IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM E. WORKMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37690

FILED

SEP 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rulard
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

William Workman appeals from a judgment of conviction, pursuant to a jury verdict, of battery with use of a deadly weapon. Following a two-day jury trial, the district court sentenced Workman to thirty-six to ninety months in prison. Workman now challenges his conviction on several grounds. We conclude that all of his claims lack merit and, therefore, affirm his conviction.

FACTS

The battery occurred on October 2, 2000, at Butch Cassidy's Saloon in Winemucca. Workman was sitting alone in the saloon at a table across from the bar. Larry Crutcher, the victim, was in the back of the bar playing pool with two other men. Crutcher testified at trial that he went to the bar to get a drink and that when he passed by Workman's table on his way back to the pool table, Workman mumbled something to him. Crutcher testified that he put his drink down and walked over to Workman's table. He testified that he leaned over the table, placed his hands on the table, and said, "[W]hat's up?" Crutcher testified that Workman got up, "made a quick move with his hand," and "headed out the door." Crutcher testified that he then noticed he was bleeding and realized he was cut on the neck. Judith Donovan, the bartender, testified

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that she saw a knife in Workman's hand, but she did not see Workman cut Crutcher. The entire incident lasted only a few seconds.

DISCUSSION

Workman now challenges his conviction, alleging that the district court erred by: (1) excluding evidence of a recent prior battery committed against him, which he offered to support his theory of self-defense; (2) not allowing him to question Crutcher at trial regarding Crutcher's prior acts of violence; (3) admitting three photographs into evidence that showed Crutcher's wound and blood on the bar floor; (4) allowing two of the State's witnesses to repeat some of their testimony; (5) rejecting his proposed lesser-included offense instruction for battery; and (6) giving an erroneous jury instruction regarding the defendant's flight. Workman also alleges that: (1) the State failed to negate his self-defense argument and that there was, therefore, insufficient evidence to support his conviction; (2) the cumulative errors committed at trial warrant reversal of his conviction; and (3) his sentence is cruel and unusual because it is disproportionate to the crime. We conclude that all of Workman's claims lack merit.

Evidence of the recent battery committed against Workman

Prior to trial, Workman indicated that he planned to introduce testimony from Paul Ohlmeier, the man Workman alleged previously battered him, and Officer Krupika, the police officer who investigated the alleged battery. Workman argued that the evidence would show his subjective belief that Crutcher was threatening him and that he needed to defend himself. Workman argues that the district court improperly excluded this evidence that would have supported his theory of self-defense. The record was not preserved, however, as to whether Workman

agreed to the exclusion or whether the district court excluded the evidence over Workman's objection.

During trial, the State sought to admit the preliminary hearing testimony of a deceased witness. Because the testimony contained references to the recent battery allegedly committed against Workman, the State asked the court to determine whether evidence of the battery would be admissible before it read the testimony to the jury. The court agreed, stating that it would "review that and go on the record before we bring in the jury. We'll be in recess about five minutes." The record indicates that a recess was taken, but nothing was said on the record regarding admissibility of the prior incident. The portions of the testimony that referenced the prior incident were not read to the jury and neither Workman, nor the State, again raised the issue.

On appeal, this court will not consider matters not appearing in the record.[1] Although it's possible that during the five-minute recess the district court instructed Workman that he would not be allowed to call any witnesses or otherwise introduce facts regarding the prior incident, that conclusion is mere speculation. Here, despite Workman's allegation to the contrary, the record presented on appeal simply precludes a determination that the district court excluded the evidence Workman intended to introduce regarding the recent battery committed against him.

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[1]Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (holding that because appellant "failed to preserve a record of the proceedings in which the [lower court] allegedly refused to admit any evidence," the court would not consider the matters on appeal).

Workman's attempt to question Crutcher regarding his prior acts of violence

Crutcher testified at the preliminary hearing that he had previously been involved in some fights to defend himself. At trial, Crutcher testified that he had never used violence to defend other tribal members in his hometown. When Workman's counsel attempted to question Crutcher regarding his preliminary hearing testimony, which Workman argues was contradictory to his testimony at trial, the State objected. The district court sustained the objection on relevance grounds. Workman's counsel then attempted to use the preliminary hearing testimony to impeach Crutcher's credibility. The State again objected, and the district court sustained for lack of foundation.

On appeal, Workman argues that the district court erred by not allowing him to question Crutcher about his prior acts of violence. He argues that the testimony was admissible for character and impeachment purposes. We disagree and conclude that the district court did not abuse its discretion by excluding the evidence for either purpose.[2]

Workman alleges that he sought to question Crutcher regarding his prior acts of violence in an attempt to establish that Crutcher was a violent person and that, at the time of the attack, Workman had a reasonable belief that self-defense was necessary. In Burgeon v. State, this court held that when the accused is trying to establish self-defense, he may inquire into specific acts of the victim that tend to show the victim's propensity for violence only if the accused had

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[2]See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (holding that this court will only disturb a district court's decision to admit or exclude evidence where there has been an abuse of discretion).

knowledge of the specific acts.[3] The record indicates that, here, Workman failed to establish that he had prior knowledge of Crutcher's previous acts of violence. Therefore, the district court did not abuse its discretion by excluding the evidence for character purposes. As to the district court's exclusion of the preliminary hearing testimony for the purpose of impeachment, Workman failed to make an offer of proof indicating why the questioning was relevant for impeachment. Absent a detailed offer of proof at trial, this court will not review a district court's decision to exclude evidence.[4]

Photographs admitted by the district court at trial

Prior to trial, Workman filed a motion in limine to exclude three photographs the State sought to offer into evidence at trial. One photograph showed blood on the bar floor and two showed the wound to Crutcher's neck. Workman argued that the photographs were more prejudicial than probative and unnecessarily cumulative of other evidence the State planned to offer. The district court denied the motion. On appeal, Workman argues that the district court's decision to admit the photographs was reversible error. We disagree.

The photographs indicated that Crutcher was cut with a knife, i.e., a deadly weapon. Because Crutcher was charged with battery with a deadly weapon, establishing use of a deadly weapon was an essential

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[3]102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986).

[4]Id. at 47, 714 P.2d at 579; McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981).

element of the State's case.[5] Workman argues, however, that even if the photographs were relevant to show use of a deadly weapon, they were needlessly cumulative because several of the State's witnesses testified to the instrumentality used. Although the district court may exclude cumulative evidence, it is not required to.[6] We, therefore, conclude that the district court did not abuse its discretion by admitting the photographs into evidence.[7]

Repetitive witness testimony

At trial, the State called Judith Donovan, the bartender at Butch Cassidy's Saloon, who testified as to what she witnessed on the night of the incident. After her testimony, the State admitted a diagram of the Saloon into evidence and asked Donovan to use the diagram to explain again what happened on the night of the incident. The State followed the same process with witness Larry Crutcher. On appeal, Workman argues that this process, in effect, allowed the State's witnesses to present the same testimony twice. He argues that this was needlessly cumulative and that the district court, therefore, abused its discretion by

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[5]Nalls v. State, 90 Nev. 124, 125, 520 P.2d 611, 612 (1974) (holding that "[p]hotographic evidence is generally liberally admitted, so long as it sheds light upon some material inquiry").

[6]NRS 48.035(2), with emphasis added, provides that "relevant[ ] evidence may be excluded if its probative value is substantially outweighed by . . . [the] needless presentation of cumulative evidence."

[7]Wesley v. State, 112 Nev. 503, 512-13, 916 P.2d 793, 800 (1996) (holding that, absent an abuse of discretion, this court will not disturb a district court's decision to admit photographs into evidence).

allowing it. We disagree. The district court is not required to exclude cumulative evidence.[8]

Jury instructions

Workman alleges that the district court erred by denying his request for a jury instruction regarding battery as a lesser-included offense of battery with a deadly weapon. This court has previously explained that a defendant is entitled to an instruction as to a lesser-included offense, only if the defendant's theory of defense is consistent with a conviction for the lesser-included offense.[9] Here, the record indicates that Workman's only theory of defense at trial was self-defense. Because battery without a deadly weapon was not part of his defense, the district court did not err by failing to give the requested lesser-offense instruction.

Likewise, the district court's instruction regarding the defendant's flight from the scene was not erroneous. The district court instructed the jury that:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is a circumstance in establishing his guilt, but is not sufficient in itself to establish guilt, but it is a fact which if proved, may be considered by the jury in the light of all other proved facts in deciding the questions of the defendant's guilt or innocence.

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[8]NRS 48.035(2), with emphasis added, provides that "relevant[ ] evidence may be excluded if its probative value is substantially outweighed by . . . [the] needless presentation of cumulative evidence."

[9]Walker v. State, 110 Nev. 571, 575, 876 P.2d 646, 649 (1994).

Workman argues on appeal that the instruction improperly shifted the State's burden to prove all of the elements of the offense charged beyond a reasonable doubt. Although the State bears the burden of showing all elements of the offense charged,[10] the instruction, as worded, did not improperly shift that burden.[11] In addition, the district court gave several other jury instructions, which "taken as a whole," adequately conveyed the State's burden of proof to the jury.[12]

Sufficiency of the evidence

In order to convict Workman of battery with a deadly weapon, the State had to prove beyond a reasonable doubt that he willfully and unlawfully used force or violence on the person of another with a deadly weapon.[13] Self-defense negates the unlawfulness element of battery with a deadly weapon.[14] Because Workman alleged self-defense, the State had

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[10]Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993).

[11]See Walker v. State, 113 Nev. 853, 870 n.4, 871, 944 P.2d 762, 773 n.4 (1997) (holding that the instruction, "[t]he flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence," did not create a mandatory presumption of guilt).

[12]See Doyle v. State, 112 Nev. 879, 901-02, 921 P.2d 901, 916 (1996) (concluding that "taken as a whole, the jury instructions in this case were sufficient to cure any ambiguity that may have existed in the challenged jury instruction").

[13]NRS 200.481; see also Sanders v. State, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994) ("To sustain a conviction, sufficient evidence must be presented to establish the essential elements of each offense beyond a reasonable doubt as determined by a rational trier of fact.").

[14]Barone, 109 Nev. at 780, 858 P.2d at 28.

to prove beyond a reasonable doubt that he did not act in self-defense.[15] On appeal, Workman contends that the State failed to adequately prove that he did not act in self-defense.[16] Based on our review of the record, we disagree.

The record indicates that the State presented sufficient evidence to negate self-defense.[17] The State's witness, Judith Donovan, testified that prior to the incident she did not hear anyone yelling, and she did not see Crutcher touch or reach out to Workman in any way. Crutcher also testified that he did not yell at, touch, or reach out to Workman in any way. He further testified that he did not threaten Workman at any time. Crutcher testified that he approached Workman because he thought Workman said something to him when he walked by. Crutcher also testified that Workman did not appear startled when he approached him. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that Workman was not acting in self-defense.[18]

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[15]See Id.

[16]Workman also attempts to attack the credibility of several of the State's witnesses. However, it is the province of the jury, not this court, to determine the credibility of witnesses. Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

[17]See Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996) (stating that this court will not disturb a jury verdict on appeal if it was supported by sufficient evidence).

[18]See Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996) (explaining that in a criminal case "sufficiency of the evidence" requires this court to determine if "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").

Sentencing - cruel and unusual punishment

Workman argues that the sentence the district court imposed upon him constitutes cruel and unusual punishment in violation of both the Nevada and United States Constitutions.[19] We disagree. Workman's sentence was well within the statutory limit proscribed by NRS 200.481(2)(e)(1) for battery with use of a deadly weapon.[20] A sentence that is within the statutory limit "will not be considered cruel and unusual punishment unless it is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity."[21]

Workman argues that, here, the gravity of the offense was minimal, i.e., it resulted in only one shallow wound, and should, therefore, warrant only the minimum sentence available. Although we agree that the gravity of the instant offense was minimal, Workman does have a lengthy criminal history, including four prior felony convictions, four prior

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[19]U.S. Const. amend. VIII; Nev. Const. art 1 § 6. Workman argues that the Nevada Constitution is more expansive than the federal constitution because it proscribes "cruel or unusual" punishment, whereas the federal constitution proscribes "cruel and unusual" punishment. Contrary to Workman's argument, this court has not distinguished the Nevada Constitution's proscription against "cruel or unusual" punishment from the U.S. Constitution's proscription against "cruel and unusual" punishment. See, e.g., Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); Naovarath v. State, 105 Nev. 525, 532 & n.6, 779 P.2d 944, 948 & 949 n.6 (1989); Schmidt v. State, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978); Anderson v. State, 92 Nev. 21, 23, 544 P.2d 1200, 1202 (1976).

[20]The district court sentenced Workman to three to six and a half years in prison. NRS 200.481(2)(e)(1) establishes that a person convicted of battery with use of a deadly weapon may be imprisoned for two to ten years and fined not more than $10,000.00.

[21]Castillo v. State, 110 Nev. 535, 544, 874 P.2d 1252, 1258 (1994).

misdemeanor convictions, and seventeen arrests. Because the district court has wide discretion to determine sentencing and is permitted "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant,"[22] we conclude that Workman's sentence is not cruel or unusual.

Because we find that all of the above allegations lack merit, we AFFIRM the district court's judgment of conviction.[23]

It is so ORDERED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk

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[22]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

[23]Because we conclude that the district court did not err at trial, we need not address Workman's cumulative error argument.