IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE ALEXANDER ARANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84153

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of attempted murder and battery resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.[1]

Sufficiency of the evidence

Appellant Jorge Arana argues that insufficient evidence supports his convictions. When reviewing a challenge to the sufficiency of evidence, we view the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Origel-Candido v. State,* 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)).

Kimberllyn Garcia-Olmos testified at trial that she was sitting in a parked car outside her home with her friend, Eduardo Alcala-Lopez, when she saw Arana, her ex-boyfriend, standing outside the driver's-side door of the vehicle. Garcia-Olmos saw fire and realized she had been shot. Immediately after the shooting, Arana lifted Garcia-Olmos out of the car and carried her to his truck. Inside the truck, Garcia-Olmos saw a friend of

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Arana's holding a gun. Garcia-Olmos began to lose consciousness, but heard Arana tell the friend to clean and hide the gun. When the trio arrived at the hospital, the friend immediately drove the truck away while Arana remained with Garcia-Olmos.

Following surgery, Garcia-Olmos informed police that Arana was the shooter. However, at trial Garcia-Olmos stated that she never actually saw Arana holding or firing a gun. Rather, she assumed Arana shot her because Arana was the only person Garcia-Olmos saw outside the car in the moments before the shooting. Garcia-Olmos' testimony about Arana's location was corroborated by Arana's phone, which hospital staff found on the front windshield of Alcala-Lopez's car, after Alcala-Lopez was driven to the hospital in his car by a relative.

Garcia-Olmos also testified that Arana had previously threatened to "come after" her if she ever left him. She stated that Arana had been aware she was with Alcala-Lopez and sent her text messages expressing jealousy in the hours before the shooting. After the shooting, Arana told Garcia-Olmos that "the flowers" had been for the person she was with but not for her, which she understood to be an admission of Arana's intent to shoot only Alcala-Lopez. Alcala-Lopez was not present at trial, but the parties stipulated that he suffered gunshot wounds to his head, face, chest, right shoulder and wrist, and left leg.

After viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of attempted murder and battery resulting in substantial bodily harm, committed against both Alcala-Lopez and Garcia-Olmos, beyond a reasonable doubt. *See* NRS 0.060 (substantial bodily harm); NRS 193.153(1) (attempt); NRS 200.010 (murder); NRS

200.481(1)(a) (battery); *see also Ochoa v. State*, 115 Nev. 194, 200, 981 P.2d 1201, 1205 (1999) (applying doctrine of transferred intent to attempted murder); *Keys v. State*, 104 Nev. 736, 739, 766 P.2d 270, 272 (1988) (clarifying intent element for attempted murder). To the extent Arana challenges the district court's denial of the defense motion for judgment of acquittal, we similarly discern no error. *See* NRS 175.381(2); *Kassa v. State,* 137 Nev. 150, 152, 485 P.3d 750, 755 (2021) ("[A]ppellate review of an order denying [a motion for judgment of acquittal] is in essence the same as a review of the sufficiency of the evidence." (quotations omitted)).

Arana contends that because the jury acquitted him of discharging a firearm at or into an occupied vehicle and declined to find that he used a deadly weapon to commit the battery and attempted murder offenses, the jury could not have found that he shot the victims.[2] Arana further argues that the verdicts are inconsistent. Sufficiency of the evidence review, however, requires that we assess whether the evidence adduced at trial *could* support any rational determination of guilt on each count; it is independent of the jury's determination that evidence on another count was deficient. *United States v. Powell,* 469 U.S. 57, 67 (1984); *see also*

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[2]Alternatively, Arana posits that the verdicts could be reconciled if the jury determined he aided and abetted or conspired with the true shooter, but in that event complains that the State did not provide adequate notice of those theories, in violation of due process. The State never presented evidence or argument that Arana was guilty of aiding and abetting or conspiracy, and Arana did not have a right to notice of theories that were not pursued. *See West v. State,* 119 Nev. 410, 419, 75 P.3d 808, 814 (2003) (stating that the purpose of the notice requirement is to prevent prosecutors from changing theories mid-trial, thereby prejudicing the defendant's ability to prepare a defense). We therefore conclude that Arana's due process argument lacks merit.

Brinkman v. State, 95 Nev. 220, 224, 592 P.2d 163, 165 (1979) (holding that evidence was sufficient to convict appellant of robbery committed with a knife, despite jury not finding use of a deadly weapon). Furthermore, inconsistency alone is not a basis for reversal under Nevada law. *See Bollinger v. State,* 111 Nev. 1110, 1116-17, 901 P.2d 671, 675 (1995) ("[T]here is no reason to vacate respondent's conviction merely because the verdicts cannot be rationally reconciled." (quoting *Powell,* 469 U.S. at 69)). While inconsistent verdicts may be the result of juror error, it is equally possible that the jury reached such verdicts as a form of compromise or clemency. *Powell,* 469 U.S. at 65; *see also Burks v. State,* 92 Nev. 670, 672 n.3, 557 P.2d 711, 712 n.3 (1976) ("[A] jury may convict on some counts but not others not because they are unconvinced of guilt, but because of compassion or compromise." (quoting *United States v. Greene,* 497 F.2d 1068, 1086 (7th Cir. 1974))). We defer to the jury's verdict where, as here, the convictions are supported by sufficient evidence, which adequately protects the defendant against "jury irrationality or error."[3] *Powell,* 469 U.S. at 67.

Verdict form

Arana next challenges the inclusion of what he contends are lesser-included offenses on the verdict form without sufficient evidentiary support. *See Rosas v. State,* 122 Nev. 1258, 1267, 147 P.3d 1101, 1108-09 (2006) (observing that a defendant is entitled to an instruction on lesser-

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[3]Arana further asserts that the verdicts violated double jeopardy. However, Arana was neither prosecuted for a second time following a valid judgment nor punished under two statutory provisions that penalize the same offense. *See Jackson v. State,* 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). We therefore conclude that this claim lacks merit.

included offenses when "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater" (quotations omitted)), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 404 P.3d 761 (2017). Arana's claim is, in essence, an objection to the district court's instruction that the jury could find Arana guilty of battery and attempted murder without finding that a deadly weapon was used in the commission of these offenses. *Cf. United States v. Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998) ("Verdict forms are, in essence, instructions to the jury."). Regardless of whether it is framed as a challenge to the verdict form or the instructions, Arana's objection was untimely. *See Flanagan v. State*, 112 Nev. 1409, 1422-23, 930 P.2d 691, 699-700 (1996) (holding that failure to object to or request jury instructions when instructions are settled generally precludes appellate consideration); *Guy v. State*, 108 Nev. 770, 783, 839 P.2d 578, 586 (1992) (declining to consider a challenge to special verdict forms where the defendant did not raise objections to the proposed jury instructions or forms when asked by the district court). Despite the district court's invitation to make a record of any objections to the verdict form during the settling of jury instructions, Arana did not articulate concerns until immediately before announcement of the verdict. By this point, the jury had already received written instructions, heard closing arguments, and deliberated for multiple days.

Arana argues that the district court has the authority to correct errors in the verdict so long as the jury has not yet been discharged. *See Davidson v. State*, 124 Nev. 892, 897, 192 P.3d 1185, 1189 (2008) (acknowledging that the district court may "send the jury back to correct clerical errors and mistakes in their verdict" before discharge). However, Arana's objection did not address an error in the verdict rendered by the

jury. Rather, it sought to alter a substantive instruction that had already been provided. Therefore, we decline to apply this standard to the circumstances presented here.

Failure to preserve an error by making a timely objection forfeits the right to assert it on appeal. *Jeremias v. State,* 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). Our decision whether to correct a forfeited error is discretionary. *Id.* at 52, 412 P.3d at 49. We have previously declined to grant relief on plain error review where the failure to object could reasonably be seen as intentional or where exercising review could tend to promote gamesmanship. *Id.* at 52-53, 412 P.3d at 50. Correcting any error in the verdict form under the present circumstances would encourage defendants to forgo an objection in hopes they might be given the chance to reassert it later, after gleaning more information about the jury's deliberations. *Cf. Herzog v. United States*, 226 F.2d 561, 570 (9th Cir. 1955) (observing that settling of jury instructions "would be a very fertile field for sowing error if a defendant were permitted to assign as error a charge in which he acquiesced"). We thus decline to exercise our discretion to review this forfeited claim.

Jury instructions

Arana next raises several instructional errors. We review the district court's decision to give an instruction for an abuse of discretion, *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005), but review de novo whether an instruction accurately states the law, *Nay v. State,* 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Arana first argues that the district court erred in providing Jury Instruction No. 18 regarding prior inconsistent statements.[4] The first portion of the challenged instruction describes the standard a district court applies when considering whether to admit a testifying witness's prior statement. When determining whether such a statement is admissible as non-hearsay, the district court is permitted to treat the witness's inability to remember the prior statement as the denial required to render the prior statement inconsistent pursuant to NRS 51.035(2)(a). *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). While, in the present case, it was unnecessary to instruct the jury on the admissibility of non-hearsay statements that had been admitted, we conclude that the first sentence was not an inaccurate statement of law.

Further, we discern no merit in Arana's argument that the second half of the instruction, which states that a prior inconsistent statement may be considered for the truth of the matter asserted, required jurors to find that the prior statement was more accurate than Garcia-Olmos' conflicting trial testimony. The instruction simply articulates the long-held rule that prior inconsistent statements may be used both

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[4]Jury Instruction No. 18 read:

> When a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection may be construed as a denial of having made the prior statement.
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> Evidence that, at some other time, a witness made a statement that is inconsistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

substantively and for impeachment. *See Dorsey v. State*, 96 Nev. 951, 953, 620 P.2d 1261, 1262 (1980); *Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. 424, 432, 305 P.3d 887, 893 (2013) (defining substantive evidence). Further, additional instructions correctly stated the jury's role in deciding questions of credibility when a witness provides conflicting statements. Because Garcia-Olmos testified at trial and was subject to cross-examination regarding her earlier statements and testimony, the district court was within its discretion to give the jury instruction as written.

Arana also argues that the district court committed reversible error by rejecting proposed jury instructions regarding flight and evidence capable of two reasonable interpretations. A defendant is entitled to a jury instruction if it goes to the defendant's theory of the case as disclosed by the evidence, no matter how "weak, inconsistent, believable, or incredible" it may be. *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010). However, the instruction cannot be misleading or state the law inaccurately. *See Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005); *Crawford*, 121 Nev. at 754, 121 P.3d at 589.

Arana argues that he was entitled to an "inverse flight" instruction because he took Garcia-Olmos to the hospital and remained with her despite police presence, supporting the defense theory that he was not responsible for the shooting. A district court may give a flight instruction where the record shows that the defendant's flight immediately after the commission of a crime was done with consciousness of guilt and to evade arrest. *Weber v. State*, 121 Nev. 554, 581-82, 119 P.3d 107, 126 (2005). However, while flight may provide circumstantial evidence of guilt, an absence of flight does not necessarily support an inference of innocence. *See United States v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971). There are many

reasons why Arana may have stayed with Garcia-Olmos while she received medical treatment independent of his guilt, and his presence at the hospital in the aftermath of the shooting does not negate any essential element of the charged offenses. Therefore, the district court's refusal to give the reverse flight instruction was not in error.

Arana also orally requested that the jury be instructed on the traditional flight inference. He argued this was appropriate because there was evidence that other individuals, particularly Alcala-Lopez and Arana's friend, sought to avoid police following the shooting. Flight instructions are permissible, when supported by the evidence, because a defendant's attempt to evade apprehension is relevant to a guilty state of mind. *See, e.g., Rosky v. State,* 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005); *Tavares v. State,* 117 Nev. 725, 734-35, 30 P.3d 1128, 1134 (2001). In contrast, the state of mind of another uncharged person is not similarly relevant. Even if we assume that there may be circumstances under which a third-party's flight could negate the defendant's guilt such that the instruction would be warranted to support a defense theory, that was not the case here. There is no evidence in the record to suggest that Alcala-Lopez was suspected of being anything but a victim of the shooting. Furthermore, Garcia-Olmos testified that Arana instructed his friend to clean and hide the gun. To the extent the friend's flight is evidence of an intent to evade police, it equally implicates Arana. For these reasons, the district court did not abuse its discretion in declining to give either flight instruction.

Next, Arana argues that the district court acted arbitrarily by denying a proffered instruction regarding two reasonable interpretations because the court indicated it "never personally liked" the instruction. This

court has repeatedly held that it is not error for the district court to refuse to give this instruction if the jury is properly instructed regarding reasonable doubt. *See, e.g., Mason v. State,* 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (citing *Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976)). Here, the jury was properly instructed on reasonable doubt and it is apparent from the record that the district court's statement was intended to express academic disagreement with other members of the bench regarding the two reasonable interpretations instruction's value. We discern no abuse of discretion and conclude that none of the claims addressing jury instructions warrant relief.

Allen instruction

Arana next argues that the district court gave a coercive *Allen* instruction during deliberations.[5] An *Allen* instruction admonishes a deadlocked jury that "the case must at some time be decided or that minority jurors should reconsider their positions in light of the majority view." *Farmer v. State*, 95 Nev. 849, 853, 603 P.2d 700, 703 (1979).

Here, the district court sent a note encouraging jurors to continue to deliberate in an attempt to reach a unanimous verdict after receiving a note from the jury expressing difficulty agreeing on all counts. The district court's note further instructed the jury to return the following morning if the case was not resolved by the end of the judicial day. The note did not provide legal instruction, demand the jury reach a verdict, *see Redeford v. State,* 93 Nev. 649, 651-53, 572 P.2d 219, 220-21 (1977), or encourage any juror to surrender honest convictions for the purpose of reaching a consensus, *see Wilkins v. State,* 96 Nev. 367, 373 n.2, 609 P.2d

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[5]*Allen v. United States,* 164 U.S. 492 (1896).

309, 313 n.2 (1980). We therefore conclude that this communication was not an *Allen* instruction. *See Farmer,* 95 Nev. at 853, 603 P.2d at 703 ("A simple request . . . that the jury continue its deliberations is not inappropriate or coercive and does not amount to a[n] [*Allen*] charge."). Because the note was not an *Allen* charge, we need not consider whether it fell short of the model instruction adopted by this court in *Wilkins.* Furthermore, we discern no coercive language or effect, and conclude that reversal on this ground is unwarranted.

Sentencing

Arana argues that the district court erred in sentencing by failing to comply with NRS 176.017, which applies when a defendant is convicted as an adult for an offense committed as a juvenile. This statute requires the court to consider the relative culpability of minors and "typical characteristics of youth" when determining an appropriate sentence. NRS 176.017(1). The district court is not required to address these factors on the record or indicate how they impacted the sentence. Nevertheless, the record here shows that the district court explicitly articulated that Arana was a juvenile and lacked life experience at the time of the offense, acknowledged counsel's argument that minors process information and control their behavior differently than adults, and stated that it considered the fact that Arana is still developing. The court identified a number of aggravating factors but indicated it would not sentence Arana to the maximum term of imprisonment because of his youth. We therefore conclude that the district court properly considered the factors set forth in NRS 176.017 and did not abuse its discretion in sentencing.

Arana next argues that the district court: (1) applied the wrong standard of proof in sentencing when it indicated it found by a

preponderance of the evidence that Arana was the shooter; and (2) considered unreliable evidence by observing that Arana shot Garcia-Olmos and Alcala-Lopez. We conclude these arguments lack merit. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (recognizing that a sentencing proceeding is not a second trial); *Lucas v. State*, 96 Nev. 428, 433, 610 P.2d 727, 731 (1980) (finding no abuse of discretion where the district court made inferences in sentencing that were reasonably drawn from trial evidence); *cf. United States v. Watts*, 519 U.S. 148, 152 (1997) (permitting federal sentencing courts to consider facts introduced at trial relating to charges of which the defendant was acquitted so long as they are proven by a preponderance of the evidence).

Cumulative error

Finally, Arana argues that cumulative error warrants relief. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (providing relevant factors to consider for a claim of cumulative error). As we discern no errors to cumulate, we conclude this argument lacks merit. *See Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Herndon

_____, J.
Lee

_____, J.
Bell

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