IN THE SUPREME COURT OF THE STATE OF NEVADA

LOHNY JACK ELMORE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60306

FILED

JAN 16 2013

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of discharging a firearm at or into a structure and assault with a deadly weapon. Second Judicial District Court, Washoe County; Robert E. Estes, Senior Judge.

First, appellant Lohny Jack Elmore, Jr., claims that his convictions for discharging a firearm and assault with a deadly weapon violate the Double Jeopardy Clause and are redundant. We disagree. Each of Elmore's convictions requires proof of an element that the other does not: assault with a deadly weapon requires proof that the defendant either attempted to use physical force on another person or placed another person in apprehension of immediate bodily harm, NRS 200.471(1), and discharging a firearm at or into a structure requires proof that the defendant discharged a firearm at or into some structure, NRS 202.285(1). Accordingly, Elmore's convictions do not violate the Double Jeopardy Clause, see Blockburger v. United States, 284 U.S. 299, 304 (1932) (establishing an elements test for double jeopardy purposes), and because neither statute indicates that cumulative punishment is precluded, Elmore's convictions are not redundant, see Jackson v. State, 128 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 55, December 6, 2012) (applying

the Blockburger test to redundancy claims when the relevant statutes do not expressly authorize or prohibit cumulative punishment).

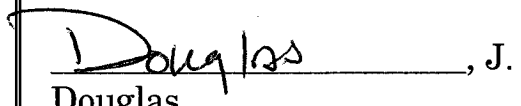
Second, Elmore claims that the district court relied upon impalpable or highly suspect evidence during sentencing by comparing his conduct to a gang-style drive-by shooting. However, the district court's comparison was not evidence and was not based on evidence, it was merely an analogy. Elmore has not shown that the district court relied upon impalpable or highly suspect evidence, see Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), the relevant statutes are unconstitutional, see Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996), or the two 18- to 48-month prison terms exceed the parameters of the relevant statutes, see NRS 200.471(2)(b); NRS 202.285(1)(b). We are not convinced that the sentence violates the constitutional proscriptions against cruel and unusual punishment, see Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion); Blume, 112 Nev. at 475, 915 P.2d at 284, and we conclude that Elmore has failed to demonstrate that the district court abused its discretion at sentencing, see Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

Third, Elmore claims that NRS 176A.290(2) is unconstitutional because it prohibits the district court from assigning a defendant who is guilty of committing a violent offense to the veteran's court unless the prosecuting attorney stipulates to the assignment. However, nothing in the record before this court demonstrates that Elmore sought and was denied treatment in a program for veterans pursuant to NRS 176A.290. Accordingly, we conclude that Elmore lacks standing to challenge the constitutionality of this statute. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

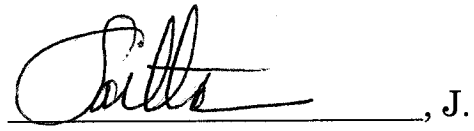
Having considered Elmore's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Gibbons, J.



Douglas, J.



Saitta, J.

cc: Chief Judge, Second Judicial District Court
Hon. Robert E. Estes, Senior Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk