

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEE TURNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51620

FILED

MAY 15 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of three counts of assault with a deadly weapon and one count of discharging a firearm at or into a vehicle. Eighth Judicial District Court, Clark County; David B. Barker, Judge. The district court adjudicated appellant David Lee Turner a habitual criminal and sentenced him to serve various concurrent prison terms totaling 60 to 215 months.

First, Turner contends that the jury was improperly instructed as to the specific intent necessary to sustain a conviction for assault with a deadly weapon. Turner claims that the jury was not instructed that the State was required to prove that he acted with the specific intent to inflict bodily injury on the victims. Turner cites to Powell v. State, 113 Nev. 258, 262-63, 934 P.2d 224, 227 (1997), and Wilkerson v. State, 87 Nev. 123, 126, 482 P.2d 314, 316 (1971).

Our construction of the assault statute in Powell and Wilkerson is no longer valid because the Nevada State Legislature has since redefined "assault." See 2001 Nev. Stat., ch. 216, § 1, at 986-87. Moreover, the record Turner provided for our review does not indicate that

he objected to the instructions at trial. Failure to object to instructions at trial precludes appellate review absent plain error. See Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000). We have considered the instructions as a whole,¹ and we conclude that they sufficiently directed the jury to consider whether Turner intentionally placed “another person in reasonable apprehension of immediate bodily harm” with the use of a deadly weapon. See NRS 200.471(1)(a). Accordingly, the district court did not commit plain error.

Second, Turner contends that insufficient evidence was presented at trial to support his convictions for assaulting victims George Hudson and George Wilson with a deadly weapon. Turner claims that

¹The jury instructions presented regarding intent were:

Instruction No. 4.

An assault with a deadly weapon is an intentional placing of another person in reasonable apprehension of immediate bodily harm, by or through the use of a deadly weapon.

To constitute an assault, it is not necessary that any actual injury be inflicted.

Instruction No. 17.

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which the act is done is shown by the facts and circumstances surrounding the case. Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

there was no evidence presented that he had the specific intent to inflict violent injuries upon Hudson and Wilson. Turner asserts that Hudson did not testify at trial and that Wilson's testimony was inconsistent.

“[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Accordingly, the standard of review for a challenge to the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Circumstantial evidence is enough to support a conviction. Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), holding limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

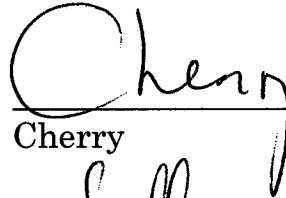
Here, the jury heard testimony that an argument occurred between Hudson, David Wright, and Turner outside a VFW Post. Hudson punched Turner, Turner fell to the ground, Hudson and Wright returned to the bar, and Turner walked away. Turner later returned to the VFW Post as it was closing and its patrons were leaving. Wilson saw Turner standing outside with a gun, Hudson get into his Cadillac, and Wright get into his SUV. As an unknown car, Hudson's Cadillac, and Wright's SUV lined up to exit the parking lot, Turner told Wilson to move out of the way, asked if Wilson was “with them,” and began shooting at the SUV. When Wright saw that he was being shot at, he accelerated, attempted to go around Hudson's Cadillac, and damaged the Cadillac as he squeezed between it and a fence. When the bullets came in Wilson's direction, he


ran and lay down beside a brick wall. Wilson identified Turner as the person who shot at him at the VFW Post. The jury was also provided with demonstrative evidence that indicated the relative positions of the parties during the incident.


From this evidence, we conclude that a rational juror could infer that Turner intentionally placed victims Hudson and Wilson in “reasonable apprehension of immediate bodily harm” with the use of a deadly weapon. See NRS 200.471(1)(a). It is for the 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. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Having considered Turner’s contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. David B. Barker, District Judge
Law Offices of Cynthia Dustin, LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk