

**CRIMINAL PROCEDURE – JUDGMENT OF CONVICTION – JURY VERDICT**

**Summary**

Appeal from a judgment of conviction, entered after jury verdict, for battery with substantial bodily harm.

**Disposition/Outcome**

Affirmed. Clerical errors in allowing two erroneous jury instructions were harmless. Jurors are allowed to present written questions to the witness upon court approval. There was sufficient evidence presented for a jury to convict. The prosecution did not comment on the defendant’s failure to testify. Prejudice did not occur when the prosecution recommended a sentence higher than the maximum sentence allowed, nor did the sentence constitute cruel and unusual punishment.

**Factual and Procedural History**

On February 1, 2002, Scott Fritsche, Kristopher Grant, Robin Gregerson, bartender Kristen Fisher, and defendant Christopher Allred were at the Liberty Club, a nightclub in Ely.

During the evening, Fisher broke up a fight between Grant and his fiancée Gregerson. In the early morning hours of February 2, 2002, Fritsche and Grant got into an argument, but did not get into a physical altercation. Defendant Allred was present in the bar during both fights. Fisher again broke up the argument between Fritsche and Grant, and escorted Fritsche out of the bar. Allred later joined Fritsche outside. Fisher testified that Grant remained in the bar while Allred was outside with Fritsche.

Shortly thereafter, Allred returned to the bar and told everyone that he had been in a fight with Fritsche. He told Fisher that he had gone outside with Fritsche to calm him down, and that Fritsche had attempted to hit him, so Allred “fishhooked”<sup>2</sup> Fritsche and punched him once.

At 3:00 a.m., Officer Swetich drove past the Liberty Club and discovered Fritsche lying in the street. The officer called for an ambulance and rolled Fritsche on his side to prevent him from choking on his blood. As people began to exit the bar, the officer asked if anyone knew what had happened and Allred responded that he was responsible.

Allred told the officer that he had broken up a fight between Grant and Fritsche, and Fritsche took a swing at him. In self-defense, Allred fishhooked Fritsche and punched him.

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<sup>1</sup> By Hilary Barrett Muckleroy.

<sup>2</sup> “Fishhooked” means to put your thumb on a person’s cheek and then squeeze the cheek between your thumb and forefinger.

Grant told the officer that he never physically fought with Fritsche. When the officer confronted Allred with the inconsistency, Allred conceded that he had not broken up a fight between Grant and Fritsche, and that he and Fritsche had been alone at the time of the altercation. The officer suggested that Allred kicked Fritsche, and Allred offered his boots up for examination. Later analysis produced no significant evidence in support of the prosecution's case.

Fritsche testified that he did not remember arguing with anyone at the bar that night, leaving the bar, or fighting with Allred. He only remembered waking up in the hospital with a lot of pain. Fritsche suffered a missing tooth, swollen nose, and required plastic surgery to repair the damage. He received two temporary false teeth and experienced pain for nearly two months after surgery.

Allred was charged with one count of battery with substantial bodily harm. During closing argument, the prosecution pointed out inconsistencies between Allred's story to Fisher and his later story to Officer Swetich. The prosecutor then said, "Allred doesn't come forth with an accurate account of how this occurred ever."

After the jury began deliberations, jurors discovered that two additional jury instructions not read by the judge. The jury asked if they should consider the two instructions, and the district court responded in the negative.

The jury found Allred guilty and he was subsequently sentenced to 60 months. Allred received the maximum sentence because of prior drug and alcohol abuse and arrests, and because of the severity of Fritsche's injuries.

## **Discussion**

### **Erroneous Jury Instructions**

Allred's first argument was that the jury instructions regarding lesser included offenses and confessions prejudiced him and that because the erroneous jury instructions were included; the court denied Allred the right to a fair trial.

The Court had examined erroneous jury instructions under different circumstances and considers them under a harmless error analysis.<sup>3</sup> An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."<sup>4</sup>

Because the district court ordered the jury to disregard the erroneous instructions, the Court must presume they did so. Further, Allred failed to demonstrate how he was prejudiced by the inclusion of the erroneous instructions.

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<sup>3</sup>Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 29-30 (Nev. 2000).

<sup>4</sup> *Id.* (quoting *Neder v. U.S.*, 527 U.S. 1, 18 (1999)).

## Jury Questioning

Allred next argued that the district court denied him due process in allowing the jury to present written questions to Officer Swetich, and urged the court to reconsider *Flores v. State*.<sup>5</sup>

Nevada is among the majority of jurisdictions that acknowledge jury questions can enhance the “truth-seeking function of the trial process.”<sup>6</sup> Allowing jury questions in a criminal proceeding is left to the discretion of the trial court.<sup>7</sup> The district court must take procedural safeguards in order to minimize the risk of prejudice inherent in jury questioning. These include:

1. Initial jury instructions explaining that questions must be factual in nature and designed to clarify information already presented;
2. Requiring jurors to submit their questions in writing;
3. Determination regarding the admissibility of the questions must be done outside the presence of the jury;
4. Counsel must have the opportunity to object to the questions outside the presence of the jury;
5. Admonition that only questions admissible under the rules of evidence will be asked;
6. Counsel is allowed to ask follow-up questions;
7. Admonition that jurors are not to place undue weight on the responses to their questions.<sup>8</sup>

In the present case, the district court complied with most of these safeguards. The court instructed the jury not to draw any negative inference if a question was not asked; instructed the jury not to presume what the answer would be for a question not asked; required written questions; discussed the admissibility of juror questions and allowed counsel the opportunity to object outside of the presence of the jury; and allowed counsel to ask follow-up questions.

The court failed to instruct the jury not to place undue weight on the responses to their questions. However, failure to give one admonition is harmless error. Because the court substantially complied with *Flores*, Allred was not denied due process.

## Prosecutor’s Comment

Allred also argued that the prosecutor’s comment regarding Allred’s inconsistent statements represented a comment on Allred’s failure to testify, in violation of his due process rights.

Nevada has stated that as long as a prosecutor’s statements do not draw attention to a defendant’s failure to testify, it is acceptable to comment on the defense’s failure to counter

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<sup>5</sup> 114 Nev. 910, 912-13, 965 P.2d 901, 902 (Nev. 1998). *Flores* allows jurors to pose questions to witnesses.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 913.

<sup>8</sup> *Id.*

evidence presented.<sup>9</sup> Further, a prosecutor's comments are to be viewed in context and a conviction should be lightly overturned based on a prosecutor's comments alone.<sup>10</sup>

Allred's attorney failed to object to the prosecutor's comment during closing argument. The failure to object generally precluded appellate review of the issue except for plain error.<sup>11</sup>

Taken in context, the prosecutor's comment was not improper. Further, even if the Court determined that it was, it did not constitute plain error.

### Demonstrative Exhibits

Allred argued that while the prosecution had the right to use demonstrative exhibits during closing arguments, the exhibits were highly prejudicial, irrelevant, and not supported by the evidence.

The district court reviewed the State's proposed exhibits outside of the jury's presence. The exhibits included admitted photographs of Fritsche's hands and face and a list of the injuries Fritsche sustained, along with the notation "physical evidence of a battery."

The court determined that the phrase "physical evidence of a battery" was argumentative, and ordered it removed. The court further ordered the list of injuries be accurate. Aside from those changes, the exhibits were consistent with testimony and photos already admitted. Therefore, the prosecution's exhibits were proper.

### Sufficiency of Evidence

In reviewing the evidence supporting a jury's verdict, the court looks to "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt by the evidence it had a right to consider."<sup>12</sup>

In this case, the prosecution presented substantial evidence to prove Allred's guilt, including Officer Swetich's testimony regarding Fritsche's injuries and Allred's statements, and Fisher's testimony regarding Allred's behavior when he returned to the bar. Because of this substantial evidence, a reasonable jury could find Allred guilty beyond a reasonable doubt.

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<sup>9</sup> Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513-14 (Nev. 2001).

<sup>10</sup> Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 70-71 (Nev. 2000) (quoting *U.S. v. Young*, 470 U.S. 1, 11 (1985)).

<sup>11</sup> Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (Nev. 2001).

<sup>12</sup> Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (Nev. 2000).

## Cruel and Unusual Punishment

Allred contended that his 60 month sentence constituted cruel and unusual punishment, in violation of the 8<sup>th</sup> Amendment of the United States Constitution and Article 1 of the Nevada Constitution.

Allred's sentence was within the parameters of relevant statutes.<sup>13</sup> Allred did not argue that the statutes were unconstitutional, but rather argued that the court should have followed the Department of Parole and Probation's recommendation of 12-32 months. The district court considered the facts of the case, and the goal of deterrence, rehabilitation, and punishment in rejecting Parole and Probation's recommendation and sentencing Allred to 60 months, with parole eligibility after 24 months.

Allred's sentence was within the statutory guidelines and did not shock the supreme court's conscience.

## Prosecutor's Misstatement

Allred next contended that his sentence is unfair because the prosecutor recommended a sentence of 24 to 62 months when the maximum sentence for his crime was 60 months.<sup>14</sup>

Because the prosecutor's statement was a mistake, the statement was not pervasive during the proceeding, and the district court did not sentence Allred to 62 months, Allred failed to demonstrate how the prosecutor's statement prejudiced him.

## Suspect Evidence

Allred argued the district court relied on suspect evidence when sentencing him. The district court judge commented during sentence that Allred was lucky he did not kill Fritsche and inferred that if Officer Swetich had not arrive don the scene when he did, Fritsche could have died.

The supreme court ruled that this comment did not rise to the level of highly suspect evidence. The district court relied on Allred's prior criminal activity and drug and alcohol abuse in sentencing Allred.

## Conclusion

Allred failed to demonstrate how the inclusion of erroneous jury instructions, presentation of jury questions, and the prosecution's statements during trial and sentencing prejudiced him. Further, the State put forth sufficient evidence for a reasonable jury to convict

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<sup>13</sup> See NEV. REV. STAT. 193.130(2)(c) (2004) (providing for a prison term of 1-5 years for a category C felony); NEV. REV. STAT. 200.481(2)(b) (2004) (providing that battery with substantial bodily harm is a category C felony).

<sup>14</sup> NEV. REV. STAT. 193.130(2)(c) (2004).

Allred and a sentence within the statutory guidelines did not constitute cruel and unusual punishment.