

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL SYLVESTER PORTER, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56826

**FILED**

JUN 08 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT

BY S. Young  
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 conspiracy to commit a crime, two counts of burglary while in possession of a deadly weapon, two counts of discharging a firearm at or into a structure and/or vehicle, one count of discharging a firearm out of a motor vehicle, six counts of assault with a deadly weapon, two counts of discharging a firearm at or into a vehicle, and two counts of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Daniel Sylvester Porter, III claims that insufficient evidence supports his conviction for Count 2 (burglary while in possession of a deadly weapon) because the State failed to prove that he had the requisite intent or had a weapon when he first entered the barber shop. Porter also claims that insufficient evidence supports both convictions for attempted murder with the use of a deadly weapon because the State failed to prove that he had the intent to kill.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443

U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It is for the jury to assess the witnesses' credibility and determine the weight to give their testimony, and the jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict. McNair, 108 Nev. at 56, 825 P.2d at 573; Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

At trial the jury heard testimony that Porter and Virgil Hurd entered the barber shop at approximately 9:30 a.m., asking for Ronnie Surgeon. Virgil had a long gun clip either in his hand or hanging out of his pocket. Surgeon was not at the barber shop at the time and someone called him and told him that Porter and Hurd were looking for him. Surgeon arrived at the shop at approximately 9:35. Upon Surgeon's arrival, Hurd exited the shop and went to Surgeon's car, flashing a gun in Surgeon's face and taunting him. Surgeon exited the car and went into the shop, followed by Hurd. Porter had remained in the shop during this altercation and did not harm anyone while in the shop. Once back inside the shop, Hurd and Porter "crowded" around Surgeon. Hurd pointed a gun at Surgeon and started talking "crazy" and told Surgeon they would be back, but no specific threats were made at that time. Hurd and Porter then left the shop.

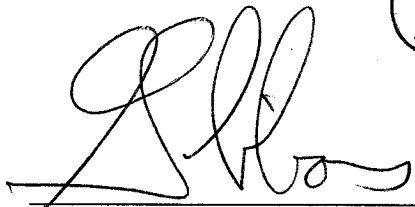
Shortly after Hurd and Porter left, Surgeon called Hurd asking to fight. Hurd and Porter returned to the shop a short time later in a white car. Upon their arrival, Surgeon noticed that they were wearing gloves, which indicated to him that they came to shoot, so he ran out the back door of the shop as Hurd and Porter were entering the shop. Hurd entered the shop first. Porter followed, then stepped around Hurd and fired multiple shots toward the back of the shop, where Surgeon was

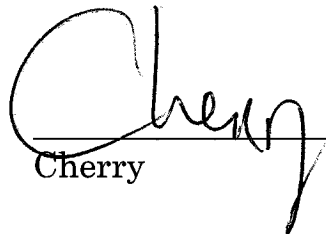
exiting the shop. While Porter was shooting, several individuals, including Vernon Jenkins, ran out the front of the shop. Jenkins ran down the strip mall and when he turned to look back he noticed that Porter and Hurd had exited the shop and were pointing guns in his direction. Porter fired three shots at Jenkins and Jenkins ran and hid between two vehicles parked in front of a nearby business. Hurd and Porter got into the white car and started driving. Porter was in the passenger seat, aiming a gun out the window. Jenkins testified that Porter shot at him several more times and the shots went through both of the vehicles he was hiding behind and just over his shoulder into the school behind him.

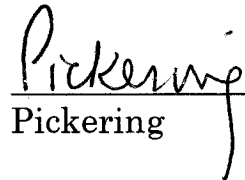
We conclude that the evidence was sufficient for a rational juror to infer that Porter harbored a specific intent to kill both Surgeon and Jenkins when he fired multiple shots at each of them. See Sharma v. State, 118 Nev. 648, 657-58, 56 P.3d 868, 873-74 (2002) (to find a defendant guilty of attempted murder State must prove the defendant had the specific intent to kill at the time of the incident). We therefore affirm the convictions for attempted murder with the use of a deadly weapon. See NRS 193.330 (attempt); NRS 193.165 (use of a deadly weapon); NRS 200.010 (defining murder); NRS 200.030(1), (2) (defining degrees of murder). We further conclude, however, that the evidence was not sufficient to establish that when Porter first entered the barber shop at 9:30 a.m., he entered with the intent to commit an assault and/or battery or with the intent to discharge a firearm in that building. See NRS 205.060(1) (intent must be present at time of entry into the structure); NRS 200.471(1)(a) (defining assault); NRS 200.481(1)(a) (defining battery); NRS 202.285(1) (discharging a firearm into a structure). We therefore

reverse Porter's conviction for Count 2, burglary while in possession of a deadly weapon. Accordingly, we

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

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. Valorie Vega, District Judge  
Robert E. Glennen, III  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk