IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRANCE OLYSOSISS STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70976

ORDER OF AFFIRMANCE

Terrance Olysosiss Stewart appeals from a judgment of conviction, pursuant to a jury verdict, for battery with use of a deadly weapon and preventing or dissuading a witness from testifying or producing evidence. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.[1]

Stewart was convicted for shooting Nyree Wilson and thereafter sending threatening Facebook messages and texts to Wilson and his girlfriend.[2] On appeal, Stewart asserts: (1) there is insufficient evidence to support his conviction for battery with use of a deadly weapon, (2) the district court erred by failing to instruct the jury on attempted battery or assault with a deadly weapon, (3) the State failed to produce a sufficient foundation showing Stewart sent threatening texts, and (4) the district court failed to properly canvass Stewart before allowing him to represent himself at trial. We disagree.

Our review of the record reflects the State produced sufficient evidence of battery with use of a deadly weapon to uphold Stewart's

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[1]The Honorable William Kephart conducted the *Faretta* canvas in this case.

[2]We do not recount the facts except as necessary to our disposition.

conviction. Battery is a "willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). A firearm is a deadly weapon. NRS 193.165(1). Evidence is sufficient to support a verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted)). So long as the victim testifies with some particularity regarding the incident, the victim's testimony alone is sufficient to uphold a conviction. *Rose*, 123 Nev. at 203, 163 P.3d at 414. In this case, Wilson testified that Stewart fired a gun at him, Wilson felt pain in his hip, hospital staff found a grazing wound on Wilson, and a bullet was lodged in his clothes. A rational trier of fact could find the essential elements of battery with use of a deadly weapon based on testimony adduced at trial.[3] Therefore, reversal is not warranted on this basis.

We next conclude Stewart may have been entitled to a jury instruction on attempt battery, but he was not entitled to a jury instruction on assault with use of a deadly weapon. Assault is a lesser-related offense of battery. A defendant is not entitled to an instruction for a lesser-related offense. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). Although the district court should have given an instruction for attempt battery, as it is a lesser-included offense, we conclude the error is harmless as the jury convicted Stewart of the greater offense and our review

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[3]To the extent there was conflicting testimony regarding whether Wilson was actually hit, "it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 438-9 (1975).

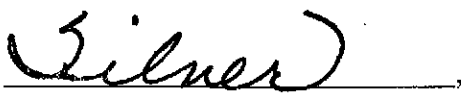
of the record reveals there is substantial evidence to support the jury's verdict. Accordingly, we conclude that no relief is warranted. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d. 465, 476 (2008).

Furthermore, the district court properly admitted into evidence threatening texts sent to Wilson's girlfriend. Before a party may admit evidence, the party must authenticate the evidence by introducing "evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." NRS 52.015(1). Because Stewart failed to object to the texts' authenticity at trial, we review the district court's decision to admit the texts for plain error. *See Flores v. State,* 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (2005); NRS 178.602. Before the texts were entered into evidence, Wilson's girlfriend testified that she knew they were from Stewart because the first one said "this is Terrance" and listed a court date that only Stewart would know about. Thus, our review of the record does not reveal plain error.

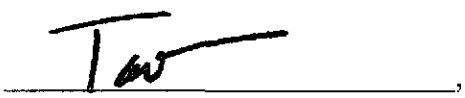
Finally, the district court properly canvassed Stewart pursuant to *Faretta v. California,* 422 U.S. 806 (1975) before allowing him to represent himself at trial. "[I]n order to exercise the right to self-representation, a criminal defendant must knowingly, intelligently, and voluntarily waive the right to counsel." *Hooks v. State,* 124 Nev. 48, 53-54, 176 P.3d 1081, 1084 (2008). The district court must conduct a *Faretta* canvass to ensure the defendant understands the dangers and disadvantages of self-representation. *Id.* Though Stewart argues the district court did not properly canvass him regarding his Fifth Amendment

right to remain silent,[4] our review of the transcript involving the *Faretta* canvass reflects that the district court asked Stewart whether he understood the consequences of testifying in his own behalf and warned him about putting "[his] foot in [his] own mouth." Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Kenneth G. Frizzell, III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]To the extent Stewart argues that cross-examining witnesses waived or violated his right to remain silent, Stewart has not identified any evidence in the record that Stewart's mere act of asking questions of witnesses incriminated him. In addition, the district court cautioned Stewart multiple times during trial about his "testifying" when he was supposed to be limiting his conduct to asking questions of witnesses.