IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG A. DOWNING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58685

FILED

JAN 12 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 burglary while in the possession of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

First, appellant Craig A. Downing contends that insufficient evidence was adduced to support the jury's verdict. We disagree and conclude that 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 Downing's accomplice, Kyle Rodney, met the victim at a casino where the victim won more than $10,000. Later that evening, Downing and Rodney traveled together to the victim's house where, in the parking garage, they proceeded to severely beat and rob him, leaving him unconscious. The victim testified that he was not sure who used which weapon, but they both beat him—one with a small bat and the other with an unknown hard object. Downing's girlfriend, Ashley Womack, witnessed the attack and testified that Downing was the one who beat the victim with a bat previously hidden in his sleeve. At one point during the beating, the victim heard one of the two men say to him, "Now you're going to die," and, at that moment, saw a knife thrust towards his face, cracking his orbital bone and slicing through to his skull. As the victim attempted to crawl away, he was hit repeatedly in the back of his head and then his face with the bat before he lost consciousness and stopped moving. Womack's testimony indicated that Downing and Rodney were working together, and they fled from the scene together after stealing the victim's cell phone, wallet, and car keys. The emergency room physician who treated the victim testified about his significant injuries, and several photographs detailing the victim's injuries were shown to the jury.

It is for the jury to determine the weight and credibility to give conflicting testimony, and a jury's verdict will not be disturbed on appeal

where, as here, substantial evidence supports the verdict. See NRS 193.165; NRS 193.330(1); NRS 199.480(1); NRS 200.010; NRS 200.030; NRS 200.380(1); NRS 200.481; NRS 205.060(1), (4); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Additionally, circumstantial evidence alone may sustain a conviction. See 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.").

Second, Downing contends that his conviction for battery with the use of a deadly weapon violates his right to be protected from double jeopardy because it is a lesser-included offense of attempted murder with the use of a deadly weapon. Downing did not object below, see Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) ("Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error sua sponte." (quotation omitted)), and we conclude that he fails to demonstrate reversible plain error because battery is not a lesser-included offense of attempted murder, see NRS 178.602; see also NRS 193.330; NRS 200.010; NRS 200.481, and convictions for both do not violate the proscriptions against double jeopardy, see Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two

distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); Wilson v. State, 121 Nev. 345, 358-59, 114 P.3d 285, 294-95 (2005). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[1]

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Susan Scann, District Judge
Edward B. Hughes
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]Although we filed the fast track statement and appendix submitted by Downing, they fail to comply with the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(1)(C); NRAP 28(e)(1); NRAP 30(b)(2). The procedural history refers to matters in the record without specific citation to the appendix and the appendix only contains rough draft transcripts of the 5-day jury trial. We also note that the fast track response submitted by the State is similarly deficient. Counsel for Downing and the State are cautioned that the failure to comply with the briefing and appendix requirements may result in them being returned, unfiled, to be correctly prepared, NRAP 32(e), and in the imposition of sanctions, NRAP 3C(n).