

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY PERRY OLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51976

FILED

JUN 03 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
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 one count of attempted murder and one count of battery constituting domestic violence with substantial bodily harm. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated appellant Anthony Perry Oliver a habitual criminal and sentenced him to two concurrent terms of life in prison with the possibility of parole after 10 years.

Oliver argues two issues on appeal: Insufficient evidence supports the conviction for attempted murder and the trial court abused its discretion when it adjudicated him a habitual offender. We reverse the conviction for attempted murder and affirm the adjudication of Oliver as a habitual criminal.

Sufficiency of the evidence

While conceding at trial that he committed battery on the victim, Oliver argues that there was insufficient evidence adduced at trial to support a conviction for attempted murder. In particular, he argues there was insufficient evidence as to his specific intent to murder the

victim. The standard of review for sufficiency of the evidence is “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.” Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 727 (2008) (internal quotations and citations omitted). “This court will not disturb a jury verdict where there is substantial evidence to support it, and circumstantial evidence alone may support a conviction.” Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Murder is the unlawful killing of a person with malice aforethought, NRS 200.010, and attempted murder is “[a]n act done with the intent to commit [murder], and tending but failing to accomplish it.” NRS 193.330(1). In other words, attempted murder occurs when a person tries but fails to unlawfully kill someone with malice aforethought. While malice may be express or implied, only express malice will support a conviction for attempted murder. Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988). “Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.” NRS 200.020(1). In contrast, implied malice may exist “when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.” NRS 200.020(2).

Viewed in the light most favorable to the State, the evidence at trial showed that Oliver beat the victim, his girlfriend of several months, so severely with his fists and feet that she nearly died from her injuries, which included lung contusions more consistent with a vehicle accident or gunshot wound than with a beating, a broken septum, and a broken eye wall. When the victim tried to run from Oliver after the initial

blow, he chased her and pulled her by her hair to the ground, where he kicked her for approximately two to three seconds until someone in a nearby apartment turned on a light, at which time he ran away. The victim was dazed and confused but conscious when the police arrived at the scene, and she identified Oliver as her assailant. However, her condition deteriorated rapidly such that she was induced into a coma for approximately six weeks, during which time medical personnel did not believe she would survive. When she awoke from the coma, the victim had very little memory of the incident, recalling only that she and Oliver were walking to his niece's house to get something to eat because she was hungry, then "waking up" out of breath and running from Oliver when he pulled her to the ground by her hair.

The above facts are clear evidence of implied malice. Oliver attacked his victim without provocation, administered a severe beating and fled without knowing whether the victim would survive, all of which points to an abandoned and malignant heart. However, the evidence does not present external circumstances that would support the finding of express malice that is necessary to sustain a conviction of attempted murder. Here, the only external circumstances are the severity of the victim's injuries, Oliver's pursuit of the victim for an unknown duration, and Oliver kicking the victim for two to three seconds once she was on the ground. While the situation is certainly abhorrent, it does not manifest a deliberate intention to take the victim's life such that any rational juror could find beyond a reasonable doubt that Oliver attempted to murder the victim.

Accordingly, we reverse Oliver's conviction for attempted murder.

Habitual offender

Oliver assigns to the district court three errors related to his adjudication as a habitual offender, all of which are without merit.

Oliver first argues that he has only two prior felony convictions so that the district court erred in adjudicating him a habitual offender. NRS 207.010(1)(b) provides that where a person is convicted of a felony and has three prior felony convictions, he may be adjudicated a habitual criminal. Despite Oliver's claims, the record demonstrates that he had three prior felony convictions. The amended information lists three prior felony convictions, and the sentencing hearing transcript reflects that the State provided the district court with certified judgments of conviction for three prior felonies.


Oliver next argues that the district court failed to exercise its discretion in adjudicating him a habitual criminal. In particular, he points to the court's statement at sentencing that it "would be an abus[e of] discretion" if he were not adjudicated a habitual criminal. So long as the record as a whole indicates that the district court was not laboring under a belief that it had no discretion, this court will not disturb the habitual criminal adjudication. Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000). We conclude that the challenged comment demonstrates that the district court exercised its discretion. The comment, delivered after hearing argument from counsel, the victim's impact testimony, and Oliver's statement, showed that the court was not laboring under a false belief that it lacked discretion as to whether to adjudge Oliver a habitual criminal. Rather, it flowed from the court's concern, expressed several times during the hearing, that Oliver would kill somebody if he were not imprisoned for life.


Finally, Oliver argues that the district court committed reversible error when it failed to make particularized findings in support of its habitual criminal adjudication. A trial court is not required to make particularized findings so long as it is clear from the record that it exercised its discretion. Id. As discussed above, it is clear from the record that the sentencing court exercised its discretion in adjudicating Oliver a habitual criminal.


Because it is plain from the record that Oliver had the requisite number of prior felony convictions and that the district court properly exercised its discretion in adjudicating Oliver a habitual criminal, we conclude that his claims lack merit.

Because sufficient evidence does not support attempted murder, we reverse Oliver's conviction for that offense. However, we affirm the judgment of conviction in all other respects. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court to correct the judgment of conviction consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
Draskovich & Oronoz, P.C.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk