

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIEN RIVERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43989

FILED

MAR 03 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery by an inmate in lawful custody. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge. The district court sentenced appellant Damien Rivero to serve a prison term of 24 to 60 months to run consecutively to all prior unrelated cases.

Rivero contends that the State adduced insufficient evidence to support his conviction because it failed to prove that the use of force was "unlawful." More specifically, Rivero contends that the evidence adduced at trial proved that he was in reasonable fear of imminent bodily injury when he struck the victim because: (1) the victim was a member of a prison gang that had ordered Rivero killed; (2) the victim had earlier threatened Rivero; and (3) Rivero had previously been stabbed by an inmate who was in the same prison gang as the victim. We conclude that Rivero's contention lacks merit.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational

trier of fact.¹ In particular, we note that an Ely State Prison correctional officer testified that he observed Rivero punch the victim twice in the face, causing his nose to bleed. Additionally, the correctional officer testified that the victim did not say or do anything to provoke Rivero, and that Rivero did not sustain any injuries during the incident. In addition to the correctional officer, a Spanish-language interpreter, who witnessed the altercation, testified that she observed Rivero hit the victim hard in the head, and that the victim did not fight back.

Rivero testified at trial on his own behalf, explaining that he hit the victim in self-defense. Specifically, Rivero testified that, although he did not know the victim, he considered him his "enemy" because, previously, the victim had threatened to beat him up in order "to make merits" to increase his stature in the prison gang, Aryan Warriors. Rivero explained that the Aryan Warriors had ordered him killed and, fourteen months earlier, a member of that prison gang had stabbed him. Rivero also explained that just prior to the incident he observed the victim watching him and felt with his "spider sense" that the victim was going to do him harm. An Ely State prison inmate also testified on behalf of the defense, stating that he overheard the victim threaten to kill Rivero approximately eight months before the incident at issue.

Although Rivero argues that he punched the victim in self-defense, the jury could reasonably infer from the testimony presented that Rivero unlawfully and willfully used force upon the victim.² It is for the


¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

²See NRS 200.481(1)(a) ("'Battery' means any willful and unlawful use of force or violence upon the person of another.").

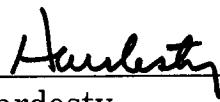
jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.

Having considered Rivero's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Dan L. Papez, District Judge
Lockie & Macfarlan, Ltd.
Attorney General Brian Sandoval/Ely
White Pine County District Attorney
White Pine County Clerk