IN THE SUPREME COURT OF THE STATE OF NEVADA

LANCE ATCHLEY GARZA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37100

FILED

APR 20 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 three counts of battery with a deadly weapon. The district court sentenced appellant to serve three concurrent terms in prison of 16 to 48 months. The district court also ordered appellant to pay an administrative assessment fee of $25.00, a DNA testing fee of $250.00, and restitution in the amount of $176.00.

Appellant was convicted of two counts of battery with the use of a deadly weapon for striking a windshield with a metal bar[1] causing glass to shatter upon two children seated in the backseat of the car. Appellant contends that there was insufficient evidence to support his conviction because the State failed to proffer evidence that he used, attempted to use, or threatened to use the metal bar in a manner that was readily capable of causing substantial bodily harm. We

[1]There was conflicting testimony concerning the type of metal bar used by appellant. One witness testified that the metal bar was a tire iron, while another testified that the metal bar was a lug wrench jack handle. Both metal bars were presented to the jury.

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disagree. The State presented sufficient evidence for the jury to find that, in striking the windshield of a moving vehicle with a metal bar, appellant was threatening or attempting an act that was readily capable of causing substantial bodily harm.[2]

Appellant also contends that there was insufficient evidence to support his conviction for battery with a deadly weapon for striking the adult victim with the metal bar because the evidence at trial proved that he acted in self-defense. We conclude that there was sufficient evidence in support of the jury's verdict that appellant battered the adult victim with a deadly weapon, rather than acted in self-defense.[3] Although appellant testified that he hit the adult victim in fear as he lunged towards him to fight, the victim testified that he was merely approaching appellant in a non-intimidating manner and that appellant was trying to entice the victim into a fight.

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[2]See Zgombic v. State, 106 Nev. 571, 574, 798 P.2d 548, 550 (1990), (recognizing that the functional test is used in defining a deadly weapon where use of the weapon is an element of the charged offense) superseded by statute on other grounds as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998); see also Loretta v. Sheriff, 93 Nev. 344, 345 n.1, 565 P.2d 1008, 1009 n.1 (1977) (noting that in certain circumstances whether the defendant's use of a particular object was use of a deadly weapon is a question for the trier of fact).

[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981) (recognizing that the jury determines the weight and credibility of the witnesses, and that the jury's verdict will not be disturbed on appeal when supported by sufficient evidence).

Finally, appellant contends that he should not be retried for simple battery in the event that his conviction is reversed because simple battery is a lesser-included offense of battery with a deadly weapon. Because we affirm appellant's conviction, we need not reach this issue.

Having reviewed all of the contentions raised in this appeal and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. David A. Huff, District Judge
Attorney General
Churchill County District Attorney
Jeffrey D. Morrison
Churchill County Clerk