IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, CLARK COUNTY,
Appellant,
vs.
VICTOR MANUEL BUENA AND CARLOS ANTONIO PANTOJA,
Respondents.

No. 43856

FILED

NOV 04 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a sheriff's appeal from an order of the district court granting in part and denying in part respondents' pretrial petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Respondents Victor Manuel Buena and Carlos Antonio Pantoja were arrested on November 21, 2003, and subsequently charged by way of an amended criminal complaint with one count each of conspiracy to commit battery, conspiracy to commit murder, and murder with the use of a deadly weapon, twelve counts of attempted murder with the use of a deadly weapon, three counts of discharging a firearm at or into a structure, and one count of failure to stop on the signal of a police officer. The charges stemmed from a quarrel that started inside a bar and moved outside, after which, twelve gunshots were allegedly fired resulting in one death and three injured victims. Following a preliminary hearing in the justice's court, the respondents were bound over for trial in the district court on all of the counts.[1]

[1]It is not clear from the record on appeal why the initial criminal information and two subsequent amended criminal informations charged

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On July 20, 2004, Pantoja filed a pretrial petition for a writ of habeas corpus in the district court. The State opposed the petition, and Pantoja filed a reply. After conducting an evidentiary hearing on August 9, 2004, the district court granted the petition in part, allowing three of the eleven counts of attempted murder to stand, but dismissed eight of the counts based on the rule against multiplicity.[2] Buena was also present with his own counsel at the hearing, and with the permission of the district court, was allowed to join in on Pantoja's petition; accordingly, eight of the eleven counts of attempted murder with the use of a deadly weapon also brought against Buena were dismissed. The State now appeals from the portion of the district court's order granting the petition.

At the preliminary hearing, the State presented evidence that a total of twelve shots were fired by the respondents – one resulting in a death, and three hitting three different individual victims – and as a result, the State initially charged respondents with twelve separate counts of attempted murder with the use of a deadly weapon. Citing to Powell v. State[3] and Bedard v. State[4] for support, the State argued that charging

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. . . *continued*
respondents with eleven counts of attempted murder with the use of a deadly weapon rather than twelve, as reflected in the criminal complaint.

[2]See Bedard v. State, 118 Nev. 410, 413, 48 P.3d 46, 47-48 (2002).

[3]113 Nev. 258, 263-64, 934 P.2d 224, 227-28 (1997) (holding that an individual cannot be convicted of three counts of assault where only one shot was fired, but noting that where multiple shots are fired, multiple counts might be sustained).

[4]118 Nev. at 414, 48 P.3d 46, 48-49 (holding that several counts of burglary not multiplicitous where entry into each suite occurred at different time and place and did not arise out of a single wrongful act).

the respondents accordingly did not violate the rule against multiplicity because "[e]ach count requires proof of an additional fact, namely, an additional trigger pull and shot." We disagree with the State's contention.

This court will defer to the district court's determination of factual sufficiency when reviewing pretrial orders on appeal.[5] In respondents' case, however, the district court's findings involved a matter of law and statutory interpretation which requires no deference and allows for de novo review on appeal.[6]

A criminal information "charging the same offense in more than one count"[7] violates the rule against multiplicity.[8] This court has stated that the general test is: "offenses are separate if each requires proof of additional fact that the other does not."[9] Accordingly, "'[o]ffenses are . . . not multiplicitous when they occur at different times and different places, because they cannot then be said to arise out of a single wrongful act.'"[10]

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[5]See Sheriff v. Provenza, 97 Nev. 346, 630 P.2d 265 (1981).

[6]See Sheriff v. Marcus, 116 Nev. 188, 192, 995 P.2d 1016, 1018 (2000).

[7]United States v. Sue, 586 F.2d 70, 71 n.1 (8th Cir. 1978); Gordon v. District Court, 112 Nev. 216, 229, 913 P.2d 240, 248 (1996).

[8]United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976).

[9]Gordon, 112 Nev. at 229, 913 P.2d at 249; see also Bedard, 118 Nev. at 414-15, 48 P.3d at 48-49.

[10]Gordon, 112 Nev. at 229, 913 P.2d at 249 (quoting State v. Woods, 825 P.2d 514, 521 (Kan. 1992)) (citation omitted).

Our de novo review of the record on appeal reveals that the district court did not err in granting in part respondents' pretrial habeas petition, thereby dismissing eight of the eleven counts of attempted murder with the use of a deadly weapon. In Bedard, this court concluded that the defendant was properly charged with several counts of burglary because each separate office suite that was burglarized involved a separate unlawful entry at a different time and place and could not "be said to have arisen out of a single wrongful act."[11] The State oversimplified the holding of Bedard in citing to it for support because it is distinguishable from the instant case. Here, the State charged respondents with eleven counts for attempting to murder three individuals, and justified each count by alleging a separate additional fact – namely, each separate pull of the trigger. At the evidentiary hearing on the petition, the district court concluded in part:

> I have never seen an information like this. I have been around a long time . . . . Seems to be overcharging. . . . This all looks like the same count.
>
> So you're saying every shot is another attempted murder. . . .
>
> I guess the State could plead . . . Count IV, attempted murder on Gustavo Arandas, Count V, attempted murder on Johnny Aguirre, Count VI, attempted murder on Manuel[a] Gomez Santos. So the State has three attempt[ed] murders, but I ain't giving you all of these other ones. . . .
>
> The other [eight additional counts of attempted murder] I think you are overcharging in this Court's humble opinion.

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[11]Bedard, 118 Nev. at 414, 48 P.3d at 48.

We agree with the district court and conclude that each shot was not separately chargeable as a separate offense: the shootings were part of a single wrongful act, occurring in the same place only scant moments apart. Therefore, while the three counts of attempted murder with the use of a deadly weapon may stand, one count for each victim, the remaining eight counts were properly dismissed as multiplicitous.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[12]

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Gabriel L. Grasso
Special Public Defender David M. Schieck
Clark County Clerk

[12]Finally, we must point out a clerical error in the district court's order. The district court mistakenly stated that counts IV-XV (12 counts) were duplicitous, however, the second amended information filed prior to the evidentiary hearing only alleged eleven counts of attempted murder with the use of a deadly weapon (counts IV-XIV).