IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SEAN CEDENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71794

FILED

DEC 11 2017

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

ORDER OF AFFIRMANCE

Sean Cedeno appeals from a judgment of conviction for attempted murder with use of a deadly weapon, battery with use of a deadly weapon, and discharging a weapon at or into an occupied vehicle. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Following a verbal altercation, Cedeno fired 17 bullets at Jesse Gangl and Marcus Hutchinson, grazing both men. Some of the bullets lodged into both Hutchinson's car and an unoccupied vehicle parked nearby owned by a third party named Jerry Dahl. Cedeno claimed self-defense at trial, but the jury convicted him of all charges and the court sentenced Cedeno to a term of imprisonment and ordered restitution in the amount of $1,169.41 for damage to Dahl's vehicle.[1]

On appeal, Cedeno asserts that: 1) the evidence presented at trial was insufficient to sustain a conviction for the crime of attempted murder, specifically contending that the state failed to prove that Cedeno harbored express malice; 2) the district court erred in instructing the jury that self-defense cannot be claimed by an original aggressor; and 3) the district court abused its discretion in ordering restitution.

[1]We do not recount the facts except as necessary to our disposition.

First, we consider whether there was sufficient evidence to convict Cedeno of attempted murder. Reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (internal quotation marks omitted). The jury weighs the evidence and the credibility of the witnesses in determining whether the elements of the crime are met, and this court will not disturb a verdict that is supported by substantial evidence. *Id.*

Attempted murder "is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988); *see* NRS 193.330; NRS 200.020. Intent to kill "can rarely be proven by direct evidence of a defendant's state of mind . . . ." *Sharma v. State*, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002). Rather, it can be inferred "from the facts and circumstances . . . such as the use of a weapon calculated to produce death, the manner of use, and the attendant circumstances characterizing the act." *Washington v. State*, 132 Nev. ___, ___, 376 P.3d 802, 808 (2016), *reh'g denied* (Sept. 16, 2016), *reconsideration en banc denied* (Nov. 23, 2016) (internal citation omitted). Thus, the Nevada Supreme Court has consistently held that "circumstantial evidence may constitute the sole basis for a conviction." *Canape v. State,* 109 Nev. 864, 869, 859 P.2d 1023, 1026 (1993).

At trial, the jury watched surveillance camera footage of Cedeno going to his car and then running across the complex toward the street, concealing something under his shirt. It also later showed Cedeno firing shots

toward Hutchinson's car where Gangl and Hutchinson were standing. Further, testimony from both men established that Cedeno approached, pulled a gun from under his shirt, and opened fire in their direction. Moreover, both Gangl and Hutchinson received grazing wounds—Gangl in the head, Hutchinson in the shoulder.

Cedeno claims that the State's evidence fails to show express malice because an alternative explanation for his actions exists: he claims to have fired at Gangl and Hutchinson to prevent them from entering the complex, thus protecting himself and his family from harm. But on appeal, this court reviews the sufficiency of evidence in the light most favorable to the prosecution, not to the defendant. And Cedeno's firing 17 rounds directly at Gangl and Hutchinson—and both men receiving wounds as a result—provides circumstantial evidence of intent to kill. Further, the jury considered Cedeno's claim that he and his family feared for their safety, weighed the credibility of the evidence Cedeno presented, and convicted Cedeno for attempted murder anyway. Consequently, viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could have determined that Cedeno possessed the requisite mental state for attempted murder.

Next, we consider whether the district court erred in instructing the jury that self-defense cannot be claimed by an original aggressor. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Failure to object to an instruction generally precludes appeal on that issue. *Green v. State,* 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). But this court has discretion to review an unobjected-to instruction for plain error. *Id.* Under plain error review, the court considers "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial

rights." *Id.* An error affects the defendant's substantial rights when it causes "actual prejudice or a miscarriage of justice," which in the jury instruction context has been defined as error that affects the outcome of the trial. *See id.* at 548, 80 P.3d at 97 (declining to find defendant's substantial rights were prejudiced because the court was "convinced that the result at trial would not have been different had the jury been properly instructed"). Because Cedeno did not object to instruction 43, the instruction in question, we review for plain error.

Cedeno fails the first step of the plain-error analysis, as the instruction was a correct statement of the law. Instruction 43 correctly stated the language the supreme court provided in *Runion v. State*, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) ("The right of self-defense is not available to an original aggressor. That is a person who has sought a quarrel with a design to force a deadly issue and thus, through his fraud, contrivance[,] or fault, to create a real or apparent necessity for making a felonious assault."). Further, this instruction is not incomplete, nor does it render the other jury instructions moot as Cedeno claims. In fact, the court allowed seven instructions related to either self-defense or the defense of others. Specifically, instruction 44 articulated that a non-aggressor need not retreat when faced with the threat of deadly force. In addition, instruction 42 allowed for the defense of others by *anyone* who reasonably believes death or serious injury is imminent. These two instructions would have allowed the jury to find that Cedeno acted either in his own defense or in the defense of others. Thus, the record belies Cedeno's argument that instruction 43 led to an incomplete statement of self-defense law or somehow mooted other jury instructions.

Cedeno also fails the second step of the plain-error analysis because he does not demonstrate that any error prejudiced his substantial rights. Based on the evidence presented at trial—both the video showing the

shooting and witness testimony—a reasonable jury could have agreed that Gangl was the original aggressor, not Cedeno, but still found Cedeno's self-defense argument was not credible. Thus, it is not clear that a different result would have been reached had instruction 43 not been given. Therefore, reversal is not warranted on this ground.[2]

Finally, we consider whether the district court abused its discretion in ordering restitution for damage to Dahl's unoccupied vehicle. Restitution under NRS 176.033(1)(c) is a sentencing determination, which this court generally will not disturb "so long as it does not rest upon impalpable or highly suspect evidence." *Martinez v. State*, 115 Nev. 9, 12–13, 974 P.2d 133, 135 (1999) (quoting *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). The purpose of restitution in the criminal law context is to compensate a victim for costs arising from a defendant's criminal act. *Martinez v. State,* 120 Nev. 200, 202–03, 88 P.3d 825, 827 (2004) (citing Black's Law Dictionary, 1315 (7th ed. 1999)). But "a defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution." *Erickson v. State,* 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991).

When restitution is appropriate, NRS 176.033(1)(c) requires a court to "set an amount of restitution for each victim of the offense." The supreme court has noted that victims are "passiv[e], where the harm or loss suffered is generally unexpected and occurs without the voluntary participation of the person suffering the harm or loss." *Igbinovia v. State*, 111 Nev. 699, 706, 895 P.2d 1304, 1308 (1995). Furthermore, nothing requires that

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[2]Because we conclude that instruction 43 was not given in error, we do not reach the State's counterargument that Cedeno invited any jury instruction error.

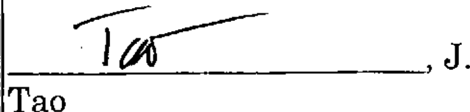
restitution be made only to the intended or named victim of the crime; rather, the victim need only have been "injured" as a direct result of the commission of a crime. Indeed, entities other than the named victim may be granted restitution. *See Roe v. State*, 112 Nev. 733, 735, 917 P.2d 959, 960 (1996) (granting restitution to a government agency for money it expended on behalf of victims of a crime).

Here, the jury convicted Cedeno of the crimes that directly resulted in the damage to Dahl's car. Dahl was a passive, involuntary participant who suffered unexpected financial loss because his car happened to be next to where Gangl and Hutchinson were standing when Cedeno shot at them. And the district court relied on estimates from three different auto-repair businesses in arriving at the restitution amount. Thus, its conclusion was not based on impalpable or highly suspect evidence. Therefore, the court did not err in concluding that Dahl was a restitution-worthy victim of Cedeno's crimes.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

__________, C.J.
Silver


__________, J.
Tao

__________, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
District Judge, Department Eight, Second Judicial District Court
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk