IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLANDO SCOTT MARTIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58534

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of assault with a deadly weapon, battery with a deadly weapon, battery with a deadly weapon causing substantial bodily harm, discharging a firearm in a public place, carrying a concealed weapon, and felon in possession of a firearm. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Appellant Orlando Scott Martin, Jr., contends that there was insufficient evidence to support his convictions for assault with a deadly weapon and battery with a deadly weapon because the State failed to prove that he was a principal or aider and abettor and that he was not acting in self-defense. Martin was convicted for assaulting four named victims and one or more unidentified victims by intentionally placing them in reasonable apprehension of immediate bodily harm by discharging a firearm one or more times and for battering two of the named victims. 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 crimes beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, Martin was captured on video lifting up his shirt to display a firearm to patrons inside a bar. He was later seen waving the firearm in a threatening manner and exchanging words with a group of men outside the bar. A witness testified that Martin and a companion later cocked their weapons and pointed them in the direction of the same men who were standing in a crowd outside the bar. At that moment, an individual from the crowd drew his weapon and fired at Martin. According to the witness, Martin returned fire. Several people behind the initial shooter are seen falling to the ground and running for cover. Martin testified that he was unarmed, was only waving an empty holster, and his friend returned fire in self-defense. A firearms expert testified that shell casings from three distinct firearms were recovered at the scene. Three of the four named victims testified that they heard Martin return fire and dove to safety. Two of these victims testified that they were shot in the foot. The fourth named victim testified that he had no memory of the incident and only remembered waking up in the hospital with a severe gunshot wound to his leg. Another witness testified that he saw Martin holding a gun and was frightened when he heard the gunshots.

We conclude that a rational juror could infer from these circumstances that Martin committed the two counts of battery and four of the five counts of assault with a deadly weapon. See NRS 200.471(1)(a)(2); NRS 200.481(1)(a), (2)(e); NRS 195.020; Harkins v. State, 122 Nev. 974, 990, 143 P.3d 706, 716 (2006) ("self-defense is not available to an original aggressor"); Ochoa v. State, 115 Nev. 194, 197-98, 981 P.2d 1201, 1204 (1999) (explaining the doctrine of transferred intent). The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports these convictions. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20,

20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

However, we cannot conclude that a rational juror could have found the essential elements of NRS 200.471(1)(a)(2) beyond a reasonable doubt with respect to count four. In order to sustain a conviction for assault under NRS 200.471(1)(a)(2), the State must prove that (1) Martin had the specific intent to place the victim in apprehension of immediate bodily harm, (2) the victim apprehended this harm, and (3) Martin engaged in conduct which made this apprehension reasonable. See 2 Wayne R. LaFave, Substantive Criminal Law § 16.3(b) (2d ed. 2003 & Supp. 2011-12). The named victim in count four testified that he had no memory of the incident and the video evidence is insufficient to determine whether Martin's conduct caused this victim to be in apprehension of immediate bodily harm. As discussed below, an individual may be a victim of battery without also being a victim of assault. Therefore, we reverse Martin's conviction for count four.

Martin also contends that his convictions for both assault and battery on two of the named victims violates the Double Jeopardy Clause and are redundant because they punish the same illegal act. See Wilson v. State, 121 Nev. 345, 358-59, 114 P.3d 285, 294-95 (2005). Because battery with a deadly weapon does not include the element of apprehension of immediate bodily harm, the Double Jeopardy Clause does not prohibit convictions for both offenses. See id.; NRS 200.471(1)(a)(2); NRS 200.481(1)(a), (2)(e). Similarly, convictions for both offenses are not redundant because the gravamen of the charged offenses is different. See State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000);

see also Hearing on A.B. 344 Before the Senate Judiciary Comm., 71st Leg. (Nev., May 3, 2001) (explaining the Legislature's purpose for adding the language in NRS 200.471(1)(a)(2)). NRS 200.471(1)(a)(2) protects individuals from the apprehension of immediate bodily harm. NRS 200.481(1)(a) protects individuals from actual force or violence. A victim can have force or violence used against them without ever being placed in fear or apprehension of such force or violence. For these reasons we conclude that Martin's convictions do not violate the Double Jeopardy Clause and are not redundant.

Finally, Martin contends that the district court erred by rejecting his proposed instructions on assault with a deadly weapon as a lesser-included offense of battery with a deadly weapon and transferred intent. The district court did not err by rejecting Martin's proposed lesser-included jury instruction because assault with a deadly weapon is not "'necessarily included'" in the offense of battery with a deadly weapon. See Rosas v. State, 122 Nev. 1258, 1264, 147 P.3d 1101, 1106 (2006) (quoting NRS 175.501). The district court also did not err by rejecting Martin's proposed instruction on transferred intent because by Martin's own admission and our comparison of the two instructions there is no substantive difference between Martin's proposed instruction and the instruction issued to the jury. See Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (reviewing district court's decision for abuse of discretion or judicial error).

Having reviewed Martin's contentions and concluded that he is only entitled to the relief described above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. David A. Hardy, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk