

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68924

FILED

JUN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal under NRAP 4(c) from a judgment of conviction entered pursuant to a jury verdict of attempted robbery with the use of a deadly weapon, assault with the use of a deadly weapon, and discharging a weapon where a person might be endangered. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Jose Garcia claims there was insufficient evidence to support his convictions because there were material conflicts between the testimony of the witnesses regarding the color and make of a vehicle and the number of shots fired, the police did not recover a bullet or firearm, and only the victim's testimony tied Garcia to the crimes in this case. We review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that Garcia and the victim had known each other for about two years, the victim received a cash settlement arising from an automobile accident, and Garcia believed he

was entitled to some of the cash. One afternoon, as the victim was walking down a public street, Garcia pulled up in a vehicle and demanded money. When the victim responded he had no money, Garcia got out of the vehicle, continued to demand money, and pointed a handgun at the victim's head. Garcia said to the victim "if [the victim] didn't give him the money this was what [is] gonna happen" and then fired the handgun at the ground. The police found a spent .40 caliber cartridge case at the crime scene, the victim identified Garcia as his assailant, and the victim showed the police where Garcia lived. Two percipient witnesses testified they saw two men arguing and heard the handgun fired, but their testimonies differed as to the vehicle description and the number of shots fired.

We conclude that a rational juror could infer from this testimony that Garcia attempted to rob the victim by scaring him with a deadly weapon and discharged the weapon on a public street where others could be harmed. See NRS 193.165(6); NRS 193.330(1); NRS 200.380(1); NRS 200.471(1)(a); NRS 202.290(2); *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction."). 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).

Garcia also claims the district court erred by failing to state on the record that it had considered the factors required by NRS 193.165(1) before imposing the additional penalty for use of a deadly weapon. Garcia did not preserve this claim of error for appellate review, so we review for plain error. See NRS 178.602; *Mendoza-Lobos v. State*, 125 Nev. 634, 644,


218 P.3d 501, 507 (2009) (applying plain-error review to alleged sentencing errors).

“An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. At a minimum, the error must be clear under current law, and, normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights.” *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks, brackets, and citation omitted).

Here, the record reveals the district court failed to state on the record that it considered the information described in NRS 193.165(1) paragraphs (a) to (e) in deciding the appropriate penalty for Garcia’s use of a deadly weapon. However, the record also reveals the district court was aware of the facts and circumstances of Garcia’s crime, his criminal history, his mitigation evidence, and that no victim-impact evidence was presented. *See* NRS 193.165(1). As Garcia has not shown the error was prejudicial, we conclude the error is not reversible plain error. *See Mendoza-Lobo*, 125 Nev. at 644, 218 P.3d at 508; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (“[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.”).

Having concluded Garcia is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Stefany Miley, District Judge
Law Office of Nadine Morton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk