

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE EASLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42316

FILED

JUL 23 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND
TO CORRECT THE JUDGMENT OF CONVICTION

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. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Jose Easley to serve two consecutive prison terms of 56 to 140 months.

Easley first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. While acknowledging that the testimony of eyewitness "Doreen Everett satisfied all the necessary elements for a finding of Attempted Murder," Easley argues that Everett's "testimony could not be regarded as credible given the conflicting physical evidence and the contradictory testimony of disinterested witnesses." 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

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

In particular, we note that in addition to Everett's eyewitness testimony describing the shooting, the victim Paul O'Neal, Everett's husband, also testified at trial. O'Neal testified that, on the day in question, Everett told him that a man was trying to kill her and had attempted to break into the apartment. After an unsuccessful search for the individual by car, the couple returned to the apartment complex. Thereafter, an apartment security guard identified Easley as the individual in question. O'Neal ran up to Easley, who was exiting his vehicle holding his baby, and yelled at him to bring the baby upstairs and then come back down and discuss the situation. O'Neal testified that Easley took the baby up to his apartment, returned with a handgun and pointed it O'Neal. O'Neal said he was shocked to see the gun and put his hands straight up in the air, but Easley fired, hitting O'Neal in the hand. O'Neal then attempted to hit the gun out of Easley's hand but Easley fired a second time, hitting O'Neal in the stomach. As O'Neal fled to an adjacent apartment, Easley shot him several times in the back.

Although Easley argued at trial that he shot O'Neal in self-defense, pointing to testimony that O'Neal was in a rage, much bigger than him, and was the initial aggressor, the jury could reasonably infer that Easley shot O'Neal without justification with the intent to kill.² It is for the jury to determine the weight and credibility to give conflicting

²Las Vegas Metropolitan Police Officer Kevin Stephens testified at trial that he interviewed Easley about a week after the shooting and that Easley never said that he shot O'Neal in self-defense. In fact, during that interview, Easley denied any involvement in the shooting whatsoever.

testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.³

Easley also contends that reversal of his conviction is warranted because defense witness Stacie Harris, Easley's girlfriend, testified on re-cross examination that Easley was an ex-felon. In particular, the following colloquy occurred:

Prosecutor: Now, let's talk about this whole parole and probation thing, it is, in fact a violation . . . [t]o not keep up with your fees and do all those other things.

Harris: Yes.

Prosecutor: And you were, in fact, in violation?

Harris: No. Actually, I wasn't in violation . . . [a]s long as my supervision fees are paid prior to me expiring, then I'm ok. I wasn't in violation until you guys called and said I wasn't cooperating, because she was getting ready to write me up and early discharge [sic].

Prosecutor: Didn't you say earlier you were in violation because you had been talking to the defendant?

Harris: I said I was in violation because the D.A.'s office called my probation officer and told them I was in contact with an ex-felon; I wasn't cooperating with law enforcement; I gave false information to a police officer, and that's how this came about -- the violation.

³See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Citing to Courtney v. State,⁴ Easley contends that Harris's reference to his ex-felon status was reversible error because: (1) the district court did not give a cautionary instruction; (2) "the statement was somewhat solicited by the prosecutor;" and (3) "[i]t became blatantly obvious that Mr. Easley was a convicted felon." We disagree.

"The test for determining whether a statement is a reference to criminal history is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity."⁵ Applying this test to the instant case, we agree that Harris's testimony was improper since, in context, it implied that Easley was an ex-felon and had a criminal record. However, we conclude that the error involving Harris's statement was harmless beyond a reasonable doubt. First, despite Harris's argument on appeal that the statement was "somewhat solicited" by the prosecutor, in the proceedings below, defense counsel, the prosecutor, and district court all agreed that the statement was not intentionally solicited, but was inadvertently made during re-cross examination to impeach Harris.⁶ Second, any prejudicial effect of the

⁴104 Nev. 267, 756 P.2d 1182 (1988) (holding that inadvertent reference to defendant's criminal history was not harmless beyond a reasonable doubt, despite the fact that the trial judge admonished the jury not to consider it, because the evidence presented against the defendant was not overwhelming).

⁵Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281 (1992).

⁶See Thomas v. State, 114 Nev. 1127, 1141-42, 967 P.2d 1111, 1121 (1998) (holding that witness testimony referencing defendant's criminal
continued on next page . . .

admission of the testimony was minimized by the fact that Harris neither mentioned the number nor the nature of Easley's previous offenses.⁷ Although Easley notes that the jury did not receive a cautionary instruction,⁸ in light of the overwhelming evidence of Easley's guilt, we are convinced that Harris's inadvertent reference to Easley's ex-felon status did not affect the outcome of the proceedings. Accordingly, reversal of Easley's conviction is not warranted.

Having considered Easley's contention and concluded that it lacks merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Easley was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district

... continued

history was harmless, in part, because the statement was unsolicited by the prosecutor and there was overwhelming evidence of the defendant's guilt).


⁷Id.


⁸It is unclear from the record on appeal whether defense counsel actually requested a cautionary instruction. Defense counsel's initial objection was discussed at an unrecorded sidebar conference. Thereafter, on the record, defense counsel did not move for a mistrial or request a cautionary instruction, but instead explained that he was objecting "to stop [Harris] from testifying" because her reference to Easley's ex-felon status "[threw] prejudice into the case."

court for the limited purpose of correcting the judgment of conviction.
Accordingly, we

ORDER the judgment of conviction AFFIRMED and
REMAND this matter to the district court.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Jonathan E. MacArthur
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk