


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GIOVANNIA SOTOGARIBAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83921-COA

FILED

MAR 24 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Giovannia Sotogaribay appeals from a judgment of conviction, pursuant to a jury verdict, of battery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

In January 2020, Jon Neal was visiting the Las Vegas Strip with his sister and several family members.<sup>1</sup> At around 8:00 p.m., Neal and his family walked across a pedestrian bridge on the Strip when he made eye contact with a man, later identified as Sotogaribay, who was standing next to the railing. As Neal walked past, he heard Sotogaribay call out insulting epithets.

Neal looked back and saw Sotogaribay in a fighting stance, about to swing at him, with a rock in his hand. Sotogaribay struck the right side of Neal's head. Neal's sister, Nichole, testified that she saw a rock fall to the ground during the altercation.

Neal is a professionally trained mixed martial arts fighter, and he managed to restrain Sotogaribay while Nichole called 9-1-1. Hotel security guards arrived, followed by officers from the Las Vegas Metropolitan Police Depart (LVMPD). One security guard, Lamond Powe, testified that he took a rock from Sotogaribay's hand and another rock from

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<sup>1</sup>We recount the facts only as necessary for our disposition.

Sotogaribay's back pocket. Both rocks were eventually given to LVMPD Officer Christopher Longi, who measured and weighed them. One rock weighed 8.82 ounces, and the other weighed 9.45 ounces.

Neal suffered only minor injuries, including a scratch behind his ear. He refused medical treatment and left the scene with his family.

The State charged Sotogaribay with battery with use of a deadly weapon. During jury selection, the State asked questions about whether jurors require forensic evidence to find a defendant guilty. Specifically, the State asked, "does anyone feel that you have to have DNA evidence in order to find a defendant guilty?" and "[d]oes anyone believe that you need fingerprint evidence in every case to find the defendant guilty?" The district court allowed these questions over Sotogaribay's objection.

During trial, Officer Longi testified that he attended an evidence viewing meeting with the prosecutor and the public defender's office. Sotogaribay objected to Officer Longi's reference to the public defender's office and requested a mistrial. The district court denied Sotogaribay's request for a mistrial and instructed the jury to disregard Officer Longi's comment.

Sotogaribay also proposed two jury instructions relevant to this appeal. Sotogaribay's first proposed instruction replaced the word "until" with "unless" in the reasonable doubt instruction. Sotogaribay's proposed instruction read, in pertinent part, "[t]he Defendant is presumed innocent unless the contrary is proved." The State's proposed instruction, which was ultimately given to the jury, stated, "[t]he Defendant is presumed innocent until the contrary is proved." Sotogaribay's second proposed instruction defined a deadly weapon. It stated, in pertinent part, "[a]n essential element of the crime of Battery with Use of a Deadly Weapon is that the defendant used an object distinct from his body to engage in actual harmful or offensive

physical contact with the victim.” Both of Sotogaribay’s proposed instructions were rejected by the district court.

After a three-day jury trial, Sotogaribay was convicted and sentenced to serve a prison term of 24-60 months. Sotogaribay now appeals.

On appeal, Sotogaribay raises seven issues. He argues the district court erred in (1) permitting the State to inquire about specific areas of evidence during voir dire; (2) denying Sotogaribay’s motion for a mistrial after a witness referenced meeting with the public defender’s office; (3) rejecting Sotogaribay’s proposed jury instructions; and (4) admitting the 9-1-1 call, which Sotogaribay contends was irrelevant, cumulative, and prejudicial. Sotogaribay also argues that (5) the State made improper comments during closing argument, warranting the reversal of his conviction; (6) there was insufficient evidence that he used a deadly weapon during the altercation; and (7) cumulative error warrants reversal. We disagree.

*The district court did not abuse its discretion in permitting the State to ask voir dire questions about forensic evidence*

Sotogaribay argues the State’s voir dire questions about forensic evidence impermissibly “inquire[d] into specific areas of evidence” and implied to jurors that the State could meet its burden of proof without forensic evidence. Sotogaribay further claims the State’s questions violated EDCR 7.70(b)-(d) because they touched on anticipated instructions, were based on hypothetical facts, and implicitly argued the facts of the case. The State responds that the questions properly inquired about the prospective jurors’ general attitudes about forensic evidence.

“[T]he scope of voir dire and the method by which voir dire is pursued are within the discretion of the district court.” *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991) (internal citations and quotation marks omitted). A challenge to voir dire on appeal is reviewed for an abuse

of discretion. *Morgan v. State*, 134 Nev. 200, 210, 416 P.3d 212, 223 (2018). The function of voir dire is to discover whether a juror “will consider and decide the facts impartially and conscientiously apply the law as charged by the court.” *Adams v. Texas*, 448 U.S. 38, 45 (1980).

In *Chaparro v. State*, 137 Nev. 665, 666, 497 P.3d 1187, 1190 (2021), the defendant was charged with sexual assault and battery with intent to commit sexual assault upon a victim age 16 or older. Prior to trial, the State successfully moved to admit the defendant’s prior conviction for battery with intent to commit sexual assault. *Id.* Defense counsel attempted to ask voir dire questions about the effect of the defendant’s prior conviction for the same offense he was currently being tried for. *Id.* at 670, 497 P.3d at 1193. The Nevada Supreme Court held the questions were improper because the similarity of offenses “posed a serious risk of causing jurors to prejudge the facts of the case.” *Id.* at 671, 497 P.3d at 1193. This risk was further “exacerbated by the fact that this ‘evidence’ would be received by the jury during voir dire without context or instruction from the court as to its proper use.” *Id.* at 671 n.4, 497 P.3d at 1193 n.4. In lieu of addressing the defendant’s prior conviction specifically, the court noted that defense counsel could have asked “questions regarding a potential juror’s perspective on defendants with prior convictions, without specifically inquiring into his own previous conviction.” *Id.* at 671, 497 P.3d at 1194. Because “[t]he district court did not categorically obstruct inquiry into the general issue of potential jurors’ views on defendants with previous convictions,” there was no error. *Id.*

Here, the State’s questions did not relate to the specific facts of Sotogaribay’s case, but rather inquired about “the general issue of potential jurors’ views on” forensic evidence. *Id.* Therefore, we conclude that the voir dire questions about forensic evidence were proper under *Chaparro*.

We also conclude that the State's questions did not violate EDCR 7.70. They did not propose "hypothetical facts" or allow the State to "be able to read how a potential juror would vote" based on the facts of Sotogaribay's case. *Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). The questions did not reference either the presence or lack of forensic evidence in Sotogaribay's case, but rather asked if jurors required forensic evidence to convict in *any* case.

The State's questions were related to a legitimate purpose: whether the jurors would be able to properly apply the law to the facts of the case. Forensic evidence is not *required* to obtain a guilty verdict. See *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (stating that circumstantial evidence alone is sufficient to support a conviction). The State's questions about whether jurors would require forensic evidence to find a defendant guilty is directly related to whether the jurors could properly weigh all the evidence in a case. Therefore, we conclude that the district court did not abuse its discretion in permitting the State's questions about forensic evidence.

*The district court did not abuse its discretion in denying Sotogaribay's request for a mistrial when a witness referenced the public defender's office*

During his trial testimony, Officer Longi referenced meeting with the deputy district attorney and the public defender's office at an evidence viewing. Sotogaribay argues this comment warranted a mistrial because jurors often harbor negative views of indigent criminal defendants and might have penalized him by equating indigency with criminality, by assuming that his attorneys would not have taken his case voluntarily, or by criticizing the use of taxpayer money to fund a defense. Sotogaribay further points out that defense counsel had sought to avoid such prejudice

by not mentioning their employment with the public defender's office. The State responds that the term "public defender" is not derogatory and that any prejudicial effect was remedied by a curative instruction.

"Denial of a motion for mistrial is within the district court's sound discretion, and [the reviewing] court will not overturn a denial absent a clear showing of abuse." *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). The district court denied Sotogaribay's motion for a mistrial in reliance upon *Sullivan v. State*, No. 60231, 2013 WL 1500408, at \*2 (Nev. Apr. 10, 2013) (Order of Affirmance), an unpublished order where the supreme court ruled that an intentional reference to defense counsel as a public defender was not inherently misconduct. Although *Sullivan* is not controlling authority, Sotogaribay concedes that *Sullivan's* reasoning is contrary to his position.<sup>2</sup>

Additionally, under these circumstances, Officer Longi's comment was not grounds for a mistrial. "[A] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." *Ledbetter v. State*, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006) (internal quotation marks omitted). Because Officer

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<sup>2</sup>Sotogaribay relies on *State v. Bonn*, 412 N.W.2d 28, 30 (Minn. Ct. App. 1987), and *People v. James*, 117 P.3d 91, 96 (Colo. App. 2004), as a basis to deviate from *Sullivan*. In these cases, the appellants argued that jurors could penalize a defendant's indigency by equating it with criminality, assuming a lawyer would not have undertaken the case willingly, or resenting the use of taxpayer money to provide legal assistance. However, the Minnesota and Colorado courts both rejected these arguments and declined to find reversible error. *Bonn*, 412 N.W.2d at 30; *James*, 117 P.3d at 96.

Longi's remark was isolated, not intentionally solicited by the prosecutor, and the jury was promptly admonished to disregard it, "any prejudice flowing from it was adequately cured by the district court." *Id.* at 265, 129 P.3d at 680. Therefore, we conclude that the district court did not abuse its discretion in denying Sotogaribay's request for a mistrial.<sup>3</sup>

*The district court did not abuse its discretion in rejecting Sotogaribay's proposed jury instructions*

Sotogaribay argues the district court abused its discretion in rejecting two of his proposed jury instructions. Because district courts have "broad discretion" in settling jury instructions, this court reviews a district court's decision regarding jury instructions for abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "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." *Id.* (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

Sotogaribay's first proposed jury instruction replaced the word "until" with "unless" in the reasonable doubt instruction. Sotogaribay argues that using "unless" more clearly conveys the State's burden of proof, whereas using "until" lowered the State's burden because it suggests a predetermined outcome. However, as correctly noted by the State, this argument has previously been rejected. *Blake v. State*, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005) (stating that using "until" comports with the definition of reasonable doubt in NRS 175.211); *see also Chavarin-Arreola v. State*, No. 49741, WL 6101999 (Nev. July 11, 2008) (Order of Affirmance)

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<sup>3</sup>We do not address the propriety of references to public defenders or the public defender's office under other circumstances, as there could be situations where such comments are inappropriate. *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (holding that a prosecutor may not make comments intended to influence the outcome of a case).

(using “until” rather than “unless” is not a misstatement of law); *Hudson v. State*, No. 82231-COA, 2022 WL 214241, \*7 (Nev. Ct. App., Jan. 24, 2022) (Order of Affirmance) (rejecting argument that “until,” as opposed to “unless,” minimized State’s burden of proof). Therefore, the district court did not abuse its discretion in rejecting Sotogaribay’s proposed reasonable doubt instruction.

Sotogaribay’s second proposed jury instruction stated, in pertinent part, “[a]n essential element of the crime of Battery with Use of a Deadly Weapon is that the defendant used an object distinct from his body to engage in actual harmful or offensive physical contact with the victim.”

This court reviews the accuracy of a proposed jury instruction de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). “[A] district court must not instruct a jury on theories that misstate the applicable law.” *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

A “battery” is statutorily defined as “any willful and unlawful use of force or violence upon the person of another.” NRS 200.481(1)(a). Although “deadly weapon” is not defined within the context of NRS 200.481(2)(e) (battery with the use of a deadly weapon), “the Legislature intended ‘deadly weapon’ within NRS 200.481(2)(e) to be interpreted broadly, according to both the functional definition and the inherently dangerous definition.” *Rodriguez v. State*, 133 Nev. 905, 909, 407 P.3d 771, 774 (2017). The “inherently dangerous” definition provides that “[a] deadly weapon is any instrument which, if used in the ordinary manner contemplated by its design or construction, will, or is likely to cause a life-threatening injury or death.” *Id.* at 906, 407 P.3d at 772. The “functional” definition alternatively defines a deadly weapon “as any 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.” *Id.*

Sotogaribay’s proposed instruction defined “deadly weapon” as “an object distinct from his body to engage in actual harmful or offensive physical contact with the victim.” However, neither the “inherently dangerous” definition nor the “functional” definition of a deadly weapon requires “actual harmful or offensive physical contact.”

Sotogaribay’s proposed definition of a deadly weapon is also at odds with the relevant statutes. A person can be found guilty of battery with use of a deadly weapon even if no harm is inflicted. The definition of “battery” does not require “harmful” or “offensive” contact, only “willful and unlawful” contact. NRS 200.481(1)(a). Because the legal definitions of “battery” and “deadly weapon” do not require “actual harmful or offensive physical contact,” Sotogaribay’s proposed jury instruction misstates the law. Therefore, the district court did not abuse its discretion in refusing to give it.

*The district court did not abuse its discretion in admitting the 9-1-1 call*

Sotogaribay argues the district court erroneously admitted Nichole’s 9-1-1 call because it was irrelevant, cumulative, and prejudicial. “We review a district court’s decision to admit or exclude evidence for an abuse of discretion.” *McLellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). “Relevant evidence” is defined as “evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015 (emphasis added). However, relevant evidence “may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.” NRS 48.035(2). Likewise, relevant evidence is inadmissible “if its probative value

is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 48.035(1).

We conclude that the district court did not abuse its discretion in admitting Nichole’s 9-1-1 call. The call was relevant because it contained Nichole’s observations about what was happening as she witnessed Sotogaribay’s altercation with her brother, which was the State’s best evidence of the crime. The call was not cumulative because it contained more detail than Nichole’s trial testimony. And Sotogaribay fails to explain how the call was unfairly prejudicial where there was nothing unduly inflammatory or prejudicial about the call. *Cf. Harris v. State*, 134 Nev. 877, 882, 432 P.3d 207, 212 (2018) (holding that the probative value of autopsy photographs was substantially outweighed by the danger of unfair prejudice where jurors did not need “to see multiple color photographs of the victims’ charred bodies splayed across an autopsy table to appreciate the medical examiner’s testimony that they were alive when the Maserati struck the taxicab”). Because Sotogaribay only asserts bare legal conclusions without supporting analysis, he fails to establish the district court abused its discretion in admitting the 9-1-1 call.

*The State’s comment during its rebuttal closing argument was a permissible inference from the evidence presented and not prosecutorial misconduct*

During its rebuttal closing argument, the State made the following comment: “In some way, we’re lucky this was on Mr. Neal. Mr. Neal knew how to defend himself, Mr. Neal knew how to control the situation, and Mr. Neal had the reflexes to avoid a full-on blow with that rock.” Sotogaribay contends this comment was improper because it implied “a different hypothetical victim” would have sustained more serious injuries and served to inflame the jurors. The State responds that this was proper commentary based on the evidence presented because Neal testified that he

had been a professional MMA fighter for 12 years and utilized his training in his interaction with Sotogaribay.

When analyzing claims of prosecutorial misconduct, this court engages in a two-step analysis. “First, we must determine whether the prosecutor’s conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal.” *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (citation omitted). Prosecutors may not argue facts or inferences not supported by the evidence. *Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985). However, a “prosecutor may argue inferences from the evidence and offer conclusions on contested issues.” *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotation marks omitted).

On its face, the State’s comment did not present anything hypothetical. The comment was a direct reference to Neal, the victim in the case, and how he was able to defend himself. Sotogaribay does not dispute that Neal is a professional fighter, or that Neal’s martial arts experience played a role in his interaction with him. The comment was supported by evidence from the record and was not improper. Therefore, we conclude that there was no prosecutorial misconduct and that Sotogaribay’s claim is without merit.

*There is sufficient evidence that Sotogaribay used a deadly weapon*

Sotogaribay claims there was insufficient evidence to prove that he used a deadly weapon. Specifically, Sotogaribay argues the evidence is insufficient to establish that the rock—as opposed to Sotogaribay’s hand or fist—made contact with Neal.

“The standard of review in a criminal case is ‘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.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Circumstantial evidence alone is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

In this case, the verdict is supported by substantial evidence. Neal testified that he saw a rock in Sotogaribay’s hand before Sotogaribay struck him. Nichole testified she saw a rock fall to the ground during the scuffle. The security guard testified that he pulled a rock from Sotogaribay’s hand and another from his pocket. Lastly, jail calls played during the trial contained an admission from Sotogaribay that he hit Neal with a rock. Therefore, because the verdict is supported by substantial evidence, we conclude that Sotogaribay’s claim is without merit.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

<sup>4</sup>Sotogaribay also claims the cumulative errors at trial entitle him to relief. Because Sotogaribay failed to demonstrate any error, he is not entitled to the reversal of his conviction. *See Chaparro*, 137 Nev. at 673-74, 497 P.3d at 1195.

cc: Hon. Carli Lynn Kierny, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk