

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY MICHAEL ALCARAZ A/K/A
ANTHONY MICHAEL ALCAREZ A/K/A
ANTHONY MICHAEL ALCARARAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44830

FILED

NOV 21 2007

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

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon and one count of carrying a concealed weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Anthony Michael Alcaraz to a prison term of 38 to 96 months for attempted murder with an equal and consecutive term for the use of a deadly weapon, and a consecutive term of 12 to 48 months for carrying a concealed firearm.

Alcaraz first contends that the district court erred by admitting Exhibits 29 and 30, which were photographic re-enactments. We conclude that the photographs should not have been admitted. Exhibit 29 showed Officer Drummond standing by a block wall pointing his gun. This photograph was not relevant because no one challenged the fact that Drummond was standing at the corner of the block wall pointing his gun.

Nonetheless, the error in admitting Exhibit 29 is harmless beyond a reasonable doubt, because the photograph is not prejudicial.¹

Exhibit 30 shows Drummond crouching by the wall and another officer standing where Alcaraz stood during the incident. The other, posed officer is shown pointing a gun at Drummond. There was no foundation for this photograph, as not one of those who were present testified to seeing a gun in Alcaraz's hand. The photograph is therefore not an accurate representation supported by any evidence.² Moreover, the minimal probative value of the photograph was substantially outweighed by the danger of unfair prejudice.³ The district court therefore committed reversible error by admitting Exhibit 30.

Further, we conclude that there was insufficient evidence adduced at trial to support the conviction for attempted murder. The State's theory of the case was that Alcaraz pointed his gun at Drummond and fired. No one, however, heard a gunshot or saw a muzzle flash. The extent of the State's evidence against Alcaraz was a spent shell found at the scene and a minuscule amount of gunshot residue found on Alcaraz's clothing. Significantly, no bullet was ever found at the scene, although the officers testified that they looked for one. Moreover, there was evidence

¹See Chapman v. California, 386 U.S. 18, 24 (1967) (holding that error is harmless where the verdict is unattributable to the error beyond a reasonable doubt).

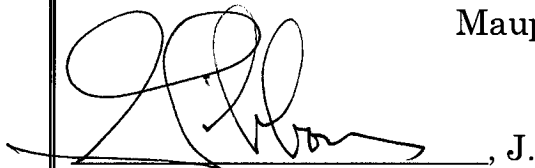
²See State v. Roberts, 28 Nev. 350, 376, 82 P. 100, 102-03 (1905) holding that photographs entered into evidence should be "correct representations").

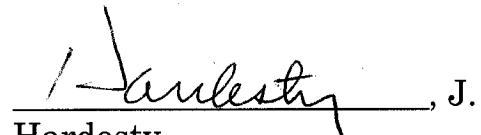
³See NRS 48.035(1); see also Meegan v. State, 114 Nev. 1150, 1154-55, 968 P.2d 292, 295 (1998), modified on other grounds by Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001).

that Alcaraz's gun discharged earlier in the day during an attempted robbery in Bullhead City. The State failed to provide any evidence at all that the shell and the residue were the result of the gun being fired at Drummond. It is entirely possible that the shell and the residue were the result of an earlier discharge, either during the attempted robbery or on some other occasion. We conclude that the State failed to prove that Alcaraz attempted to murder Drummond and the conviction for attempted murder is therefore reversed.⁴ We remand this matter to the district court with instructions to vacate the conviction for attempted murder.⁵ The conviction for carrying a concealed weapon is affirmed.

It is so ORDERED.

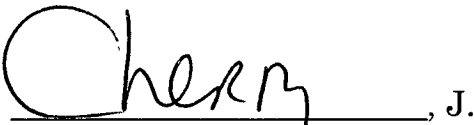

_____, C.J.
Maupin

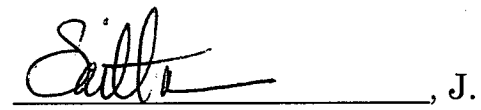

_____, J.
Gibbons


_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta

⁴See Batin v. State, 118 Nev. 61, 64-65, 38 P.3d 880, 883 (2002).

⁵We note that the judgment of conviction incorrectly states that Alcaraz was convicted pursuant to a guilty plea. In fact, Alcaraz was convicted pursuant to a jury verdict. Upon remand, the district court shall correct this error in the judgment of conviction.

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Federal Public Defender/Las Vegas
Nevada Attorneys for Criminal Justice
Eighth District Court Clerk