

IN THE SUPREME COURT OF THE STATE OF NEVADA

PORFIRIO DUARTE-HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58946

FILED

APR 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of attempted murder with the use of a deadly weapon, manufacture and/or possession of an explosive or incendiary device, malicious destruction of private property, and possession of an explosive or incendiary device during the commission of a felony. Eighth Judicial District Court, Clark County; Michael Villani, Judge.¹

Sufficiency of the evidence

Appellant Porfirio Duarte-Herrera contends that insufficient evidence supported his conviction for attempted murder because the State failed to present any evidence that he had the specific intent to kill Ryan Wallace or anyone else. 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. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

¹District Judge Michael Villani decided the pretrial motions and presided over the sentencing hearing. Senior District Judge James Brennan presided over the trial.

The jury heard testimony that Duarte-Herrera added shot taken from shotgun shells to his pipe-bomb to increase its lethality, used a timer to limit control over the bomb after it was activated, placed the bomb on Wallace's truck while it was parked at the Home Depot, and set the timer to detonate the bomb during the store's business hours.

We conclude that a rational juror could reasonably infer from this evidence that Duarte-Herrera specifically intended to kill. See NRS 193.200 (intent); NRS 193.330(1) (defining attempt); NRS 200.010 (defining murder); NRS 200.020(1) (defining express malice); Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874-75 (2002) ("Intent to kill . . . may be ascertained or deduced from the facts and circumstances . . . such as use of a weapon calculated to produce death, the manner of use, and the attendant circumstances." (alteration and internal quotation marks omitted)). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Evidentiary ruling

Duarte-Herrera contends that the district court violated his rights to due process, a fair trial, present a defense, and confront his accusers when it ruled that he could not cross-examine police detectives about the voluntariness of his statements without opening the door to testimony that he was also interviewed about the Luxor Hotel-Casino bombing. "We generally review a district court's evidentiary rulings for an abuse of discretion. However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed

de novo.” Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal citation and quotation marks omitted).

The record does not support Duarte-Herrera’s contention that the district court made a ruling. Duarte-Herrera asked the district court if he could cross-examine the detectives about his in-custody status and the multiple unrecorded interviews that he was subjected to. He believed that this line of questioning would show that his will was overborne by repeated interviews and would support his theory of defense that his statement was not made voluntarily. The district court, however, recognized that this line of questioning might open the door to otherwise inadmissible evidence by creating a false impression that Duarte-Herrera was being held without adequate cause and was interviewed solely about the Home Depot bombing. See U.S. v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988) (discussing the curative admissibility rule). The district court informed Duarte-Herrera that it was up to him to devise his own strategy, he could try asking these questions, but, if his cross-examination created a false impression, the State would be entitled to present rebuttal evidence. We conclude that the district court did not abuse its discretion or violate Duarte-Herrera’s constitutional rights in this regard.

Jury instructions

Duarte-Herrera contends that the district court made three jury instruction errors. “The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.” Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

First, Duarte-Herrera contends that the district court erred by instructing the jury that “[i]t is not necessary to prove the elements of

premeditation and deliberation in order to prove attempted murder” because the instruction relieves the State of its burden to prove each element of the offense, is confusing and misleading, and is contradicted by Nevada caselaw. The State asserts that the language used in this instruction was taken directly from Keys v. State, 104 Nev. 736, 740-41, 766 P.2d 270, 273 (1988), and accurately reflects current Nevada law. We agree and conclude that Duarte-Herrera has not demonstrated an abuse of discretion or judicial error in this regard.

Second, Duarte-Herrera contends that the district court erred when instructing the jury that it must find that his statements to the police were voluntary before they may be considered during deliberations because the instruction did not provide guidance for determining whether a statement was given voluntarily. Duarte-Herrera argues that part of his defense was that his statements were made involuntarily, he had a right to have the jury instructed on his theory of defense, and the district court should have given his proffered instruction. “A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it.” Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and alteration omitted). Both parties proffered instructions on the voluntariness of Duarte-Herrera’s statement, and the district court found that both instructions were argumentative. The district court sustained Duarte-Herrera’s objection to the State’s instruction, striking the instruction’s second paragraph before presenting it to the jury. Because the amended instruction accurately reflects Nevada law, see Carlson v. State, 84 Nev. 534, 535-36, 445 P.2d 157, 158-59 (1968) (adopting the “Massachusetts Rule” and holding that “[t]he term

‘voluntary’ carries a clear meaning, without need for further definition or explanation”), and properly places Duarte-Herrera’s theory of defense before the jury, see Crawford, 121 Nev. at 754-55, 121 P.3d at 589, we conclude that the district court did not abuse its discretion in this regard.

Third, Duarte-Herrera contends that the district court erred by instructing the jury that “the State [had] the burden of proving beyond a reasonable doubt every material element of the crime charged” (emphasis added). Duarte-Herrera asserts that the instruction was confusing and reduced the State’s burden of proof because it did not identify the “material elements” of each charge. And he argues that Nunnery v. State, 127 Nev. ___, ___, 263 P.3d 235, 259-60 (2011) (upholding use of the “material element” language in jury instructions), was wrongly decided because it relied on prior opinions that did not specifically address the issue of whether a jury could be instructed to determine the “materiality” of an element of a crime. We conclude that the district court did not abuse its discretion by giving this instruction and reject Duarte-Herrera’s request to overrule Nunnery.

Redundant convictions

Duarte-Herrera contends that his convictions for attempted murder with the use of a deadly weapon and possession of an explosive or incendiary device during the commission of a felony are redundant because the gravamens of these offenses are the same.

“When a defendant receives multiple convictions based on a single act, this court will reverse redundant convictions that do not comport with legislative intent. After the facts are ascertained, an examination of whether multiple convictions are improperly redundant begins with an examination of the statute.” Wilson v. State, 121 Nev. 345,

356, 114 P.3d 285, 293 (2005) (internal quotation marks and footnote omitted). We examine the construction of a statute de novo, apply the plain meaning to the words used in statutes that are unambiguous, and resolve statutes that are ambiguous in the defendant's favor. See Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004).

We conclude that the gravamen of both offenses is the same—Duarte-Herrera attempted to commit murder with the use of a pipe-bomb—and the redundant convictions do not comport with legislative intent. NRS 202.820(1) states:

A person who:

- (a) Uses an explosive to commit any felony; or
- (b) Carries an explosive unlawfully during the commission of any felony,

is guilty of a separate felony unless the use of an explosive is a necessary element of the other crime.

The plain language of this statute indicates that the Legislature did not intend for multiple convictions to arise from the same act when the use of an explosive was a necessary element of the other crime. Here, the other crime was attempted murder with the use of a deadly weapon. Because the State sought a deadly weapon enhancement based on the use of an explosive, the use of an explosive was a necessary element of the crime which had to be submitted to a jury and proven beyond a reasonable doubt. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Consequently, the conviction for possession of an explosive or incendiary device during the commission of a felony cannot stand as a separate felony and must be reversed.

Having considered Duarte-Herrera's contentions, and for the reasons discussed above, 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.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Michael Villani, District Judge
Hon. James Brennan, Senior District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk