IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY LYNN PALMER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54824

FILED

NOV 05 2010

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ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon, burglary with the use of a deadly weapon, and carrying a concealed weapon.[1] Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge. Appellant Jeffrey Palmer raises two issues.

First, Palmer claims that the district court erred in denying his motion to suppress evidence. Specifically, Palmer argues that when a police officer observed him driving a vehicle that had been reported stolen, the officer did not have probable cause to arrest him and therefore evidence of the gun he was carrying in his waistband, and other evidence gathered following the arrest, should have been suppressed. We disagree and conclude that because a person of reasonable caution could have believed that Palmer committed the crime of possessing a stolen vehicle,

[1]This appeal was filed pursuant to NRAP 4(c) after the district court determined that appellant had been deprived of his right to a direct appeal due to ineffective assistance of counsel.

the district court did not err in denying his motion. See Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991); NRS 205.2715(2).

Second, Palmer claims that insufficient evidence supports his conviction for carrying a concealed weapon and for the jury's deadly weapon findings for the charges of burglary while in possession of a deadly weapon and robbery with use of a deadly weapon. We agree. Trial testimony established that Palmer robbed a convenience store with a device that looked like a Sig Sauer semi-automatic weapon, but that the victim of the robbery believed to be a pellet or air gun based upon his experience with such weapons and the rattling sound it made. Palmer was later arrested with exactly such a weapon concealed on his person. The pellet gun was entered into evidence for the jury to examine, but the State offered no evidence of its firing mechanism or that it was likely to cause or readily capable of causing serious bodily harm or death. See NRS 193.165(6); NRS 202.265(5)(b). The extent of the testimony establishing that the device was capable of firing "a metallic projectile . . . by means of spring, gas, air or other force," NRS 202.265(5)(b), was the arresting officer's agreement with the statement that the device is "the kind of gun that actually shoots out BBs or pellets or something like that." This evidence is insufficient for a rational trier of fact to have found beyond a reasonable doubt that this pellet gun was capable of firing metal projectiles, see Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1094-95 (2009) (concluding that insufficient evidence supported deadly weapon enhancements where prosecution did not prove that pellet gun that mimicked Beretta 9mm handgun was capable of firing metallic projectiles), and we therefore conclude that the deadly weapon enhancements of Palmer's robbery and burglary convictions must be

reversed. Additionally, no evidence was adduced in an attempt to prove that the pellet gun was a "weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion," NRS 202.253(2), and therefore his conviction for carrying a concealed weapon must likewise be reversed. See McIntyre v. State, 104 Nev. 622, 623, 764 P.2d 482, 483 (1988).[2]

Accordingly, we

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

/ Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Benjamin C. Durham
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]In his reply brief, Palmer also seems to raise an issue regarding the sufficiency of the victim's identification. The argument is improperly raised as a reply brief is limited to answering any new matter in the opposing brief. NRAP 28(c). Further, as the victim made an unequivocal in-court identification of Palmer as the man who robbed him, the argument lacks merit.