

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCOS RIVERA,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 43530

FILED

MAY 17 2006

JANETTE M. BLOOM
CLERK OF THE SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count of conspiracy to commit robbery (count one), one count of attempted robbery with the use of a deadly weapon (count two), and one count of battery with intent to commit a crime (robbery) (count three). Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The district court sentenced appellant Marcos Rivera to 24 to 60 months for conspiracy to commit robbery, 24 to 72 months for attempted robbery with use of a deadly weapon, an equal and consecutive term for the deadly weapon enhancement, and 12 to 48 months for battery with intent to commit a crime (robbery). The sentence on count one runs concurrent with the sentence on count two, however, the sentence on count three is consecutive to the sentence on count two.

Rivera was arrested following an altercation with Felinda Cabana in a downtown Las Vegas alley, during which Rivera pulled out an air pistol that resembled a firearm and demanded money from Cabana. During the ensuing struggle, Rivera struck Cabana in the head with the air pistol and kicked her after she fell to the ground. Two Las Vegas police officers arrived on the scene, and Rivera fled without obtaining any

money. He was found in the backyard of a nearby house and arrested. A co-defendant, who was with Rivera prior to and during the altercation, pleaded guilty to conspiracy to commit robbery. The co-defendant's guilty plea agreement was later admitted as evidence during Rivera's jury trial.

On appeal, Rivera argues that (1) the district court erred when it allowed the State to amend the information and that such error affected his substantial rights; (2) he was denied a fair trial because of an incorrect jury instruction; (3) his double jeopardy rights were violated; (4) the district court erred in admitting the co-defendant's guilty plea agreement; and (5) he was entitled to a lesser included offense instruction.

The amended information

The State originally charged Rivera with robbery with use of a deadly weapon. Before the State rested, the district court allowed the State to amend the information by changing a factual assertion within the charge of attempted robbery with use of a deadly weapon. More specifically, the State changed the description of the weapon Rivera used in the commission of the crime from "firearm" to ".177 caliber air pistol."

Rivera contends that the district court committed plain error when it allowed the State to amend the information, and that this error affected his substantial rights because the amendment effectively denied him the right to cross-examine the State's witnesses on the new elements. We disagree.¹

¹Rivera failed to object below to the amended information. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) ("Generally, failure to object will preclude appellate review."). Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000) (However, "this court has the discretion to address the assigned error if it was plain and affected [the defendant's] substantial rights.").

NRS 173.095(1) provides that “[t]he court may permit an indictment or information to be amended at any time before the verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” We conclude that the change in the description of the weapon from “firearm” to “.177 caliber air pistol” was not an additional or different offense. It was a factual change that the State was still required to prove beyond a reasonable doubt, and Rivera had substantial notice and opportunity to prepare an adequate defense. Therefore, the State did not charge an additional or different offense in the amended information. Accordingly, the district court did not commit plain error, and Rivera’s substantial rights were not prejudiced.

The deadly weapon jury instruction

Next, Rivera contends that the district court erred in giving the deadly weapon jury instruction that served as an enhancement to the attempted robbery charge for two reasons. First, Rivera argues that the instruction was incorrect. Second, Rivera contends that the State failed to present evidence that supported the jury instruction because a .177 caliber air pistol is not a deadly weapon as defined by NRS 193.165(5). We conclude both arguments lack merit.²

First, we conclude that the jury instruction properly instructed the jury on the basic elements of the crime as defined in NRS

²Rivera failed to object below to the deadly weapon jury instruction. McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998) (“Failure to object to . . . a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant’s right to a fair trial.”).

193.165(1).³ Therefore, we conclude that the district court did not err in giving this instruction.

Second, after reviewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence for a rational trier of fact to find, beyond a reasonable doubt, that the .177 caliber air pistol was a deadly weapon.⁴ In Anderson v. State, this court held that a firearm is dangerous not only because it can inflict deadly harm, but also because “it may provoke a deadly reaction from the victim” or bystanders.⁵ Regardless of whether the air pistol was operable, we extend the reasoning of Anderson and Allen v. State to include air pistols that resemble firearms. Rivera used the air pistol in a fashion that could easily have provoked a deadly reaction from Cabana or a bystander. We find that sufficient evidence existed to support giving the deadly weapon jury instruction. Therefore, the instruction was not patently prejudicial and did not affect Rivera’s rights.

³Barron v. State, 105 Nev. 767, 774, 783 P.2d 444, 449 (1989) (holding that the jury instructions properly instructed the jury because the proper elements to obtain a conviction of the crime under the statute were stated in the instructions).

⁴Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996) (“The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing evidence in the light most favorable to the prosecution.”). Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975) (stating that this court will not disturb a jury verdict if it is supported by substantial evidence).

⁵96 Nev. 633, 614 P.2d 540 (1980) (quoting Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980)).

The double jeopardy claim

Rivera argues that his double jeopardy rights were violated for two reasons. First, the elements needed to prove battery with intent to commit robbery are included in the attempted robbery with the use of a deadly weapon charge. And second, both convictions are redundant because they are based on a single incident. We agree with Rivera's first argument and therefore, do not reach the merits of the second.

A defendant cannot be convicted of both a greater and lesser included offense.⁶ To determine whether a lesser included offense exists, a court must decide whether the offense in question "cannot be committed without committing the lesser offense."⁷ An individual cannot commit battery with intent to commit robbery without committing attempt robbery with the use of a deadly weapon. Rivera's conviction for attempt robbery with use of a deadly weapon resulted in greater punishment and thus, was a more serious crime than battery with intent to commit robbery. As such, we reverse Rivera's conviction for battery with intent to commit robbery but affirm his conviction for attempt robbery with use of a deadly weapon.⁸

⁶McIntosh v. State, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997).

⁷Id. at 226, 932 P.2d at 1073 (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

⁸Meador v. State, 101 Nev. 765, 771, 711 P.2d 852, 856 (1985) (stating that if the "defendant [is] convicted of two offenses which are actually one, conviction of less severely punishable offense should be set aside"); disapproved of on separate grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

The admission of Rivera's co-defendant's guilty plea at trial

Rivera argues that the co-defendant's guilty plea agreement should not have been admitted at trial because its probative value was substantially outweighed by its prejudicial effect. He reasons that, although NRS 175.282 does not apply because there was no agreement to testify between the co-defendant and the prosecution, the spirit of the statute still applies because all prejudicial evidence should have been redacted from the plea agreement. We disagree.⁹

First, NRS 175.282 does not apply in this situation because there was no agreement to testify between the State and the co-defendant in exchange for a lesser charge or reduced sentence. Second, the State moved to admit the guilty plea agreement because the co-defendant testified that she and Rivera did not conspire to commit robbery. This was inconsistent with her signed guilty plea agreement and thus relevant to impeach the co-defendant's testimony

Because we conclude that the probative value of the co-defendant's plea agreement is not substantially outweighed by the any concern set forth in this statute,¹⁰ it was not manifest error for the district court to admit the co-defendant's guilty plea agreement at trial.

Rivera's proposed jury instruction

Lastly, Rivera argues that evidence existed to support a charge of assault and battery, and as such, he was entitled to the following

⁹Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980) (holding that a trial court's evaluation of the admissibility of evidence will not be reversed on appeal unless it is manifestly erroneous).

¹⁰See NRS 48.035(1) and (2).

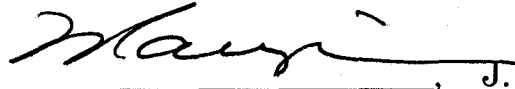
jury instructions: 1) that battery is a lesser included offense of battery with intent to commit robbery; and 2) that assault is a lesser included offense of battery because it is an attempt robbery. These arguments lack merit.¹¹

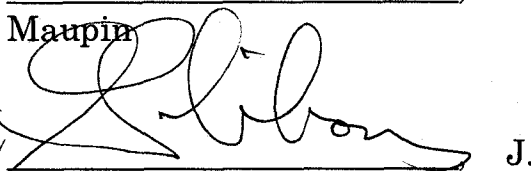
“[I]f the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense, an instruction on a lesser included offense may properly be refused.”¹² In addition to the State’s witnesses, Rivera’s testimony satisfied each element of attempt robbery with use of a deadly weapon. Consequently, the State met its burden of proof on the greater offense. Moreover, no evidence was produced at trial tending to reduce the greater offense. Therefore, Rivera’s rights were not substantially affected and the district court did not err by refusing to give the lesser-included offense instruction. Accordingly, we

¹¹Barnier v. State, 119 Nev. 128, 132, 67 P.3d 320, 322 (2003) (“This court evaluates appellate claims concerning jury instructions using a harmless error standard of review.”). NRS 178.598 defines harmless error and requires that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”

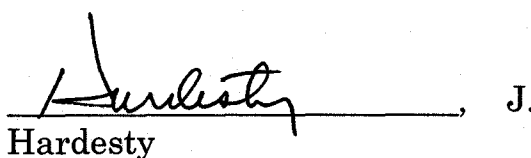
¹²Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966).

ORDER the judgment of the district court AFFIRMED as to count I and II and REVERSED as to count III. Further, we 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
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk