IN THE SUPREME COURT OF THE STATE OF NEVADA

MARCUS ANDREA DIXON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35657

FILED

MAY 16 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The district court sentenced appellant to two consecutive terms of life in prison with the possibility of parole and two consecutive prison terms of 43 to 192 months, to be served concurrently with the life terms. The district court credited appellant with 616 days for time served.

Appellant first contends that the district court improperly allowed an incorrect and misleading information to be presented to the jury. Appellant further contends that he did not have adequate notice of the State's intention to pursue an aiding and abetting theory, asserting that he did not receive notice that the State intended to pursue this theory until one week before trial when the State filed an amended information. We conclude that neither argument has merit. Appellant is disingenuous in arguing lack of notice when the aiding and abetting language was included in two prior pleadings -- the criminal complaint and the original information. We conclude that the district court's decision to allow the amended information complied with NRS 173.095(1), which provides that the court "may permit an indictment or information to be amended at any time before verdict or

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finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." We further conclude that the amended information was neither incorrect nor misleading.

Next, appellant contends the aiding and abetting instruction was improper because it allowed the jury to convict appellant even if the jury did not find beyond a reasonable doubt that appellant was the shooter. When counsel objected to the instruction at trial, he expressed concern that the instruction, if given, would allow the State to suddenly change its theory of the case in closing argument. Specifically, counsel was concerned that the State would argue that the evidence only needed to show that appellant assisted with the murder, not necessarily that he was the shooter. The State responded by reiterating that it still intended to argue in closing argument that appellant was the shooter, and that it would not argue otherwise. The district court overruled the objection and in fact the State never changed its theory in closing, but continued to argue that the evidence showed appellant was the shooter. Because the basis for the objection never materialized, we conclude that the district court correctly overruled the objection and allowed the instruction. In any event, any error in the submission of this instruction to the jury was harmless beyond a reasonable doubt, given the overwhelming evidence of appellant's guilt.[1]

Appellant next argues that the jury instructions did not properly identify the elements of the first-degree murder charge and improperly blurred the distinction between first-degree and second-degree murder. Appellant contends that these instructions were clearly erroneous based on this

[1]See Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992).

court's recent decision in Byford v. State.[2] This argument lacks merit, as Byford has prospective application only.[3] Furthermore, Byford holds that use of instructions such as those given in the present case does not constitute plain or constitutional error.[4]

Next, appellant contends that the district court improperly denied appellant's right to examine Calvin Dixon (formerly a co-defendant) when Calvin invoked his Fifth Amendment right against self-incrimination and refused to testify at appellant's trial. Because Calvin had already been found guilty in his own trial over charges stemming from this same shooting incident, appellant argues that Calvin's fear of prosecution for testifying was unfounded -- and therefore he could not validly exercise his Fifth Amendment right not to testify. This argument lacks merit because Calvin's appeal was pending at the time he refused to testify. While Calvin's testimony would have no impact on the trial which had already taken place, the testimony could nevertheless be used against him in a subsequent trial if his appeal was ultimately successful and he was granted a new trial. Thus, the district court properly allowed Calvin to invoke his Fifth Amendment right.[5]

Finally, appellant argues that the evidence at trial was insufficient to support his conviction. We disagree. In reviewing a claim of insufficiency of the evidence, we examine

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[2] 116 Nev. 215, 994 P.2d 700 (2000).

[3] See Garner v. State, 116 Nev. ___, ___, 6 P.3d 1013, 1024 (2000).

[4] See id.

[5] See Jones v. State, 108 Nev. 651, 657, 837 P.2d 1349, 1352 (1992) (stating that "[w]itnesses in criminal prosecutions have a Fifth Amendment right to refuse to answer questions when their answers might subject them to future prosecution").

"'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[6] Two witnesses positively identified appellant as the shooter. Appellant shot one victim in the back of the head four times, killing him, then shot at and missed another victim. Based on this and the other evidence contained in the record, we conclude that any rational trier of fact could have, beyond a reasonable doubt, found that appellant committed a "willful, deliberate and premeditated killing",[7] that the killing was done "with malice aforethought,"[8] and that the killing was accomplished by the use of a "deadly weapon."[9] Likewise, any rational trier of fact could have similarly concluded that the elements of attempted murder were proven beyond a reasonable doubt.

Having considered all of appellant's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

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[6]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[7]NRS 200.030(1)(a).

[8]NRS 200.010.

[9]NRS 193.165.

cc: Hon. Mark W. Gibbons, District Judge
Attorney General
Clark County District Attorney
Kajioka, Christiansen & Toti
Clark County Clerk