. “[W]e review questions of statutory interpretation de novo.” *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). NRS 205.010 states that “[a] person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any: 1. [d]welling house or other structure or mobile home, whether occupied or vacant; or 2. [p]ersonal property which is occupied by one or more persons,” is guilty of first-degree arson. We look first at the statute’s plain language to determine if the statute is ambiguous. *See Lucero*, 127 Nev. at 95, 249 P.3d at 1228.

and warrant reversal. *See Valdez v. State*, 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). However, in this case we conclude there are no errors to cumulate.

Black's Law Dictionary defines a "structure," in part, as "[a]ny construction, production, or piece of work artificially built up or composed of parts purposefully joined together." *Structure, Black's Law Dictionary* (11th ed. 2019). But the statute puts a condition on this definition, defining the crime as one that can be committed against a "dwelling house or other structure or mobile home, whether occupied or vacant." This suggests that the statute encompasses not every kind of conceivable structure, but only those that can be "occupied" in the way that dwelling houses or mobile homes can be. Here, the evidence incontrovertibly demonstrates that the Conex container was large enough to be used as a dwelling and was actually being used a dwelling, as Gomez was living in it and indeed was cooking meals in it that day until McDaniel arrived.⁴ Therefore, we conclude that there was sufficient evidence for the jury to convict Gomez for arson pursuant to NRS 205.010(1).

Sufficiency of the evidence

Gomez argues that there was insufficient evidence for the jury to convict him of first-degree arson and to add a deadly weapon enhancement to the mayhem charge. First, Gomez claims that there is no evidence that he acted maliciously. He asserts McDaniel was not a credible witness because he contradicted himself and did not appear to testify at trial, the district court improperly instructed the jury on maliciousness, and that the fire likely started from a lit barbecue pit within the Conex container. Second, he avers that there was no evidence to support a deadly

⁴We note that, although not argued by the parties, NRS 205.010(2) also defines the crime of first-degree arson to include "personal property which is occupied by one or more persons," and the Conex container also appears to meet this definition as it was property that was occupied by a person, first by Gomez himself and then by McDaniel at the time of the fire.

weapon enhancement to the mayhem charge because McDaniel only saw Gomez's face peek into the Conex unit, but he did not see Gomez light the fire.

In reviewing the sufficiency of the evidence, we must decide “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.” *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (emphasis and internal quotation marks omitted). It is the jury's function to assess the evidence's weight and determine witnesses' credibility, not a reviewing court. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Viewing the evidence in the light most favorable to the State, there is sufficient evidence that Gomez acted maliciously. The Nevada Legislature defined “maliciously” as “import[ing] an evil intent, wish or design to vex, annoy or injure another person.” NRS 193.0175; *see also State v. Second Judicial Dist. Court (Radonski)*, 136 Nev., Adv. Op. 23, 462 P.3d 671, 675 (2020) (“Nevada's definition of ‘maliciously’ as ‘an evil intent’ to injure compels the conclusion that the State must prove a defendant's specific intent to harm.”). Gomez admitted in his testimony that he had a physical confrontation with McDaniel prior to the incident. He alleged that McDaniel kicked him in the head, which could be a motive for a retaliatory act. Moreover, McDaniel testified at the preliminary hearing that Gomez peeked into the Conex container immediately before setting it ablaze. Gomez knew McDaniel was in the Conex container because he taunted him before lighting the container on fire and doused him with gasoline, as evidenced by the gasoline on McDaniel's shirt and his testimony. This

evidence is sufficient to show that Gomez had a specific intent start a fire and harm McDaniel.

Further, there is sufficient evidence to support the deadly weapon enhancement to the mayhem charge. NRS 193.165 provides a sentencing enhancement is appropriate when a person uses a deadly weapon in the commission of a crime. It defines a deadly weapon, in part, as “[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.” NRS 193.165(6)(b). There is sufficient circumstantial evidence that Gomez lit the fire using gasoline. McDaniel testified that he saw Gomez peek his head into the Conex container and taunt him immediately before dousing him with gasoline and setting him ablaze, and fire investigators found traces of gasoline on McDaniel’s clothes, which a rational trier-of-fact could accept as sufficient to deduce that Gomez started the fire using gasoline. Thus, there is sufficient evidence to support the finding of gasoline as a deadly weapon and the ensuing enhancement.

Theory of the case jury instruction

Gomez argues that the district court erred by not issuing a jury instruction indicating that the State had to prove beyond a reasonable doubt that McDaniel did not accidentally start the fire. However, Gomez did not propose the jury instruction below. “Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant’s right to a fair trial.” *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998). This court must analyze the need for an

instruction in light of the circumstances of the case. *Bowman v. State*, 132 Nev. 757, 764, 387 P.3d 202, 207 (2016).

Here, the district court did not err because it instructed the jury as to each element of the offense. The jury instructions required the State to prove each element of arson beyond a reasonable doubt, which includes proving that Gomez acted willfully and maliciously. The district court impliedly instructed the jury that it must find that the fire was not an accident because Gomez must have had the requisite evil intent to start the fire to be found guilty. Therefore, we conclude that Gomez has failed to demonstrate a patently prejudicial error.

Consciousness of guilt jury instruction

Gomez argues that the district court erred by providing a consciousness of guilt jury instruction because the jury must assess witness credibility without a presumption that the defendant is guilty. Gomez failed to object to this instruction below. We review challenges to unobjected-to jury instructions for plain error. *Bowman*, 132 Nev. at 764, 387 P.3d at 207. Before we will correct a plain error, “an appellant must demonstrate that: (1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant’s substantial rights.” *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). “[A] plain error affects a defendant’s substantial rights when it caused actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome).” *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted). NRS 175.171 provides that “no special instruction shall be given relating exclusively to the testimony of the defendant.” *See also Ford v. State*, 99 Nev. 209, 213, 660 P.2d 992, 994 (1983).

Even if the district court erred in issuing a jury instruction relating exclusively to Gomez's testimony, Gomez has not shown that actual prejudice or a grossly unfair outcome resulted. The jury instruction simply permitted the jury to construe evidence in a certain way, but it explicitly instructed the jury to make its own credibility determinations. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (stating that when a district court instructs a jury, we presume the jury followed the instructions). Accordingly, Gomez has not shown actual prejudice, nor did the jury instruction cause a grossly unfair outcome. Therefore, we conclude that Gomez has failed to demonstrate plain error.

Restitution

Gomez avers that the district court could not assess restitution against him as part of his sentence because restitution constitutes an "enhancement" of a criminal penalty and the State never gave notice in the charging document that Gomez could receive such an "enhancement" under NRS 205.034 once convicted. "We review constitutional challenges to the sufficiency of an indictment de novo." *Rimer v. State*, 131 Nev. 307, 325, 351 P.3d 697, 710 (2015). However, Gomez failed to object below, and thus we apply plain error review. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. A charging document must reference the statutes that the State charges the defendant with; the alleged time, place, and manner of the offenses; and information a defendant needs to know to prepare a defense. *Id.*; *see also* Nev. Const. art. 1, § 8; NRS 173.075(1).

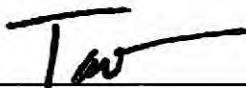
NRS 205.034 provides a district court with the option of requiring a defendant who commits arson to pay "[t]he costs of providing police and fire services related to the crime." NRS 205.034(2). Restitution differs from fines or costs; it is not a pecuniary criminal punishment and

Nevada's statutes differentiate between the two. *Martinez v. State*, 120 Nev. 200, 202-03, 88 P.3d 825, 827 (2004). We discern no error because NRS 173.075 does not require the State to include restitution statutes in the charging document because it is not a criminal charge or enhancement. Therefore, we conclude that Gomez's argument is without merit.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk