IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL JOEL GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58031

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. Appellant Angel Joel Garcia raises five issues on appeal. We will discuss each below in turn.

Transition instruction

First, Garcia argues that Jury Instruction 30, a "transition instruction," led to jury confusion and invited a compromised verdict. In this, he argues that the jury's acquittal on the first-degree murder charge was an acquittal on the lesser-included offense of second-degree murder. Therefore, his second-degree murder conviction violates double jeopardy principles. We disagree.

We discussed, at length, the correct form of "transition instructions" in Green v. State, 119 Nev. 542, 80 P.3d 93 (2003). We adopted the "unable to agree" instruction for instructing juries on the consideration of lesser-included offenses. Id. at 547-48, 80 P.3d at 96.

> Consistent with this approach, when a transition instruction is warranted, the district court must instruct the jury that it may consider a lesser-included offense if, after first fully and carefully

> considering the primary or charged offense, it either (1) finds the defendant not guilty, or (2) is unable to agree whether to acquit or convict on that charge.

Id. at 548, 80 P.3d at 97. Here, the jury was instructed properly under Green and we conclude Garcia's claim has no merit. Id.

As to Garcia's double jeopardy argument, the jury's acquittal of first-degree murder does not serve to acquit him of second-degree murder because first-degree murder contains an element second-degree murder does not. First-degree murder, as charged here, is the willful, deliberate, and premeditated killing. NRS 200.030(1)(a). Those elements are not included in second-degree murder. See NRS 200.030(2); Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1035 (1995) (explaining second-degree murder as "an unintentional homicide based on implied malice, which does not require an intentional killing but, rather, killing under circumstances which show an abandoned and malignant heart (internal quotations omitted)). Therefore, the jury could have properly determined that the State failed to prove willful, deliberate, and premeditated murder (first-degree murder) but that it proved implied malice (second-degree murder). Thus, we conclude that Garcia's double jeopardy argument lacks merit.

Malice instruction

Garcia contends that the implied malice instruction created an unconstitutional presumption that improperly shifted the burden of proof. We conclude that the district court's malice instruction was proper. The instruction provided, "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." This court has held that use of the word "may" in a malice instruction "'eliminates the issue of a mandatory presumption.'" Leonard v. State,

117 Nev. 53, 78, 17 P.3d 397, 413 (2001) (quoting Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000)). The jury also was properly instructed on the presumption of innocence and the State's burden to prove every element of the crime beyond a reasonable doubt. There was no improper shifting of the burden of proof.

Sentence enhancement

Garcia claims that the district court did not properly apply NRS 193.165(1), which requires the district court to consider and make findings on the record certain factors in determining the length of a deadly weapon enhancement sentence. Garcia argues that the district court's failure to make these findings requires a remand for resentencing. Because Garcia did not object below, we review this claim for plain error affecting his substantial rights. See Mendoza–Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009).

The record shows that the district court's sentencing rationale was based on the NRS 193.165 factors. Specifically, the district court had presided over the trial and was aware of the facts of the crime and noted Garcia's young age. Further, the district court considered victim impact testimony, letters from the victims' families, and mitigating evidence, including Garcia's expression of remorse and accountability for his actions, and a psychological report. Although the district court did not strictly follow Mendoza–Lobos' mandate by explicitly articulating its findings for each factor, the record provides sufficient justification for the sentence and the failure to explain that ruling more completely does not render it constitutionally defective. See Arizona v. Washington, 434 U.S. 497, 516–17 (1978) (holding that explicit statements regarding a trial court's

rationale is desirable but not required). Accordingly, we conclude that Garcia failed to demonstrate plain error in this regard.

Uncharged enhancement

Garcia contends that the district court enhanced his sentence based on his gang membership rather than the deadly weapon enhancement alleged in the charging document. We disagree. Although the district court noted its general desire to deter gang members from participating in similar crimes, the district court specifically stated that the sentence was enhanced based on Garcia's use of a deadly weapon during the crimes. Nothing in the record suggests that the district court sentenced Garcia on an uncharged sentence enhancement.

Consecutive sentences

Garcia argues the district court abused its discretion by sentencing him to consecutive murder sentences and imposing excessive sentences for the deadly weapon enhancement. We conclude that his contention is without merit.

This court has consistently afforded the district court wide discretion in its sentencing decision, see, e.g., Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), including the discretion to impose consecutive sentences. See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967). We will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Garcia argues that the district court erred by disregarding the mitigating information contained in a psychological evaluation. But the district court noted and

agreed with portions of the evaluation that dealt with adolescent brain development. Although Garcia's sentence is substantial, nothing in the record suggests that the district court considered impalpable or highly suspect evidence or other improper matters in imposing consecutive sentences. And the sentence is within the parameters provided by the relevant statutes. NRS 193.165(1); NRS 200.030(5). Accordingly, we conclude that the district court did not abuse its discretion in sentencing Garcia.

Having considered Garcia's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

/ Hardesty, J.
Hardesty

cc: Hon. Jerome Polaha, District Judge
Janet S. Bessemer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk