IN THE SUPREME COURT OF THE STATE OF NEVADA

BENNETT GRIMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62835

FILED

FEB 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon in violation of a temporary protective order; burglary while in possession of a deadly weapon in violation of a temporary protective order; and battery with the use of a deadly weapon constituting domestic violence resulting in substantial bodily harm in violation of a temporary protective order. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant Bennett Grimes raises five claims of error.

First, Grimes contends that there was insufficient evidence to support his burglary conviction. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *McNair v. State,* 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, evidence was presented that Grimes forced his way into his estranged wife's apartment shortly after she and her mother returned home in violation of a temporary protective order against him. Grimes stood near the front door begging and pleading with his wife to take him

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back. A woman's voice could be heard on the 911 recording repeatedly telling Grimes to leave the apartment. Grimes' wife stood about five to seven feet away from the front door, near the kitchen counter, while her mother waited outside on the balcony for the police to arrive. When the mother heard her daughter scream out, "Mom, he's stabbing me," she turned around and saw her daughter on the ground near the front door with Grimes on top of her. According to the victim, Grimes walked over to the kitchen counter, grabbed a knife from a drying rack next to the kitchen sink, and dragged her back to the front door before stabbing her 21 times.

We conclude that a rational juror could infer from these circumstances that Grimes entered the apartment with the intent to commit assault or battery, gained possession of a deadly weapon, and violated a temporary protective order. *See* NRS 193.166; NRS 205.060(1), (4). The jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the conviction. *Bolden v. State,* 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *Buchanan v. State,* 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction); *McNair,* 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

Second, Grimes contends that the district court erred by (1) placing him in a position where he had to choose between remaining silent and forfeiting his right to present his theory of self-defense or taking the witness stand, (2) refusing to instruct the jury on self-defense, and (3) prohibiting him from arguing his theory of self-defense to the jury. So long as there is some evidence, "[a] defendant has the right to have the

jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be, regardless of who introduces the evidence and what other defense theories may be advanced." *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008); *Earl v. State*, 111 Nev. 1304, 1308, 904 P.2d 1029, 1032 (1995); *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). "To require a defendant to introduce evidence in order to be entitled to a specific jury instruction on a defense theory would violate the defendant's constitutional right to remain silent by requiring that he forfeit that right in order to obtain instructions." *McCraney v. State*, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994). "During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence." *Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993); *see also State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor [has] a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.").

Grimes' theory of self-defense was that the victim came at him with a knife to get him to leave the apartment, a struggle ensued, and he overpowered her in self-defense fearing for his life. In support of this theory, Grimes cited evidence that the victim's DNA was found on the knife handle, the knife had been recently washed and was sitting in the drying rack, only the victim knew where the knife was located because it was not readily visible behind the kitchen counter bar top, the victim was standing next to the knife while Grimes was standing five to seven feet away begging the victim to take him back, and his DNA was not found on the knife. Grimes also wanted to argue that the victim's version of the

events was not credible because there was no reason for Grimes to drag the victim back to the front door before stabbing her. The district court refused to instruct the jury on self-defense and prohibited Grimes from presenting his theory to the jury because he did not testify and, even though Grimes could place the victim with the knife, the court "[could not] think of any logical inference that gets her going after him with the knife in a deadly manner." We disagree. A rational juror could certainly conclude that a woman who grabs a knife after her estranged husband breaks into her apartment in violation of a temporary protective order might use that knife to injure him. Grimes' testimony was not needed in order for him to argue self-defense and ask the jury to draw favorable inferences from the evidence. If Grimes' reasoning was faulty, "such faulty reasoning is subject to the ultimate consideration and determination by the jury." *Green*, 81 Nev. at 176, 400 P.2d at 767. We conclude that the district court erred by denying Grimes an instruction on self-defense and prohibiting him from asking the jury to draw inferences supporting his theory of self-defense.

However, we conclude that this error was harmless beyond a reasonable doubt. *See Valdez v. State,* 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (citing *Chapman v. California,* 386 U.S. 18, 24 (1967)). Even if the jury would have believed that the victim attacked Grimes with a knife, Grimes was only permitted to use "[r]esistance sufficient to prevent the offense." NRS 193.240. A reasonable juror could not have believed that, once Grimes wrestled the knife away from the victim, it was necessary for him to stab her 21 times to defend himself. *See Pineda v. State,* 120 Nev. 204, 212, 88 P.3d 827, 833 (2004) (right to self-defense exists when there is a reasonably perceived apparent danger or actual

danger); *State v. Comisford,* 41 Nev. 175, 178, 168 P. 287, 287 (1917) (amount of force justifiable is that a reasonable man would believe is necessary for protection); *People v. Hardin,* 102 Cal. Rptr. 2d 262, 268 n. 7 (Ct. App. 2000) (right to use force in self-defense ends when danger ceases). Furthermore, Grimes had a duty to retreat before using deadly force because he did not have a right to be present at the location where he used deadly force, *see* NRS 200.120(2)(b), and was actively engaged in conduct in furtherance of criminal activity, *see* NRS 200.120(2)(c); NRS 33.100; NRS 200.591(5)(a). There was no evidence that Grimes attempted to leave the apartment at any time before the altercation. For these reasons we conclude that Grimes is not entitled to relief on this claim.

