

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72994

FILED

MAY 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, VACATING IN PART, AND
REMANDING*

Michael Chavez appeals from a judgment of conviction entered pursuant to a jury verdict of two counts of assault with a deadly weapon, robbery, possession of a controlled substance with the intent to sell, transport of a controlled substance, and possession of a controlled substance. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Chavez claims insufficient evidence supports his convictions for assault with a deadly weapon because the State failed to prove the BB gun entered into evidence met the definition of a “deadly weapon.” 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).

The jury heard testimony that Chavez removed a handgun from a truck and threatened two convenience store clerks with it before running away. The police chased Chavez into an apartment complex, arrested him, and found his abandoned sweatshirt and a handgun nearby. The handgun

was a BB gun that “operates as a normal firearm. You cock it, pull the slide back, and it chambers a BB, and pull the trigger as any other firearm.” And the handgun was “spring loaded.”

No rational juror could have found from this evidence that the BB gun was a deadly weapon under the definitions set forth in NRS 193.165(6).¹ See *Berry v. State*, 125 Nev. 265, 277, 212 P.3d 1085, 1094 (2009) (“[T]he statutory definitions set forth in NRS 193.165(6) control and the State must prove that the weapon is a ‘deadly weapon’ pursuant to NRS 193.165(6).”). There was no evidence that the BB gun was (1) devised to cause substantial bodily harm or death,² see NRS 193.165(6)(a); (2) used in a manner which could cause substantial bodily harm or death, see NRS 193.165(6)(b); or (3) designed to expel a projectile by the force of an explosive or other form of combustion or by action of pneumatic pressure, see NRS 193.165(6)(c); NRS 202.253(2); NRS 202.265(1)(f), (5)(c).³ Accordingly, we conclude the deadly weapon enhancements to the assault counts must be vacated and the matter remanded for resentencing.

Chavez also claims the prosecutor committed misconduct by arguing he entered the convenience store with the intent to commit

¹Although Chavez’ trial counsel told the jury during closing argument that a BB gun is a deadly weapon under Nevada law, counsel’s closing argument was not evidence in the case. See *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001).

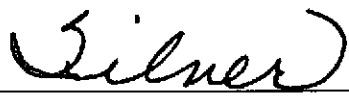
²We note the State objected and prevented Chavez’ trial counsel from eliciting testimony to whether the spring-loaded gun could kill someone.


³In 2015, the Legislature amended NRS 202.265 by removing the provision that provided “‘Firearm’ includes any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force,” and added a definition for “pneumatic gun.” 2015 Nev. Stat., ch. 314, § 1, at 1587.


burglary as evidenced by the fact he did not have any money in his pocket. He insists the prosecutor's argument was not supported by the facts in evidence. However, he did not preserve this issue for review and he cannot show plain error because he was acquitted of the burglary count. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims for plain error); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (placing the burden on the defendant "to show actual prejudice or a miscarriage of justice"); *see also* NRS 178.602.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

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