

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIAN FALCON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39766

FILED

SEP 13 2002

ORDER OF AFFIRMANCE

JANE TILM BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery by a prisoner in lawful custody. The district court sentenced appellant Julian Falcon to serve a prison term of 28 to 72 months to run consecutively to the sentence imposed in an unrelated case.

Falcon's sole contention on appeal is that reversal of his conviction is warranted because the district court erred in admitting testimony subject to the physician-patient privilege.¹ Specifically, Falcon contends his statement that he hit the correctional officer should have been excluded because he made it during the course of medical treatment

¹See NRS 49.215-.245 (discussing the physician-patient privilege).

administered by a licensed practical nurse.² We conclude that Falcon failed to prove that his statement to Nurse Theresa Curto was privileged.³

The record reveals that Falcon failed to allege, before or during trial, that Nurse Curto's testimony was privileged. Although the State filed a pretrial motion, arguing Curto's testimony was not subject to the physician-patient privilege, Falcon did not oppose the motion or file written authorities contending Nurse Curto's testimony should be excluded. Additionally, before Nurse Curto testified at trial, the district court informed the defense it was entitled to a hearing outside the presence of the jury to determine whether the statements Falcon made to Nurse Curto were admissible. After defense counsel stated that she "was waiving that hearing," the following colloquy occurred:

Court: And so then, you're not contesting the statement [was] made voluntarily and complied with the constitution?

Defense Counsel: No, Your Honor.

²See NRS 49.225 ("A patient has a privilege to . . . prevent any other person from disclosing confidential communications among himself, his doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor").

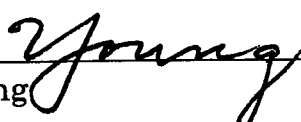
³See Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000) (holding, in part, that appellant waived spousal privilege by not specifically objecting prior to that testimony); see also NRS 49.385 (privilege waived if holder consents to disclosure of the matter); People v. District Court, 743 P.2d 432, 435 (Colo. 1987) (recognizing that claimant of the privilege bears the burden of establishing the applicability of the privilege).

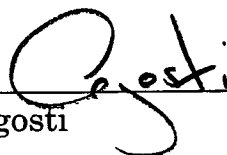
Because Falcon failed to invoke the physician-patient privilege or otherwise object to Nurse Curto's testimony, we conclude the district court did not err in allowing her to testify. Additionally, we conclude that the alleged error in this case, namely, the failure to invoke a statutory evidentiary privilege, does not rise to the level of constitutional error, plain error or an error affecting Falcon's substantial rights, which would warrant this court's discretionary review.⁴

Based on the foregoing analysis, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General/Carson City
Attorney General/Ely
White Pine County District Attorney
White Pine County Clerk

⁴NRS 178.602; Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001).