

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSENDO ROCHA MENDOZA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37748

FILED

MAY 03 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon. The district court sentenced appellant Rosendo Rocha Mendoza to serve two consecutive prison terms of 24 to 96 months. Mendoza filed the instant appeal.

Mendoza contends that the reversal of his conviction is warranted because the jury was improperly instructed with regard to an essential element of the crime of attempted murder. In particular, Mendoza argues that jury instruction no. 14 improperly combined the definition of express and implied malice resulting in plain and reversible error despite his attorney's failure to object to the erroneous instruction. We disagree.'

Jury instruction no. 14 provided that:

Malice aforethought, as used in this definition of Attempted Murder, means the intentional attempt to kill another human being without legal cause, legal excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may rise, not alone from anger, hatred, revenge or from particular ill will, spite, or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another which proceeds from a heart fatally bent on mischief or with reckless

disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention, but denotes rather an unlawful purpose and design and contradistinction to accident and mischance.

(Emphasis added).

We will address Mendoza's challenge to jury instruction no. 14 notwithstanding his failure to object at trial because "[i]t is the duty of the trial court to see that the jury is adequately informed on all elements of the offenses."<sup>1</sup> We conclude that any error in referring to implied malice was cured by jury instruction no. 13 providing that an essential element of attempted murder was a failed attempt "to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill."<sup>2</sup>

In a related argument, Mendoza argues that the prosecutor engaged in misconduct by utilizing the definition of implied malice in his closing argument. In particular, the prosecutor argued that Mendoza possessed a "heart bent on mischief" and showed "reckless disregard for social duty." Although the prosecutor referenced those terms in his closing argument, when viewed in context, the record reveals that the focus of the prosecutor's argument and theory of the case was that Mendoza shot the victim with the intent to kill. In fact, the prosecutor described the "intent to kill or the intent to murder" as an essential element of attempted murder. Further, in his discussion of the attempted murder charge, the

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<sup>1</sup>Turner v. State, 96 Nev. 164, 166, 605 P.2d 1140, 1141 (1980), overruled on other grounds by Litteral v. State, 97 Nev. 503, 634 P.2d 1226 (1981).


<sup>2</sup>See Riebel v. State, 106 Nev. 258, 261-62, 790 P.2d 1004, 1007 (1990); Keys v. State, 104 Nev. 736, 739, 766 P.2d 270, 272 (1988).

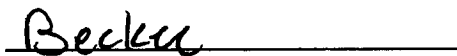
prosecutor even read jury instruction no. 13 to the jury, explaining that Mendoza's act of shooting the victim must have been "done with express malice, namely, the deliberate intention unlawfully to kill." We therefore conclude that the prosecutor's reference to implied malice did not rise to the level that would require reversal of Mendoza's conviction.<sup>3</sup>

Having considered Mendoza's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Becker

cc: Hon. John S. McGroarty, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Public Defender  
Clark County Clerk

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<sup>3</sup>See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).