

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY SANDOZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43290

**FILED**

SEP 12 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. R. [Signature]*  
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Anthony Sandoz to serve a prison term of 12 to 30 months for the conspiracy count, a concurrent prison term of 36 to 90 months for the burglary count, and a concurrent prison term of 36 to 120 months for the robbery count, with an equal and consecutive prison term for the use of a deadly weapon.

Sandoz contends that his due process rights were violated when the district court gave a jury instruction defining the offense of burglary while in possession of a "weapon" because it expanded the scope of the charged offense. We agree.

The district court has broad discretion in settling jury instructions.<sup>1</sup> A district court abuses its discretion if it gives a jury

---

<sup>1</sup>Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

instruction that broadens the scope of the crime charged in the information.<sup>2</sup>

In this case, we conclude that the district court abused its discretion in charging the jury with respect to the burglary count. Sandoz was charged by way of information with "burglary while in possession of a firearm" pursuant to NRS 205.060, but the jury instruction replaced the word "firearm" with the word "weapon." The omission of the word "firearm" was prejudicial in this case for two reasons. First, the district court had previously denied the State's motion to amend the information to replace the firearm language, finding that the amendment would constitute a change in the charged offense without adequate notice. Second, the State presented no evidence at trial that Sandoz possessed a firearm during the burglary. At trial, the State proved only that Sandoz had a BB gun. While a BB gun satisfies the definition of a deadly weapon pursuant to NRS 193.165, a BB gun is not a "firearm" pursuant to NRS 205.060 because BBs are not projected by explosion or combustion.<sup>3</sup> Because we conclude that the jurors were not properly instructed on the definition of a firearm, we reverse the conviction for burglary with use of a firearm and remand this case to the district court.

In a related argument, Sandoz argues that his due process rights were violated because the jury instruction defining a deadly weapon

---

<sup>2</sup>United States v. Dawson, 516 F.2d 796, 800-02 (9th Cir. 1975).

<sup>3</sup>See NRS 202.253(2). We reject that State's contention that the firearm provision of NRS 205.060(4) should be defined pursuant to NRS 193.165(5)(c) and NRS 202.265(4)(a)(2).

broadened the scope of the charged robbery offense. Specifically, Sandoz argues that the jurors should not have been instructed on the definition of a deadly weapon because the information only alleged that he used a firearm in the course of the robbery. Further, Sandoz argues that he did not receive sufficient notice that the State would be pursuing a theory that the robbery occurred with the use of a BB gun because the information stated the robbery occurred with a firearm. We conclude that Sandoz's contentions lack merit.

Here, the information provided adequate notice and the jurors were properly instructed that Sandoz was charged with robbery with the use of a deadly weapon.<sup>4</sup> Unlike the burglary count, the robbery count in the information expressly stated that Sandoz committed, "Robbery with use of a deadly weapon," in that he "did then and there willfully, unlawfully, and feloniously take personal property [from the victim] by means of force or violence . . . using a deadly weapon." Although the information also alleged that the deadly weapon was a "firearm," Sandoz has not demonstrated that the information was so insufficient that it resulted in a miscarriage of justice or actually prejudiced his substantial rights.<sup>5</sup> To the contrary, Sandoz received adequate notice through the

---

<sup>4</sup>See NRS 173.075(1) ("the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged"); Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985) (recognizing that the purpose of NRS 173.075 is to put the defendant on notice of the charges he is facing and to allow him to prepare a defense).

<sup>5</sup>See Sanders v. Sheriff, 85 Nev. 179, 181-82, 451 P.2d 718, 719-20 (1969) (holding that a charging document "may simply be drawn in the  
*continued on next page . . .*

information and the preliminary hearing testimony that the State was pursuing a theory that he used a BB gun as a deadly weapon in the course of the robbery. Accordingly, we conclude that Sandoz's due process rights were not violated with respect to the robbery count.

Finally, Sandoz contends that there was insufficient evidence in support of his robbery conviction because the State failed to prove that he used a firearm in the course of the robbery. While we agree with Sandoz that there was insufficient evidence that he used a firearm, as we have previously discussed, Sandoz was charged with the crime of robbery with use of a deadly weapon. And, as previously noted, a BB gun satisfies the legal definition of a deadly weapon.<sup>6</sup> Accordingly, we conclude that there was sufficient evidence that Sandoz committed robbery with the use of deadly weapon, as charged in the information, and we therefore affirm that conviction.<sup>7</sup>

Having considered Sandoz's contentions, we

---


*... continued*


words of the statute so long as the essential elements of the crime are stated").

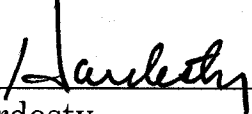
<sup>6</sup>See NRS 193.165(5); Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994).

<sup>7</sup>See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_ J.

Maupin  
  
\_\_\_\_\_ J.  
Gibbons

  
\_\_\_\_\_ J.  
Hardesty

cc: Hon. Sally L. Loehrer, District Judge  
Brent D. Percival  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk