IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS ANGEL CARDENAS-ORNELAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56897

FILED

NOV 18 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant and his brother were tried separately for a drive-by-shooting where a young man was shot and killed. These events led to appellant's contentions in this case.

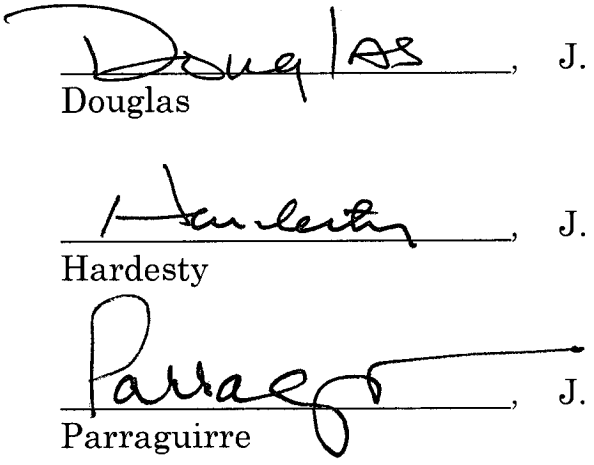
First, appellant contends his due process rights were violated when the prosecutor took inconsistent positions in his brother's trial for the same offense. Because appellant failed to object below, we review his claim for plain error affecting his substantial rights. See NRS 178.602; Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000). No such error occurred here. A prosecutor may present arguments consistent with the evidence actually adduced at each trial when both defendants share responsibility. Nguyen v. Lindsey, 232 F.3d 1236, 1240-41 (9th Cir. 2000). Here, the prosecutor argued that it did not matter who drove the car or fired the assault rifle. The prosecutor stated, in both cases, that the driver and shooter were equally culpable. Therefore, we conclude that appellant failed to demonstrate plain error in this instance.

Second, appellant contends that the district court erred by imposing a disproportionately greater sentence than was imposed on his codefendant. There is no legal requirement that codefendants receive identical punishment. Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). And nothing in the record indicates that the district court relied on "impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). The district court was made aware of relevant aspects of appellant's character and criminal history, including his gang affiliation and previous contacts with the criminal justice system. Appellant's 96- to 240-month sentence is within the statutory limits, see NRS 193.165; NRS 200.030, and we conclude that his sentence is not so "disproportionate to the offense as to shock the conscience," Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Accordingly, the district court did not abuse its discretion at sentencing. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Third, appellant contends the weapon enhancement is illegal because the use of a deadly weapon was a necessary element of the State's second-degree murder theory. We disagree. NRS 193.165(4) precludes the weapon enhancement only if the use of a deadly weapon is a "necessary element" of the crime committed. Cordova, 116 Nev. at 668, 6 P.3d at 484 (2000). This language refers to an essential component of the legal definition of the crime, considered in the abstract. Id. (quoting People v. Hansen, 885 P.2d 1022, 1031 (Cal. 1994), overruled on other grounds by People v. Sarun Chun, 203 P.3d 425, 443 (2009)). Appellant was found guilty of second-degree felony murder, which does not include the use of a deadly weapon as a "necessary" element.

Having considered appellant's arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



Douglas, J.

Hardesty, J.

Parraguirre, J.

cc: Hon. Patrick Flanagan, District Judge
Scott W. Edwards
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk