IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVADORE GARCIA A/K/A SALVADOR GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48582

FILED

OCT 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon (count I), mayhem with the use of a deadly weapon (count II), and destroying evidence (count III). Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Salvadore Garcia to serve two consecutive prison terms of 96-240 months for count I, two consecutive prison terms of 24-72 months for count II to run consecutively to count I, and a jail term of 1 year for count III to run concurrently with count II. Garcia was ordered to pay $444,115 in restitution.

First, Garcia contends that the district court abused its discretion by refusing to allow him to call a witness not endorsed on the witness list.[1] Garcia claims that his witness would have impeached the victim's testimony implicating him as the shooter. We disagree with Garcia's contention.

"It is within the district court's sound discretion to admit or exclude evidence, and 'this court will not overturn [the district court's]

[1]See NRS 174.234(1)(a)(1).

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decision absent manifest error.'"[2] The "resolution of discovery issues is normally within the district court's discretion."[3]

We conclude that the district court did not abuse its discretion by refusing to allow Garcia to call a witness not endorsed on the witness list. Defense counsel explained that he only learned about the witness, Anthony Waters, two days earlier, and because he did not know what the victim was going to say on the witness stand, he did not realize that he would need Waters' testimony. However, NRS 174.234(3)(a) imposes an ongoing obligation on a defendant to provide notice of witnesses he intends to call. Garcia did not provide any notice of his intent to call Waters until he attempted to call Waters to the stand, after which the prosecutor objected and stated, "I've never even heard of him until today." Additionally, even if the district court erred, we conclude, in light of Waters' proposed testimony, that any error was harmless beyond a reasonable doubt.

Second, Garcia contends that the district court erred by denying his motion for a new trial based on newly discovered evidence without conducting an evidentiary hearing. Garcia sought a new trial to present (1) two new witnesses he claimed would testify that he was not present in the room when the victim was shot; and (2) new physical evidence discovered at the crime scene.

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[2]Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004) (quoting Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000)) (footnote omitted).

[3]Floyd v. State, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002); NRS 174.295(2).

NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." In order to grant a motion based on newly discovered evidence, the district court must find that the evidence was, in fact, "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; [and] such as to render a different result probable upon retrial."[4] The district court has the discretion to grant or deny a timely motion for a new trial, and the district court's determination will not be reversed on appeal absent a clear abuse of its discretion.[5]

The district court heard arguments from counsel on Garcia's motion prior to sentencing. The State informed the district court that it had obtained a record of a jailhouse conversation between Garcia and his brother where they were discussing the motion for a new trial and the two new witnesses, and Garcia stated, "should have used them bitches the first time but I didn't want to get them involved." Therefore, Garcia knew about the two witnesses and chose not to tell counsel or the investigating officers. There were witnesses at trial who testified, as the new witnesses allegedly would have, that Garcia was not present in the room where the shooting occurred. As a result, the district court found that the testimony of the new witnesses would have been cumulative. We further conclude

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[4]Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997); Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

[5]See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001).

that the proposed new testimony would not have rendered a different result probable upon retrial.

The district court also found that the allegedly new physical evidence offered by Garcia and discovered by his investigative team after trial, relating to the brain matter and shell fragments found at the scene, had "already been dealt with at trial." Additionally, we conclude that the evidence could have been discovered at any time prior to trial with the exercise of due diligence. Therefore, we conclude that the district court did not abuse its discretion in denying Garcia's motion for a new trial without conducting an evidentiary hearing.

Third, Garcia contends that the convictions for attempted murder and mayhem are duplicative and impermissibly redundant. Specifically, Garcia argues that the facts used to support the charge of mayhem "were merely incidental consequences to the act of attempting to kill" the victim, and that "[b]oth crimes arise from and punish the same illegal act." Garcia claims that his conviction for mayhem should be vacated. We disagree.

While the State may bring multiple criminal charges based upon a single incident, "this court will reverse 'redundant convictions that do not comport with legislative intent.'"[6] In considering whether convictions are redundant, this court examines "whether the gravamen of the charged offenses is the same such that it can be said that the

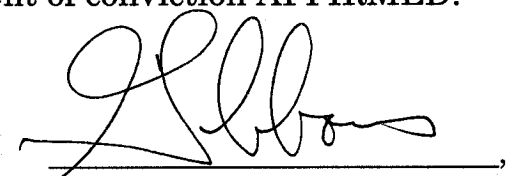
[6]State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).

legislature did not intend multiple convictions."[7] In other words, two convictions are redundant if the charges involve a single act so that "the material or significant part of each charge is the same."[8]

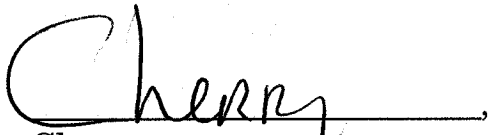
In the instant case, the gravamen of the attempted murder with the use of a deadly weapon offense is that Garcia intended to kill the victim. In contrast, the gravamen of the mayhem with the use of a deadly weapon offense is that Garcia shot the victim in the head, resulting in a permanent physical injury. Therefore, we conclude that the offenses do not punish the same illegal act and are not redundant.

Having considered Garcia's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



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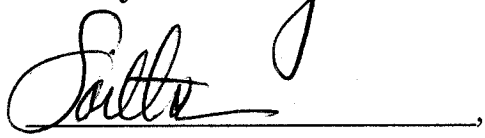
Cherry



_____, J.
Saitta

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[7]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

[8]Id. at 227-28, 70 P.3d at 751.

cc: Hon. Jackie Glass, District Judge
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Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk