IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS LOBATO ROMERO, SR., A/K/A CARLOS ROMERO LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39638

FILED

NOV 0 6 2002

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 one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to a prison term of 60 to 192 months, with an equal and consecutive term for the use of a deadly weapon.

Appellant first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1]

In particular, we note that evidence was adduced at trial that appellant went to the victim's house, and after some discussion, appellant shot the victim twice, then stood over the victim as the victim lay on the ground and shot the victim a third time.

The jury could reasonably infer from the evidence presented that appellant shot the victim with the intent to kill the victim. It is for the jury to determine the weight and credibility to give conflicting

[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[2]

Appellant next contends that the jury was improperly instructed. Initially, we note that appellant failed to object to the instructions. Accordingly, this issue has not been properly preserved for appellate review.[3] Even if the issue were properly before this court, however, reversal is not warranted. The instruction given defining "willful" was incorrect in this case, because attempted murder is a specific intent crime.[4] We note, however, that the jury was separately instructed regarding intent. This court has previously approved the jury instructions regarding intent given in this case.[5] We therefore conclude that any error in giving the instruction on "willfulness" was harmless,[6] particularly in light of the fact that the jury was given proper guidance by other jury instructions, and there was ample evidence of appellant's intent to kill, namely that appellant shot the victim repeatedly.

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[2]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[3]See Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991) (failure to object to jury instruction at trial bars appellate review).

[4]Compare Rice v. State, 113 Nev. 1300, 1306-07, 949 P.2d 262, 266 (1997) (approving the instruction for purposes of a general intent crime) with Robey v. State, 96 Nev. 459, 460-61, 611 P.2d 209, 210-11 (1980) (disapproving the instruction for purposes of a specific intent crime).

[5]Powell v. State, 113 Nev. 258, 262 n.6, 934 P.2d 224, 227, n.6 (1997).

[6]See Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 447-48 (2000) (holding that the giving of an erroneous jury instruction may be subject to harmless error analysis), cert. denied, 532 U.S. 978 (2001).

Appellant next contends that prosecutorial misconduct warrants reversal. First, appellant argues that the prosecutor's reference during closing argument to a "photographic lineup" was improper. Although somewhat unclear, appellant's argument apparently is that the prosecutor was arguing facts not in evidence. There was testimony during the trial, however, that witnesses selected appellant's photograph out of a group of photographs. We therefore, conclude that this argument is without merit.

Second, appellant argues that the prosecutor committed misconduct during closing argument by stating: "The defendant has no burden in any criminal case, but the defendant also has the ability to bring in witnesses." Appellant failed to object to the comment, and we conclude that the comment did not have "a prejudicial impact on the verdict when viewed in context of the trial as a whole," nor did it "'seriously affect[] the integrity or public reputation of the judicial proceedings.'"[7] Accordingly, we conclude that this issue has not been preserved for appellate consideration and we need not consider it sua sponte.[8]

Appellant next contends that the district court abused its discretion at sentencing. In particular, appellant argues that the district court relied on impalpable or highly suspect evidence.[9] We conclude that

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[7]Rowland v. State, 118 Nev. ___, ___, 39 P.3d 114, 118 (2002) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) vacated on other grounds by 516 U.S. 1037 (1996)).

[8]Id.

[9]See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

appellant is not entitled to a new sentencing hearing. Specifically, we conclude that the district court correctly considered at sentencing that the shooting occurred near a day care center and that appellant had been charged with another felony after committing the instant offense.

Finally, appellant contends that the district court erred by ordering him to pay $500.00 toward the defense provided by the public defender. Specifically, appellant argues that he will not be able to pay the fee. NRS 178.3975, however, provides that appellant may petition the district court and be relieved of the obligation to pay. Because the determination of whether payment of the amount due will impose manifest hardship on the defendant requires a finding of fact by the district court, we decline to consider this issue. Appellant should raise this issue in the district court in the first instance.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Maupin

_____, J.
Rose

_____, J.
Agosti

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk