IN THE SUPREME COURT OF THE STATE OF NEVADA

REYNALDO AQUINO, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51605

FILED

JUN 18 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Reynaldo Aquino, Jr., was charged with shooting Maximiliano Santa Cruz outside of the Little Darlings bookstore in Las Vegas. After a jury trial, Aquino was found guilty of conspiracy to commit robbery with the use of a deadly weapon in violation of NRS 193.165, 199.480, and 200.380; attempted robbery with the use of a deadly weapon in violation of NRS 193.165, 193.330, and 200.380; and attempted murder with use of a deadly weapon in violation of NRS 193.165, 193.330, 200.010, and 200.030.

On appeal, Aquino argues that: (1) the district court committed plain error when it permitted the State to present photographs of Aquino handcuffed, (2) the district court abused its discretion by giving improper jury instructions, (3) there is insufficient evidence to support the conviction, and (4) the sentence violates his right to due process.

For the reasons set forth below, we affirm the district court on all issues, except as to Aquino's sentencing. While we conclude that the sentence was not based upon false information, we nevertheless conclude that the district court improperly enhanced Aquino's conspiracy-to-commit-robbery count with the deadly weapon enhancement. Further, it is unclear which counts are to run concurrently or consecutively. Therefore, while we affirm on all other issues, we reverse and remand to the district court to resentence Aquino on the charge of conspiracy to commit robbery with a deadly weapon and to clarify which counts run concurrently or consecutively. As the parties are familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

Photographs of Aquino handcuffed

While Aquino concedes that he did not object to the State's introduction at trial of photographs of him in handcuffs, he argues that the district court committed plain error when it permitted the State to introduce them at trial.[1] Aquino claims that the photographs were more prejudicial than probative and destroyed his presumption of innocence at trial. We disagree.

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Mclellan v. State, 124 Nev.

---

[1]The State also introduced photographs of Jesus Carrillo, Aquino's co-defendant, in handcuffs at the time of his arrest. Aquino argues that these photographs of Carrillo prejudiced him. However, for the same reasons that we conclude that Aquino's argument regarding the photographs of him in handcuffs fails, we conclude that Aquino's arguments as to the photographs of Carrillo fail.

____, ____, 182 P.3d 106, 110 (2008). However, "'failure to object precludes appellate review of the matter unless it rises to the level of plain error.'" Id. (quoting Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005)). When conducting a plain error review, this court examines whether an error occurred and whether it prejudiced the defendant. Anderson, 121 Nev. at 516, 118 P.3d at 187. "'No prejudice can result from seeing that which is already known.'" Shuman v. State, 94 Nev. 265, 272, 578 P.2d 1183, 1187 (1978) (quoting United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973)) (deciding that the defendant was not prejudiced by wearing prison clothes to trial because the jury knew he was a prisoner); see Leonard v. State, 108 Nev. 79, 82, 824 P.2d 287, 289 (1992) (concluding that the defendant was not prejudiced by the jury seeing him being shackled and unshackled outside of the courtroom since it was aware that he was an inmate).

Here, the State introduced photographs of Aquino that were taken when he was handcuffed during his arrest. Aquino did not object and we conclude that plain error did not occur. A defendant has the right to appear before the jury "clad in the apparel of an innocent person." Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980) (concluding that it was harmless error for the jury panel to view the defendant in handcuffs and without shoes because the district court ensured that the jury had not been influenced by the error). However, in this case, the jury did not see Aquino wearing handcuffs in the courtroom. Rather, the jury saw pictures of him taken at the time of his arrest, which were introduced at trial only to accomplish identification. Because the jury was aware that Aquino had been arrested, the photographs did not inform the jury of a fact that it did not already know. Therefore, Aquino was not prejudiced by

the jury viewing photographs of him wearing handcuffs. See, e.g., Shuman, 94 Nev. at 271-72, 578 P.3d at 1187.

Jury instructions

Aquino contends that the district court abused its discretion by improperly instructing the jury as to the elements of attempted robbery and attempted murder. We first provide the standard of review for jury instructions before addressing each contention separately. Ultimately, we conclude that the district court did not abuse its discretion.

Standard of review

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. ____, ____, 195 P.3d 315, 319 (2008). However, this court reviews de novo whether a jury instruction is a correct statement of the law. Id. Failure to object to a jury instruction precludes appellate review, absent plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Attempted robbery

Aquino claims that the district court abused its discretion when it gave jury instruction number 10, which informed the jury that there was a mandatory presumption of the element of fear as to attempted robbery.

"[T]he State must prove every element of a crime . . . ." Batin v. State, 118 Nev. 61, 64, 38 P.3d 880, 883 (2002). Therefore, a jury instruction that creates a conclusive presumption that conflicts with the presumption of innocence and "invade[s]" the fact-finder's function, or shifts the burden of proof to the defendant, violates the defendant's right to due process. Sandstrom v. Montana, 442 U.S. 510, 521-24 (1979). Pursuant to NRS 200.380, robbery is:

> the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery.

Accordingly, to prove that a defendant committed robbery, the State need not prove that the defendant took the victim's property by means of fear. Rather, the State can alternatively carry its burden of proof by showing that the defendant took the victim's property by means of force or violence. NRS 200.380. As explained in State v. Luhano:

> It is unnecessary to prove both violence and intimidation. . . . If the fact be attended with circumstances of terror, such threatening word or gesture as in common experience and is likely to create an apprehension of danger and induce a man to part with his property for the safety of his person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such a case.

31 Nev. 278, 284, 102 P.2d 260, 262 (1909) (internal quotations omitted).

Jury instruction number 10 instructed the jury in accord with the law as set forth in Luhano. Aquino did not object to the instruction. Accordingly, we review for plain error and conclude that Aquino was not prejudiced by the jury instruction. See Green, 119 Nev. at 545, 80 P.3d at 95. Contrary to Aquino's assertion, the jury instruction does not create an impermissible presumption. Instead, the instruction explains that the jury could find Aquino guilty of attempted robbery even if it did not find that Santa Cruz had actually been fearful. Because this is consistent with NRS 200.380, we conclude that the instruction was an accurate explanation of the law. See Cortinas, 124 Nev. at ____, 195 P.3d at 319.

Therefore, Aquino was not prejudiced and his challenge to this jury instruction fails.

Attempted murder

Aquino further contends that jury instruction number 14 improperly instructed the jury as to the elements of attempted murder because it failed to inform the jury that it needed to find premeditation and deliberation.[2] We disagree.

In so arguing, Aquino relies on Graves v. Young, 82 Nev. 433, 434, 437, 420 P.2d 618, 618, 620 (1966), in which we stated that malice and premeditation must be shown to prove attempted murder in the first degree. However, Aquino fails to recognize that we distinguished Graves in Keys v. State, 104 Nev. 736, 741 n.1, 766 P.2d 270, 273 n.1 (1988). In Keys, this court recognized that in the past it had erroneously suggested, in cases including Graves, that attempted murder in the first or second degree existed. 104 Nev. at 741 n.1, 766 P.2d at 273 n.1. We then clarified in Keys that "[t]here are no degrees of attempted murder" and, accordingly, the State need only prove that the defendant acted with the specific intent to kill or express malice. 104 Nev. at 740-41, 766 P.2d at 273; see NRS 193.330. "There is no need for the prosecution to prove any additional elements, such as, say, premeditation and deliberation." Keys, 104 Nev. at 740-41, 766 P.2d at 273.

---

[2]Aquino additionally suggests that error occurred because neither the charging documents nor the jury instructions describe which degree of murder he attempted to commit. As noted above, this argument is without merit because there are no degrees of attempted murder. Keys v. State, 104 Nev. 736, 741, 766 P.2d 270, 273 (1988).

Here, jury instruction number 14 instructed the jury that: "[i]t is not necessary to prove the elements of premeditation and deliberation in order to prove attempted murder." Aquino did not object to the introduction of this instruction so we review for plain error. See Green, 119 Nev. at 545, 80 P.3d at 95. Because it is unnecessary to show premeditation or deliberation to prove attempted murder, jury instruction number 14 was an accurate description of the law. See Keys, 104 Nev. at 740-41, 766 P.2d at 273. Therefore, Aquino was not prejudiced and plain error did not occur.

Sufficiency of the evidence

Aquino next argues that the State failed to present sufficient evidence to prove either that he was the shooter or that he committed attempted murder.[3] After presenting the standard of review, we address both of Aquino's contentions in turn and conclude that they were supported by substantial evidence.

Standard of review

"'Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a

---

[3]Aquino makes a broad assertion that the State failed to present sufficient evidence to support any of his convictions. However, he presents no arguments demonstrating why the State did not present sufficient evidence to support his convictions for conspiracy to commit robbery with the use of a deadly weapon or attempted robbery. Therefore, this court need not address these assertions. See Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (holding that contentions unsupported by legal authority need not be considered on appeal); NRAP 28(a)(4) (noting that the appellant's argument must include citations to legal authority and the parts of the record relied on).

conviction may be based.'" Mejia v. State, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (quoting State v. Walker, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993)). In reviewing whether there is sufficient evidence to support a jury's verdict, this court determines "'"whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" Id. (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))). Where there is substantial evidence supporting the jury's verdict, it will not be overturned on appeal. Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981). Substantial evidence is "'evidence that a reasonable mind might accept as adequate to support a conclusion.'" Brust v. State, 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992) (quoting First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990), superseded by statute as recognized in Countrywide Home Loans v. Thitchener, 124 Nev. ___, ___, 192 P.3d 243 (2008)) (internal quotation omitted).

Shooter's identity

Aquino first claims that the State failed to prove that he was the individual who shot Santa Cruz. Specifically, Aquino argues that Santa Cruz described the shooter as wearing a gray sweatshirt, but he was arrested wearing a striped shirt. Further, Aquino argues that the getaway car found by the police was a Mazda, as opposed to a Toyota as described by the dispatcher.

We conclude that the evidence supports the jury's finding that Aquino was the shooter. Santa Cruz identified Aquino in a line-up the day after the incident and further identified Aquino as the shooter in a surveillance video taken in the Little Darlings' parking lot. Officer Ray

Alley Horsley, a Las Vegas Metropolitan police officer who was part of the helicopter air support the night of the shooting, testified that while Aquino was wearing a dark top while in the getaway car, he was in a light top with stripes when he was running down the street prior to his arrest. Officer Horsley also testified that the Mazda he spotted from the helicopter was similar in shape to the originally described Toyota and that both makes have similarly shaped round symbols. Crystina Vachon, a trace evidence examiner, testified that she detected trace amounts of gunshot residue on Aquino's right hand that was consistent with firing a weapon, but found no gunshot residue on Carrillo's hands. Officer Ulysses Valencia testified that after Aquino was read his Miranda rights, and voluntarily waived them, he stated that he might have shot the victim at the Little Darlings bookstore and that the gun might be in the bookstore or in the car. We conclude that this evidence was sufficient for a rational juror to conclude that Aquino was the shooter.

Attempted murder

Aquino next asserts that the State presented insufficient evidence to support his conviction of attempted murder. Aquino argues that to be convicted of attempted murder, there must be evidence that the injury to the victim was to a vital part of the body, making it likely to lead to death. Because the bullet did not injure any major organ, Aquino argues that the State only presented evidence sufficient to support a battery conviction.

In making this argument, Aquino relies on Graves v. State, 84 Nev. 262, 266, 439 P.2d 476, 478 (1968), in which we stated that "[t]here must be evidence that the wounds and resulting injury to the victim is to such a vital part of the human body, that it could lead to death, in order to

support the charge of attempt to commit murder in the first degree." In Keys, this court rejected the notion that there are degrees of attempted murder, concluding instead that the only element that the State must show is a specific intent to kill. 104 Nev. at 740-41, 766 P.2d at 273. Therefore, Aquino's argument that the State must prove Santa Cruz suffered an injury to a vital organ is without merit.

Thus, we reiterate that "[a]ttempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." Keys, 104 Nev. at 740, 766 P.2d at 273. Pursuant to NRS 193.200, intent "is manifested by the circumstances connected with the perpetration of the offense." Accordingly, this court has held that "'intent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime.'" Valdez v. State, 124 Nev. ____, ____, 196 P.3d 465, 481 (2008) (quoting Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002)). "Further, the jury may infer intent to kill from the manner of the defendant's use of a deadly weapon." Id.

The State presented sufficient evidence at trial to prove that Aquino committed attempted murder when he shot Santa Cruz. Santa Cruz testified that he parked his car at the Little Darlings bookstore after Aquino and Carrillo followed him off the freeway. Santa Cruz testified that when he exited his car, Aquino got out of his car and demanded his car keys. Santa Cruz refused and Aquino showed him the gun he was carrying in his waistband. Aquino again demanded Santa Cruz's car keys. Santa Cruz refused and asked Aquino if he was going to shoot him. Santa

Cruz began walking towards the bookstore, and Aquino shot him in the leg.

At trial, Detective James Fink testified about gun use. He testified that the most important rule of gun safety is: "Never point your gun at anything you're not willing to destroy." Detective Fink further testified that even when aiming a gun at the center of a person, as police are trained to aim, a shooter might miss if he was under stress.

We conclude that, when coupled with Detective Fink's testimony, Santa Cruz's testimony was sufficient to prove that Aquino shot him with the intent to kill. Aquino shot Santa Cruz once, in the leg, after mild provocation. When viewed in the light most favorable to the State, we conclude that a rational juror could conclude that, based on Detective Fink's testimony, Aquino was attempting to shoot Santa Cruz in the middle of his body, but missed because he was under stress. While not overwhelming evidence, it is the jury's position to determine the credibility of the evidence, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981), and we, therefore, conclude that there was sufficient evidence to support the jury's attempted murder verdict.

Sentencing

Aquino argues that his right to due process at sentencing was violated when the district court (1) relied on false evidence when imposing the sentence; (2) ordered count three to run concurrent with count one, but consecutive to count two; and (3) imposed the deadly weapon enhancement for the conspiracy count. After noting Aquino's sentence, as given in the judgment of conviction, we address each assertion in turn.

In this case, for count one, conspiracy to commit robbery with the use of a deadly weapon, Aquino was sentenced to 12 to 48 months plus

an equal and consecutive term for the use of a deadly weapon. For count two, attempted robbery with the use of a deadly weapon, Aquino was sentenced to 16 to 72 months plus an equal and consecutive term for the use of a deadly weapon. For count three, attempted murder with the use of a deadly weapon, Aquino was sentenced to 32 to 144 months plus an equal and consecutive term of a maximum of 144 months with a minimum parole eligibility of 32 months for the use of a deadly weapon. Counts two and three were to run concurrent with count one, and count three was to run consecutive to count two, with 498 days credit for time served.

False information

Aquino claims that the district court relied on false information when sentencing him because the State fallaciously represented Santa Cruz's character. Specifically, Aquino claims that the State and the Division of Parole and Probation failed to inform the district court that Santa Cruz had been arrested for trafficking in a controlled substance and possession of a firearm by a prohibited person shortly after the incident in question.

We have consistently afforded the district court wide discretion in its sentencing decision. Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial." Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996). We will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). However, if the district court relies on false information

during sentencing, then the defendant's due process rights are violated. State v. District Court, 100 Nev. 90, 96, 677 P.2d 1044, 1048 (1984).

Here, the State represented during the sentencing hearing that Santa Cruz was a working-class man whose life had been ruined when Aquino shot him. The State asserted that Santa Cruz could no longer maintain employment as a construction worker and was losing his house. Further, the Division of Parole and Probation's presentence investigation report did not include information on Santa Cruz, stating only that it had been unable to contact him.

Aquino did not formally object to the State's representations. However, Aquino did inform the district court that Santa Cruz was arrested for trafficking in a controlled substance and possession of a firearm by a prohibited person at some point after the pertinent incident occurred.

Because Aquino failed to object below to the State's representation of Santa Cruz, we conduct a plain error review as to whether the district court violated Aquino's due process rights by relying on false information during sentencing. See Mclellan v. State, 124 Nev. ____, ____, 182 P.3d 106, 110 (2008). We conclude that plain error did not occur. When sentencing Aquino, the district court was aware of Santa Cruz's arrest because Aquino informed the district court of that fact. Moreover, the district court did not base its sentence on the State's representation of Santa Cruz's character. Rather, when sentencing Aquino, it focused on Aquino shooting Santa Cruz for his car and stated that it was only by chance that Aquino did not kill Santa Cruz. Therefore, because the district court knew about Santa Cruz's arrest and did not base Aquino's sentence on Santa Cruz's character, Aquino was not prejudiced

because the district court did not rely on false information at sentencing. See Silks, 92 Nev. at 94, 545 P.2d at 1161.

Count three to run concurrent to count one, consecutive to count two

Aquino next asserts that the district court erred when it ordered that his sentence for count three should run concurrent to count one and consecutive to count two. Aquino claims that such a sentence would require his sentence for count three to be temporarily suspended until he finished serving count two.[4] The State concedes that the record is unclear as to how Aquino's sentences are supposed to run, but argues that the record shows that the district court's intent was for count two to run concurrent to count one and to run count three consecutive to count two.

Pursuant to NRS 176.035(1), "whenever a person is convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may provide that the sentences subsequently pronounced run either concurrently or consecutively with the sentence first imposed."

Here, during the sentencing hearing, the district court stated: "I'm going to run Count one concurrent to Count two; Count two consecutive to Count [t]hree; Count [o]ne concurrent to Count [t]hree as well. So we're looking at Count two and three consecutive." When Aquino

---

[4]Alternatively, Aquino suggests that running count three concurrent to count one, but consecutive to count two, would create a gap where Aquino was not serving a sentence because count two is longer than count one. This argument fails. Count three is longer than count two and, therefore, Aquino would be serving count three at all times, and would continue serving the sentence after he had served his sentence for count two.

questioned which counts were to run consecutive, the district court reiterated: "Two and three are consecutive. Everything -- Count one's concurrent to two and three." Conversely, the judgment of conviction stated that counts two and three were to run concurrent with count one, and count three was to run consecutive to count two.

Aquino's argument, that the district court violated his right to due process when it ran the sentence for count three consecutive to count two because it temporarily suspends count three until count two is served, is without merit. As indicated by NRS 176.035, it is permissible for counts to run consecutively. However, because the district court's statements at the sentencing hearing are discordant with the judgment of conviction, we instruct the district court on remand to clarify which counts are to run concurrently or consecutively to each other.

Improper enhancement

Aquino claims that the district court erred when it enhanced his sentence for conspiracy to commit robbery with the use of a deadly weapon enhancement. The State concedes that Aquino is correct and we agree.

Pursuant to the plain meaning of the term "uses" in NRS 193.165(1), "it is improper to enhance a sentence for conspiracy using the deadly weapon enhancement." Moore v. State, 117 Nev. 659, 663, 27 P.3d 447, 450 (2001) (finding that the defendant's conviction for conspiracy to commit robbery with the use of a firearm should not have been enhanced with the deadly weapon enhancement). Therefore, the district court erred when it enhanced Aquino's sentence for conspiracy to commit robbery with a deadly weapon in violation of NRS 193.165, 199.480, and 200.380, with the deadly weapon enhancement. Accordingly, we reverse Aquino's

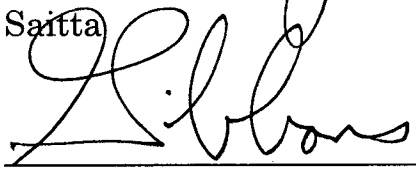
sentence in part and remand this case to the district court with instructions to vacate the second, consecutive term of Aquino's sentence for conspiracy to commit robbery.

For the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Cherry

_____, J.
Saitta



_____, J.
Gibbons

cc: Hon. David B. Barker, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk