IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHLEY CHRISTMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74956-COA

FILED

MAY 20 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ashley Christmas appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of assault with a deadly weapon and eight counts of discharging a firearm at or into an occupied structure. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

On November 29, 2013, Christmas, who was 19 years old at the time, confronted three other teenagers—Kevon, KJ, and Kevion—in the area of Joust Street and Lance Avenue of North Las Vegas.[1] Although the witnesses testified to differing versions of what occurred on that day, Christmas admitted to shooting a .40 caliber firearm at the other teenagers, who were standing in front of or nearby a house with the address of 2708 Joust Street. Kevon's mother, Denedia, and sister, Kaelee, whom he lived with at 2708 Joust Street, were inside the house at the time of the shooting. They heard the gun shots and feared for their lives. Kaelee dropped to the floor and called 911. Immediately after the shooting, KJ identified Christmas as the shooter. Denedia stated that after the shooting stopped, she saw Christmas standing on the corner down the street from the house holding a gun. A crime scene analyst later discovered evidence of a bullet strike to the stucco siding of 2708 Joust Street. Eight cartridge casings were

[1]We recount the facts only as necessary to our disposition.

ultimately found on the ground in front of a nearby residence located at 337 Lance Avenue, which had a direct line of sight to 2708 Joust Street.

A grand jury indicted Christmas on two counts of attempted murder with use of a deadly weapon toward KJ and Kevion, five counts of assault with a deadly weapon toward the three teenaged boys and Denedia and Kaelee, and eight counts of discharging a firearm at or into an occupied structure, 2708 Joust Street. A jury trial followed.

Christmas testified at trial that he fired his weapon in self-defense. He testified that he saw the three teenagers walking toward him wearing hoodies and that one of the teenagers had a gun, and that he encountered the group on the corner of Joust Street and Lance Avenue. Christmas testified that he shot at the ground in front of them and ran away.

The jury acquitted Christmas of both counts of attempted murder with use of a deadly weapon and three counts of assault with a deadly weapon as to Kevon, KJ, and Kevion. However, the jury convicted Christmas of two counts of assault with a deadly weapon as to Denedia and Kaelee, as well as all eight counts of discharging a firearm at or into an occupied structure, 2708 Joust Street.

On appeal, Christmas argues that (1) the district court abused its discretion by improperly instructing the jury regarding self-defense, (2) his convictions are not supported by sufficient evidence, (3) the district court abused its discretion by denying his motion for judgment of acquittal, (4) the indictment was not supported by sufficient evidence to show probable cause that a crime occurred, and (5) that cumulative error warrants reversal. The State counters by arguing that the jury was properly instructed and there was sufficient evidence to support both the convictions at trial and the indictment. We address each of Christmas's arguments in turn.

We initially focus on whether the district court properly instructed the jury. At trial, the district court provided four self-defense instructions to the jury, including instructions on justifiable homicide, apparent danger, the initial aggressor, and the State's burden of proof. Christmas proffers three arguments as to why the jury instructions were improper. First, he argues that the self-defense instructions themselves contained boilerplate language and were therefore improper. Second, Christmas argues that the district court should have given a separate self-defense instruction specific to the assault charges. Third and finally, Christmas argues that the district court should have sua sponte provided additional self-defense instructions pertaining to discharging a firearm at or into an occupied structure. The State responds that the jury instructions were accurate statements of law, the jury was properly instructed on self-defense, and the district court was not required to sua sponte provide additional jury instructions on self-defense.

We begin our analysis by noting that Christmas failed to object to the jury instructions at the time instructions were settled. Because Christmas did not object to such instructions below, we review for plain error. "Generally, the failure to clearly object on the record to a jury instruction precludes appellate review. However, this court has the discretion to address an error if it was plain and affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotations and citations omitted). 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.*

As a preliminary matter, we have reviewed the self-defense instructions provided to the jury in this case, and find that they correctly

state the law and comply with the standards articulated in *Runion v. State*, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000) (providing sample self-defense jury instructions); *see also Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (concluding that a jury instruction is sufficient when it correctly states the law). Further, Christmas fails to identify any proposed instructions that should have been given instead, or to explain why the language contained in the self-defense instructions was prejudicial or an invalid statement of the law. *Green*, 119 Nev. at 545, 80 P.3d at 95 ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice."). Accordingly, we conclude that the self-defense instructions provided in this case were correct statements of law, and further conclude Christmas's argument that the jury instructions contained improper boilerplate language is without merit.

Having determined that the self-defense instructions correctly stated the law, we now address Christmas's argument that the district court should have given a separate self-defense instruction specific to the assault charges. Although neither the court nor the parties proffered a separate self-defense instruction for assault, the district court later gave a self-defense instruction for the assault charges in response to a question from the jury. During deliberations, the jury asked, "[d]oes self-defense apply to assault as it does to attempt killing?" With the agreement of counsel, the district court clarified that the theory of self-defense applied equally to the assault charges as it did to justifiable homicide, and instructed the jury accordingly. Christmas neither objected to the court's instruction, nor requested or proffered any alternative instruction regarding self-defense and assault. Thus, we conclude that the district court did not plainly err in giving the self-defense instruction for the assault charges in response to the

jury's question. *See, e.g., Gonzalez v. State*, 131 Nev. 991, 996, 366 P.3d 680, 683-84 (2015) (holding that when the jury asks a question during deliberation that "suggests confusion or lack of understanding of a significant element of the applicable law," the court has a "duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion . . . even when the jury is initially given correct instructions").

Next, we turn to Christmas's argument that the district court should have sua sponte instructed the jury on self-defense for the discharging a firearm at or into an occupied structure charges. Here, we note that generally applicable self-defense instructions were given, and although during deliberations the jury asked the district court whether self-defense applied to assault, the jury did not ask whether self-defense applied to discharging a firearm at or into an occupied structure. Additionally, not only did Christmas fail to object to any of the self-defense instructions given to the jury, but he also failed to provide the district court with a proposed self-defense instruction specifically for the charge of discharging a firearm into a structure.

Indeed, when the district court asked whether a separate self-defense instruction would be appropriate for the charge of discharging a firearm, both parties agreed *against* providing the jury with an additional instruction on this charge. Moreover, Christmas failed to indicate which instruction the district court should have provided to the jury. Under these circumstances, we conclude that the district court does not have a duty to sua sponte instruct the jury on self-defense as it related to the charges of discharging the firearm at or into a structure. *See generally Jeffries v. State*, 133 Nev. 331, 338, 397 P.3d 21, 28 (2017) ("[A] district court does not abuse its discretion when it refuses to answer a jury question after giving correct

instructions if neither party provides the court with a proffered instruction that would clarify the jury's doubt or confusion."). We further conclude that the district court's failure to give a separate self-defense instruction for discharging a firearm into a building was not plain error, nor was the court's failure to sua sponte instruct the jury in this regard plain error particularly when there was no evidence of a threat emanating from the home.[2]

We next consider whether there is sufficient evidence to support Christmas's convictions. Christmas argues that because he was acquitted on the attempted murder charges and on some of the assault charges, he legally could not have been convicted of the remaining charges—assault as to Denedia and Kaelee and discharging a firearm at or into an occupied structure. Christmas also argues that his acquittal of the charges as to Kevon, KJ, and Kevion is evidence that the State failed to prove he did *not* act in self-defense. The State responds that there was sufficient evidence to support his convictions and further argues that the evidence supports that he did not act in self-defense as to the charges involving Denedia and Kaelee. We agree with the State.

In reaching our decision, Christmas primarily argues that he received an inconsistent verdict from the jury. Christmas was charged with five counts of assault; three counts were pleaded as to the three teenagers, and two counts were pleaded as to Denedia and Kaelee. All five counts arose

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[2]Christmas also argues that the jury instructions shifted the burden of proof from the State to the defense. Christmas does not cite any relevant authority or provide anything more than cursory argument on this point. Therefore, we need not consider this argument. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

from the same course of events, but the jury acquitted Christmas of the three counts of assault as to the three teenagers and convicted Christmas of two counts of assault as to Denedia and Kaelee. This result arguably, though not necessarily, supports that an inconsistent verdict occurred. *See Bollinger v. State*, 111 Nev. 1110, 1112-14, 1116-17, 901 P.2d 671, 672-74, 675-76 (1995) (concluding that an inconsistent verdict occurred where the jury found only aggravating factors regarding one victim and only mitigating factors regarding the second victim, even though the defendant was charged with the same crime arising from the same set of facts regarding both victims). Additionally, the jury convicted Christmas of eight counts of discharging a firearm at or into an occupied structure while acquitting Christmas of three counts of assault against the three teenagers he shot at while they were standing in front of the building. This, arguably, is also an inconsistent verdict, although it could be explained away for other reasons as well, such as the jury concluding that the teenagers were not truly victims when Christmas pointed his gun at the home instead of them. *United States v. Powell*, 469 U.S. 57, 69 (1984) (concluding that an inconsistent verdict occurred even though the "respondent argue[d] that the jury could not properly have acquitted her of conspiracy to possess cocaine and possession of cocaine, and still found her guilty of using the telephone to facilitate those offenses").

Nevertheless, even assuming that the verdicts were inconsistent, inconsistent verdicts are not a basis for reversal where the verdict is otherwise supported by substantial evidence. *See Powell*, 469 U.S. at 69; *Bollinger*, 111 Nev. at 1116-17, 901 P.2d at 675-76. Therefore, we must merely determine whether each conviction is supported by sufficient evidence. *See Powell*, 469 U.S. at 67 ("[A] criminal defendant already is

afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.").

When reviewing for sufficiency of the evidence, we must decide "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." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (emphasis in original) (internal quotations and citation omitted). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Guerrina v. State*, 134 Nev. 338, 343, 419 P.3d 705, 710 (2018) (quoting *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975)). Circumstantial evidence alone may sustain a conviction. *Walker v. State*, 113 Nev. 853, 861, 944 P.2d 762, 768 (1997).

After having reviewed the record, we conclude that there was sufficient evidence to convict Christmas of the convictions for assault with a deadly weapon as to Denedia and Kaelee. Assault requires "(1) [u]nlawfully attempting to use physical force against another person; or (2) [i]ntentionally placing another person in reasonable apprehension of immediate harm." NRS 200.471(1)(a). Assault is a specific intent crime. *Powell v. State*, 113 Nev. 258, 263, 934 P.2d 224, 227 (1997). In order to sustain a conviction for assault under NRS 200.471(1)(a)(2), the State must prove that (1) Christmas had the specific intent to place the victim in apprehension of immediate bodily harm, (2) the victim apprehended this harm, and (3) Christmas engaged in conduct which made this apprehension reasonable. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.3(b) (3d ed. 2019). A firearm is a deadly weapon. *See* NRS 193.165.

Evidence presented at trial supported that Christmas discharged his weapon at or in the direction of the house located at 2708 Joust Street, in which Denedia and Kaelee were inside at the time. For example, Kevon testified at trial that he saw the "dirt jump" in his front yard from bullets hitting the dirt. Kevon also testified that KJ and Kevion were standing in front of 2708 Joust while the shooting happened. In Christmas's confession to Officer Ochoa, he stated that he aimed at the teenagers. Multiple witnesses testified that there was a fresh bullet strike in the stucco siding on the front of 2708 Joust Street.

As a result, we further conclude that a rational trier of fact could find that Denedia and Kaelee reasonably feared immediate harm from the bullets. Both Denedia and Kaelee heard the gunfire, believed they were in imminent danger and, fearing for their lives, called the police. Therefore, a rational trier of fact could have found that Christmas placed those in the vicinity in which he was shooting, including Denedia and Kaelee, in reasonable apprehension of immediate bodily harm. Further, both Denedia and Kaelee testified that they felt afraid—or apprehended this harm—and finally Christmas's conduct of discharging a firearm multiple times made this apprehension reasonable. Thus, we affirm Christmas's two convictions of assault with use of a deadly weapon.

We also conclude that Christmas's convictions for discharging a firearm at or into an occupied structure are supported by substantial evidence. Discharging a firearm at or into an occupied structure requires "[a] person who willfully and maliciously discharges a firearm at or into any [occupied] house." NRS 202.285(1).

We conclude that a rational trier of fact could find that Christmas had willful and malicious intent to fire his gun at or in the

direction of 2708 Joust Street. Kevon saw the bullets hit the ground in front of his house and a bullet strike was later identified in the stucco in the siding of the house, so a rational trier of fact could find that the bullets were aimed at or into 2708 Joust Street. *Walker*, 113 Nev. at 861, 944 P.2d at 768 (concluding that circumstantial evidence may sustain a conviction). This is bolstered by Officer Ochoa's testimony that Christmas confessed to him that he went looking for the teenagers, that he intended to aim at the teenagers, and that he intended to shoot his firearm, so the jury could find that Christmas intended to aim in the direction of or at 2708 Joust Street since the teenagers were standing in front of or near the house. Christmas testified that his firearm was loaded with eight or nine bullets. That testimony, along with the eight cartridge casings on the ground and Denedia's and Kaelee's testimony that they heard "about seven" shots indicates that the jury could find that Christmas discharged his weapon eight times, until all the bullets were gone, and so had the willful and malicious intent to fire at the teenagers and at 2708 Joust Street.

Further, the police found eight cartridge casings in front of 337 Lance Avenue, which according to crime scene analyst Dana Marks, had a direct clear sight line to 2708 Joust Street. She also testified that there was a bullet strike into the stucco of the house. Thus, the jury could find that Christmas shot eight times at or into 2708 Joust when standing in front of 337 Lance, where the cartridge casings were found. Six casings were marked .40 caliber and two were unmarked with unknown caliber. Christmas testified to being on Lance Street and to shooting his .40 caliber firearm at least eight times on that day, so the jury could find that the cartridge casings came from Christmas's weapon.

Thus, we conclude that a rational trier of fact could find that Christmas maliciously discharged his firearm at or into an occupied structure, 2708 Joust Street, eight times. Further, as discussed above, Christmas did not request a self-defense instruction for shooting at or into the building, and the court was not required to give such an instruction sua sponte. Therefore, we affirm Christmas's eight convictions of discharging a firearm at or into an occupied structure.

Finally, we consider Christmas's other arguments on appeal. In light of our conclusion that Christmas's convictions were supported by sufficient evidence, we necessarily also conclude that the district court did not abuse its discretion by denying Christmas's motion for judgment of acquittal. *See* NRS 175.381(2); *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

On the same grounds, we also conclude that there was sufficient evidence presented to the grand jury to establish probable cause for the eight counts of discharging a firearm into an occupied structure. *See Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) ("[T]hat the jury convicted [the defendant] under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings."). The State argues that the charging document was supported by sufficient evidence. We apply a reduced standard to test the sufficiency of the indictment because it is being challenged for the first time on appeal. *See Larsen v. State*, 86 Nev. 451, 456, 470 P.2d 417, 420 (1970) ("If the sufficiency of an indictment or information is not questioned at the trial, the pleading must be held sufficient unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." (internal quotation marks omitted)). The evidence presented to the grand

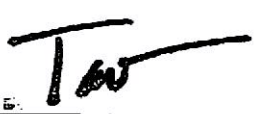
jury on this charge was consistent with the evidence presented at trial, namely that Denedia and Kaelee believed that someone was shooting at their house, that a bullet strike was found in the stucco of their house, and that casings were found consistent with Christmas's weapon. Thus, we conclude that the State presented sufficient evidence demonstrating probable cause that Christmas shot eight times at or into an occupied structure—2708 Joust Street—supporting the indictment.

Finally, Christmas argues that cumulative error requires reversal. Because we agree with the State that no error occurred, this argument is without merit. *See United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

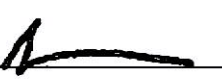
Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
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