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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **NO. 30,742**

MARVIN L. DEAN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY
James Waylon Counts, District Judge

Gary K. King, Attorney General
Santa Fe, NM

for Appellee

Chief Public Defender
Allison H. Jaramillo
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

KENNEDY, Judge.

Defendant appeals his conviction for aggravated assault (deadly weapon) and the enhancement of his sentence by eight years for being a habitual offender. [RP

307] Our notice proposed to affirm, and Defendant filed a timely memorandum in opposition. We remain unpersuaded by Defendant's arguments, and affirm.

Issue (1). Defendant continues to argue that the submitted jury instruction for aggravated assault with a deadly weapon was "inherently so confusing and misleading" so as to deprive him of due process. [RP 190; DS 8, 4-5; MIO 5-9] Defendant argues specifically that the jury instruction was misleading because it failed to distinguish between two possible uses of a cattle prod—for use as administering an electrical shock and for use as a "club." [DS 4; MIO 7]

Defendant's conviction for aggravated assault is not premised on use of the cattle prod to shock Victim, but instead is specifically premised on Defendant's use of a cattle prod as a "club" in a manner that could cause death or great bodily harm. In this regard, the jury instruction specifically requires the jury to find that Defendant "tried to touch or apply force to [Victim] by swinging at [Victim] with a cattle prod." [RP 190] Defendant asserts that the jury instruction is comparable to the instruction at issue in *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154, *abrogated by State v. Traeger*, 2001-NMSC-022, ¶¶ 1, 20, 130 N.M. 618, 29 P.3d 518, wherein the phrasing of the jury instruction erroneously did not require the jury to determine whether the "hot plate" could be used as a deadly weapon. [MIO 8] We disagree, because in the present case the jury instruction specifically provided that a

"cattle prod is a deadly weapon *only if you find that a cattle prod, when used as a weapon, could cause death or great bodily harm*[.]" [emphasis added] [RP 190] We thus disagree with Defendant's argument that the jury instruction did not provide the jury with an opportunity to decide whether the cattle prod was used as a weapon. [MIO 5] Because the jury instruction is neither confusing nor misleading, we affirm.

Issue (2). Defendant continues to argue there was insufficient evidence to support his conviction for aggravated assault with a deadly weapon. [DS 8; MIO 9-11] We note initially that the State did not proceed under a theory of aggravated assault that was dependent on whether the Victim was in fear of receiving an immediate battery. [MIO 9, 11] *Compare* UJI 14-304 NMRA *with* UJI 14-305 NMRA. Instead, as noted above, Defendant's conviction requires findings that he tried to touch or apply force to Victim by swinging at Victim with a cattle prod; that Defendant acted in a rude, insolent or angry manner; that Defendant used a cattle prod as a deadly weapon such that it could have caused death or great bodily harm; and that Defendant intended to touch or apply force to Victim. [RP 190] *See* NMSA 1978, § 30-3-2(A) (1963).

Defendant argues specifically that the evidence was insufficient to show that he swung the cattle prod at Victim. [MIO 11] We disagree. As set forth in our notice, Victim [RP 219] testified he saw Defendant holding a cattle prod and coming

after him with the cattle prod. [MIO 3; RP 221] Another witness [RP 226] testified that Defendant "came out kicking and swinging" and "had something [in] his hand like a bat." [MIO 3; RP 227] We hold that the jury could have reasonably relied on the foregoing evidence to determine that Defendant swung an object at Victim. *See State v. Sparks*, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985) (defining substantial evidence as that evidence which a reasonable person would consider adequate to support a defendant's conviction). While evidence was also introduced that Defendant also used the cattle prod to shock Victim [DS 2; MIO 1, 11], the evidence upon which Defendant's conviction is based is Defendant's use of the cattle prod as a club.

Issue (3). Defendant continues to argue that one of his 2005 prior convictions used to sentence him as a habitual offender should be voided because its underlying facts are similar to those in another case, *State v. Rowell*, 2008-NMSC-041, 144 N.M. 371, 188 P.3d 95, which Defendant argues should be retroactively applied. [DS 8; MIO 4, 12] Defendant refers to *State v. Franklin*, 78 N.M. 127, 129, 428 P.2d 982, 984 (1967), and *State v. Boyer*, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985), in support of his argument. [MIO 12] As set forth in our notice, this argument was not preserved below and lacks merit. *See generally State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (holding that, in order to preserve an

issue for appeal, the defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon); *State v. Wildenstein*, 91 N.M. 550, 552, 577 P.2d 448, 450 (Ct. App. 1978) (providing that a challenge to the validity of the prior conviction in habitual offender proceedings is a collateral attack on its validity and is not permitted on the basis of issues which could have been raised on direct appeal).

CONCLUSION

For reasons set forth herein and in our notice, we affirm.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge

MICHAEL D. BUSTAMANTE, Judge