Third, Grimes contends that the district court erred by refusing his request to strike the testimony of a crime scene analyst who was not noticed as an expert on knife wounds. The witness opined that, based on her experience photographing and viewing self-inflicted knife wounds, the wound to the right index finger of Grimes' hand was an incised wound that was consistent with what might happen when a knife slips in a person's hand. Grimes objected because the crime scene analyst was not qualified to offer an opinion as to how knife wounds might occur. This objection was overruled. When the State continued to question the witness about defensive wounds, Grimes again objected, this time based on lack of notice. The district court concluded that the witness could not testify about knife wounds because the State did not notice the witness as an expert in knife wounds or provide Grimes with a curriculum vitae. However, the district court refused to instruct the jury to disregard the expert's testimony about knife slips because it "[did not] think that was expert testimony" and Grimes did not object to that testimony based on

lack of notice. While we agree that the basis for Grimes' initial objection was not lack of notice, we conclude that the district court abused its discretion by denying Grimes' request to strike the testimony and allowing the unnoticed expert's opinion about how Grimes sustained his wounds to be considered by the jury. Grimes made the proper objection moments after his initial objection was overruled and the justification for striking both statements made by the State's expert was the same. Although the district court erred, we conclude that this error was harmless for the same reasons discussed above.

Fourth, Grimes contends that the district court's failure to disclose a jury note to counsel violated his constitutional right to due process and Sixth Amendment right to counsel at every critical stage of the proceedings. During deliberations the jury sent a note to the district court and asked whether "criminal intent [has] to be established before entering the structure, or can intent change during the chain of events for the charge of burglary?" Without informing or consulting with counsel, the district court chose not to answer the jury's question, noting after the jury verdict that, "I didn't respond to it because my only response would have been [to] continue to deliberate and look at the instructions." The jury had already been instructed that, "[e]very person who *enters* any apartment . . ., *with the intent* to commit assault or battery . . . is guilty of Burglary." (Emphasis added.) Grimes' counsel responded to the district court's untimely disclosure by telling the court, "I think that would have been a correct response." Three weeks later Grimes filed a motion for a new trial explaining that, "[i]n retrospect, defendant feels that more clarification would have aided the jury in coming to an accurate verdict."

Grimes relies on two Ninth Circuit cases to argue that the district court's failure to notify defense counsel about the jury's inquiry violated his constitutional rights and requires automatic reversal of his burglary conviction. *See Musladin v. Lamarque*, 555 F.3d 830, 842 (9th Cir. 2009); *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998). He omits decisions from other federal circuits that may undermine his contention. *See, e.g., United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985) ("A judge's failure to show jurors' notes to counsel and allow them to comment before responding violates Fed. R. Crim. P. 43(a), not the constitution."). *But cf., Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004). Regardless, decisions of the federal district court and panels of the federal circuit court of appeals are not binding on Nevada courts. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970). Even if we applied the Ninth Circuit's analysis to the district court's decision not to notify Grimes about the juror note, he would not be entitled to relief because any error was harmless beyond a reasonable doubt.[1] Three factors are typically cited in evaluating harmlessness in the context of jury notes in the Ninth Circuit: (1) "the probable effect of the message actually

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[1]To the extent that Grimes argues that the Ninth Circuit would apply a "rule of automatic reversal," we note that the panel of the Ninth Circuit that decided *Musladin* affirmed the state court's application of the harmless error standard by agreeing that the state court's decision "was not objectively unreasonable." *Musladin*, 555 F.3d at 842-43. Their proposed application of a "rule of automatic reversal" is dicta. *Id.*; *see also United States v. Mohsen*, 587 F.3d 1028, 1032 (9th Cir. 2009) ("We never suggested that all errors regarding jury communications during deliberations were subject to automatic reversal."); *United States v. Arroyo*, 514 F. App'x 652, 655 (9th Cir. 2013) (reviewing jury note error to determine whether it is harmless beyond a reasonable doubt), *cert. denied sub nom. Zepeda v. United States*, ___ U.S. ___, 134 S. Ct. 191 (2013).

sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way." *Barragan-Devis*, 133 F.3d at 1289 (internal quotation marks omitted); *United States v. Frazin*, 780 F.2d 1461, 1470 (9th Cir. 1986). Because the district court did not send a message to the jury, there is nothing to suggest that it did anything to influence the jury's decision. Furthermore, counsel told the district court that he would have only asked it to tell the jury to re-read the instructions that had already been given, had the district court consulted with him before the verdict. And, in light of the wide discretion given to the district court in responding to a jury's questions, counsel may not have succeeded in persuading the court to provide such an answer. *See Scott v. State*, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976) (district court's refusal to answer a question already answered in the instructions is not error). Even if counsel was successful at persuading the district court, such a response is unlikely to have changed the jury's verdict. Therefore, any violation of Grimes' constitutional rights caused by the district court's failure to disclose the jury note was harmless beyond a reasonable doubt and Grimes is not entitled to relief on this claim. Although Grimes is not entitled to relief on this claim, we caution the district court that it has an obligation to inform counsel of any questions that arise during jury deliberations before the jury returns its verdict regardless of whether the district court intends to answer those questions.

Fifth, Grimes contends that cumulative error warrants reversal. "When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity

and character of the error, and (3) the gravity of the crime charged." *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (internal quotation marks omitted). Having considered these factors we conclude that the cumulative effect of any errors does not entitle Grimes to the reversal of his convictions, and we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk