

IN THE SUPREME COURT OF THE STATE OF NEVADA

TREVOR BURNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63064

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon and attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

First, appellant Trevor Burns contends that insufficient evidence supports his convictions. We review the evidence presented at trial in the light most favorable to the prosecution to 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); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

At trial, the victim testified that he drove home from work and parked his vehicle in his garage. When he exited the vehicle, he was approached by an African-American male wearing a covering over the lower portion of his face. The suspect pointed a firearm at the victim and said, “[d]on’t move.” The victim then drew his own firearm, which had been concealed beneath his clothing, and pointed it at the suspect. The suspect shot at the victim and missed, but the victim returned fire and struck the suspect in the leg. The suspect fled, leaving behind his shoes

and a trail of blood. Law enforcement followed the trail, which led directly to Burns, who was not wearing shoes and had a bullet wound in his leg.

We conclude that sufficient evidence was presented by which the jury could reasonably conclude that Burns committed assault with a deadly weapon. *See* NRS 200.471(1)(a); NRS 200.471(2)(b); *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975) (“[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.”); *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (“[C]ircumstantial evidence alone may sustain a conviction”). However, we conclude that insufficient evidence was presented to establish that Burns attempted to commit robbery. *See* NRS 193.330(1) (defining attempt); NRS 200.380(1) (defining robbery). There was no testimony that Burns ordered the victim to turn over his property or otherwise attempted to take the victim’s property, and although a suspect’s intent to commit a robbery may be inferred, no evidence was presented to support such an inference in this case. We therefore reverse Burns’ conviction for attempted robbery with the use of a deadly weapon.

Second, Burns contends that the district court erred by instructing the jury not to consider his argument regarding the absence of gunshot-residue evidence and informing the jury that Burns was responsible for the absence of such evidence. Prior to trial, the State put on the record that the results of gunshot-residue testing performed on Burns’ hands would not be available by the trial date. Burns declined to waive his right to a speedy trial, but noted that he was aware the test results would not be available. During closing argument, Burns reminded the jury that a crime scene analyst had performed gunshot residue tests on him and stated “[a]nd the State hasn’t produced the results for you.”


The district court immediately sustained the State's objection to this statement, then held a bench conference, at which it stated that Burns had waived his right to comment on the lack of gunshot-residue evidence by exercising his right to a speedy trial. After Burns completed his closing argument the district court instructed the jury to disregard "any argument about the gunshot residue," stating, "[t]he Defendant had the opportunity to have [the tests] done. The test wouldn't have been done for a couple months. He did not want to wait, and he knew that before trial. So, you'll disregard that portion of the Defendant's argument."


Because Burns did not object to the district court's admonishment, we review for plain error. *See* NRS 178.602; *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). We agree that the district court's admonishment was improper because it misstated facts which were not in evidence and suggested that Burns had an obligation to get the testing completed. However, we conclude that Burns fails to demonstrate that the error affected his substantial rights and no further relief is warranted. *See id.*

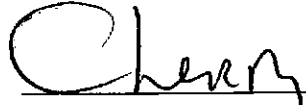
Third, Burns contends that it would have been improper for the district court to force him to choose between exercising his right to a speedy trial and his right to due process. But, as Burns acknowledges, the district court never presented him with such a choice. And, from our review of the record, the district court did not prohibit him from commenting upon the lack of the State's evidence, but rather prohibited the inappropriate argument that the State had the results of the gunshot-residue tests and did not present them. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009). Therefore, we conclude that no relief is warranted.

We conclude that Burns is only entitled to the relief granted herein, and we

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

, J.
Hardesty

, J.
Douglas

, J.
Cherry

cc: Hon. Douglas Smith, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk