IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES BAIRD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55748

FILED

JUN 13 2012

TRACIE K. LINDEMAN
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 conspiracy to commit murder, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, discharging a firearm at or into a vehicle, and discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sufficiency of the evidence

Appellant James Baird contends that insufficient evidence was adduced to support the jury's verdict. We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Trial testimony indicated that Baird was driving a vehicle with his brother, Kyle, behind him in the backseat, Elizabeth Rieger in the front passenger seat, and codefendant Jason Burkhart in the rear passenger seat. The four were stopped at an intersection when the victim, Lisa Roberts, in the vehicle to their right, leaned across the driver from her passenger-side seat in order to say "hi" to Burkhart. According to

Roberts, Burkhart looked at her but did not respond; but according to Kyle, Burkhart "pulls out his gun and he cocks it back and he said he's going to shoot this bitch." Kyle testified that Baird told Burkhart, "No, bro, not here, not right now," and they discussed following the vehicle onto the freeway once the light turned green, which Baird did. According to Kyle, Burkhart still wanted to shoot Roberts, and Baird told him he would "get it set up. He's like and you can shoot her and I'll exit off the freeway." On the freeway, Baird approached the vehicle from the right and Burkhart instructed Kyle to roll down his window. With the vehicles lined-up and the exit ramp approaching, Kyle testified that "my brother turns around and looks at [Burkhart] and he says, We're getting ready to exit basically, if you're going to shoot her, you can shoot her now." Burkhart then fired four shots at Roberts, hitting her twice, and Baird quickly exited the freeway. Burkhart testified at Baird's trial and denied talking to him about shooting Roberts, instead claiming that he told Baird to catch up to the vehicle so he could talk to Roberts. Burkhart further contradicted Kyle's testimony and stated that Baird did not know that he was in possession of a gun at the time. Roberts immediately identified Burkhart as the shooter.

Circumstantial evidence alone may sustain a conviction. Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003); Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (noting that conspiracy "is usually established by inference from the parties' conduct"), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). It is for the jury to

determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 193.165(6); NRS 193.330(1); NRS 199.480(1); NRS 200.010(1); NRS 200.030; NRS 200.481(1), (2)(e)(2); NRS 202.285(1)(b); NRS 202.287(1)(b). Therefore, we conclude that Baird's contention is without merit.

Redundant convictions

Baird contends that the district court erred by denying his post-verdict motion to merge the convictions on counts 2 and 3 (attempted murder with the use of a deadly weapon and battery with the use of a deadly weapon) and 4 and 5 (discharging a firearm at or into a vehicle and discharging a firearm out of a motor vehicle) because they are each based on the same illegal act and therefore impermissibly redundant. Baird sought the dismissal of counts 3 and 5.

"[W]e will reverse redundant convictions that do not comport with legislative intent." Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (internal quotation marks omitted). 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 legislature did not intend multiple convictions.'" Id. (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)). In this case, our review of the statutory elements reveals that the gravamen of the offenses charged in counts 2 and 3 and in counts 4 and 5 are not the same and allow for multiple punishments. See NRS 193.165(6); NRS 193.330(1); NRS 200.010(1); NRS 200.030; NRS 200.481(1), (2)(e)(2); NRS 202.285(1)(b); NRS 202.287(1)(b). Therefore, we conclude that Baird's

contention is without merit and the district court did not err by denying his motion.

Motion for a new trial/newly discovered evidence

Baird contends that the district court erred by denying his motion for a new trial based on newly discovered impeachment evidence without conducting an evidentiary hearing. See NRS 176.515(1). The district court has broad discretion in ruling on a timely motion for a new trial. See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001). The district court conducted a hearing and heard arguments from counsel pertaining to a post-verdict affidavit provided by Elizabeth Rieger. The district court found that the evidence was newly discovered and arguably material, and that reasonable diligence was used to locate Rieger prior to trial, albeit unsuccessfully. But in denying Baird's motion, the district court stated, "I cannot find that it's not cumulative or that it renders a different result probable." We agree and conclude that the district court did not abuse its discretion by denying Baird's motion for a new trial. See Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997) (holding that to grant new trial motion based on newly discovered evidence, district court must find evidence "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").

Motion to dismiss/Brady violation

Baird contends that the district court erred by denying his oral motion to dismiss based on the State's failure to provide the defense with information pertaining to Elizabeth Rieger. See Brady v. Maryland, 373 U.S. 83, 87 (1963); Strickler v. Greene, 527 U.S. 263, 280 (1999)

(Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense). Determining whether the State adequately disclosed information pursuant to Brady involves questions of both fact and law which we review de novo. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). Here, Baird failed to demonstrate that the State improperly withheld any information pertaining to Elizabeth Rieger that was exculpatory or favorable to his defense in violation of Brady. Therefore, we conclude that the district court did not err by rejecting Baird's claim and denying his motion to dismiss. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Saitta

_____, J.
Pickering

_____, J.
Hardesty

cc: Hon. Elissa F. Cadish, District Judge
Bush & Levy, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk