

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

STATE V. RAMIREZ

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION  
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,  
V.  
ANTHONY J. RAMIREZ, APPELLANT.

Filed July 17, 2012. No. A-11-717.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

James C. Stecker for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

**INTRODUCTION**

Anthony J. Ramirez appeals his conviction and sentence for use of a deadly weapon to commit a felony, unlawful discharge of a firearm at an occupied motor vehicle, possession of a stolen firearm, and possession of a short rifle. Because we find no merit to Ramirez' assignments of error, we affirm.

**BACKGROUND**

Ramirez was initially charged with seven offenses in the Platte County District Court: (1) aiding and abetting first degree assault, (2) use of a deadly weapon to commit a felony, (3) unlawful discharge of a firearm at an occupied building, (4) unlawful discharge of a firearm from a vehicle, (5) possession of a stolen firearm, (6) possession of a short rifle, and (7) conspiracy to commit stalking. Ramirez filed a plea in abatement and a motion to transfer to juvenile court. After a joint hearing on the plea and motion, the court dismissed the charge of aiding and abetting first degree assault, but it denied the motion to transfer. A jury trial took place on the remaining charges.

The evidence developed at trial showed that several members of the “18th Street” gang lived or were often present at a “gang house” in Columbus, Nebraska, which house belonged to Ramirez’ sister and her husband. The rival gang in Columbus is the “Surenos 13 Escondidos” (Escos). Ismael Ruiz has been a member of the 18th Street gang for 6 years. After work on October 5, 2010, Ruiz went to the “gang house,” where he was living at the time. Shortly after Ruiz arrived, Ramirez and a fellow gang member, Ben Gonzalez, arrived and were talking about a stabbing. Ruiz observed blood on Gonzalez’ clothing, his shoes, and a knife. Ruiz learned that Gonzalez had been in a fight with an Escos member, which fight led to the stabbing. Ruiz learned that Ramirez fought Juan Trujillo, who is another member of the Escos. Trujillo confirmed that he and Ramirez were in a fistfight on October 5. On October 15, there was another altercation between the two gangs when an Escos member shot at two 18th Street gang members.

On October 30, 2010, there was a party at the “gang house” for Halloween. Later in the evening, Ruiz took Ramirez, Gonzalez, and Claudia Perez to a gas station to buy cigarettes in Ruiz’ red pickup. Ramirez sat in the front passenger seat while Perez and Gonzalez were in the back seat. As they were driving, Gonzalez saw a vehicle that he thought belonged to an Escos. Ruiz drove back around to check it out and recognized Trujillo, whom Ramirez had fought a few weeks earlier. When they passed through the alley, Trujillo threw beer bottles at Ruiz’ pickup, so Ruiz circled around for a second time. Gonzalez handed a gun to Ramirez, who stuck the gun out of the passenger window and shot toward a truck in the alley. Ruiz described the gun as a rifle with a cut or sawed-off barrel. There were socks covering the areas on the gun that were touched to prevent fingerprints. Ruiz testified that the gun belonged to two other gang members, but Gonzalez brought the gun into Ruiz’ pickup. Ruiz observed a blue pickup follow them as he drove away. Ramirez leaned out of the window with the gun, but Ruiz could not tell if he took a shot at the blue pickup because the gun jammed. Gonzalez took the gun from Ramirez and tried to unjam it. As they were driving away, Ramirez threw the gun out of the window into an alley.

Juan Hernandez, Trujillo’s brother-in-law, lived in a house near the shooting. On that night, Hernandez was in the house when he heard a loud vehicle drive by and then take off. Someone then came in the house and said shots had been fired, so Hernandez went outside. Hernandez observed a red pickup drive through the alley behind his house approximately 15 feet away. Trujillo also observed a gun being fired from the passenger side of the red pickup by a person wearing a white shirt. Hernandez heard a shot as he was getting into his vehicle and then followed the red pickup to get its license plate.

As Hernandez followed the red pickup, he observed a man lean out of the passenger side window. Hernandez described the man as being bald, wearing a white shirt, and holding a gun with a white bandanna wrapped around it. Hernandez testified that it looked like a short gun. He heard another shot, so he drove back to his house. Police arrived at the residence shortly thereafter.

Officer Corey Sylvester of the Columbus Police Department was on duty the evening of October 30, 2010, and the morning of October 31. At approximately 3 a.m., Sylvester heard reports of a driveby shooting. While he was on his way to the scene, he saw Ruiz’ pickup, which had reportedly been observed in the area. Sylvester observed the pickup violate a traffic signal, and then he followed it through several streets and alleys. When Sylvester caught up to Ruiz’

pickup, he activated his patrol car's lights and initiated a traffic stop. Ramirez was observed sitting in the passenger seat and was wearing a white T-shirt and had his head shaved.

After placing the red pickup's occupants in custody, Sylvester retraced his route to search the area and located a rifle in an alley. The rifle had a bullet jammed in the barrel. Sylvester also went with a Columbus Police Department investigator to speak with Hernandez. Hernandez guided the officers through the route on which he followed the red pickup. Sylvester searched the area and located a .22-caliber shell casing in the street. No other shell casings or bullet impacts were located by Hernandez' house.

At the police station, the investigator examined the rifle and cleared the round that was jammed in the chamber. The rifle and spent .22-caliber shell casing were also examined by a firearm and toolmark examiner for the Nebraska State Patrol Criminalistics Laboratory. She determined that the shell casing had been fired from the same gun that she examined in the laboratory.

There was evidence presented that the .22-caliber rifle had been stolen from a home in a September 2010 burglary. The homeowner identified the rifle that was recovered in this case as his, but he noted that the stock and barrel were cut off. The homeowner had the owner's manual with the rifle's serial number, which matched that found on the rifle that was recovered in this case and entered into evidence.

During the State's questioning of another Columbus Police Department investigator, Jeremy Zywiec, concerning his investigation in this case, the following exchange was had on the record: "Q. And based on that information, what did you do next? A. After speaking with [Ruiz], I attempted to speak with . . . Ramirez and . . . Gonzalez, both, and they were both uncooperative." Ramirez' attorney promptly objected and moved to have the answer stricken. Outside the presence of the jury, Ramirez' attorney also requested a mistrial based upon Zywiec's testimony. Ramirez' motion for mistrial was argued, and the issue was taken under advisement by the court. When the jury returned, the court stated that the objection posed by Ramirez was sustained and that the last response of the witness was stricken from the record and should be disregarded.

At the end of the State's evidence, Ramirez moved to dismiss all the charges against him. The district court overruled the motion with respect to counts II, IV, V, and VI. The court sustained the motion as to count VII, conspiracy to commit stalking with a weapon, because of the State's failure to offer sufficient evidence as to certain material elements of that particular charge. With regard to count III, unlawful discharge of a firearm at an occupied building, the court took the motion to dismiss under advisement and ultimately dismissed that charge as well. At that time, the court also overruled Ramirez' motion for mistrial based upon Zywiec's testimony.

As part of Ramirez' presentation of evidence, Perez testified that at the time of the events in question, she was living at the "gang house" during the week and some weekends. Perez testified that early in the morning on October 31, 2010, she was riding in Ruiz' pickup with Ruiz, Ramirez, and Gonzalez. Perez was dressed in a Halloween costume, with a painted face and wearing black clothing. After going to the gas station, they continued to drive around, listening to music. Perez never saw a firearm in the vehicle or at the house.

Perez later took the stand for a second time, wanting to change her testimony. Perez admitted that her first story was not the truth and that she lied because she was scared. This time, Perez testified that she was involved in a driveby shooting on the morning in question and that she shot the gun. Perez testified that she had stolen the gun by herself from a residence in Columbus and had put the gun in Ruiz' truck. Perez testified that she shot at a vehicle in the alley, because she thought it might belong to an Escos that she fought with earlier in the night at a bar. Perez testified that she was intoxicated and that it was possible she shot the gun again later. When they drove down another alley, Perez threw the gun out of the window.

Ramirez recalled Zywiec, who testified that he requested the State Patrol to do latent fingerprint and DNA testing on the firearm, magazine, and shell casing. There were no fingerprints or DNA detected on the items tested that conclusively belonged to Ramirez. There was no gun residue testing done on any of the occupants of Ruiz' pickup, because the officers did not have the resources to do so.

The jury found Ramirez guilty of possession of a stolen firearm, possession of a short rifle, unlawful discharge of a firearm at an occupied motor vehicle, and use of a deadly weapon to commit a felony.

On August 5, 2011, Ramirez appeared for sentencing. The court sentenced Ramirez to imprisonment as follows: 5 to 10 years for use of a deadly weapon to commit a felony, 6 to 12 years for unlawful discharge of a firearm at an occupied motor vehicle, 2 to 4 years for possession of a stolen firearm, and 1 to 2 years for possession of a short rifle. All of the sentences were to be served concurrent with one another except for the sentence for use of a deadly weapon to commit a felony, which is to be served consecutive to the other sentences imposed. Ramirez was granted 279 days of time served with regard to the three concurrent sentences, but was granted no credit with respect to the sentence imposed against him for use of a deadly weapon to commit a felony. Finally, the court declined to order restitution for the stolen firearm, given the prison sentence imposed and Ramirez' lack of earning capacity or assets.

Additional background information will be included as needed in our discussion of Ramirez' assignments of error.

#### ASSIGNMENTS OF ERROR

Ramirez assigns, restated and renumbered, that the district court erred in (1) overruling Ramirez' motion to transfer to juvenile court, (2) failing to declare a mistrial, (3) overruling Ramirez' objection to jury instruction No. 3, (4) finding that the convictions were supported by sufficient evidence, and (5) imposing excessive sentences.

#### STANDARD OF REVIEW

A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion. *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). Whether jury instructions given by a trial court are correct is a question of law. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is 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. *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011). Whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *Id.*

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

## ANALYSIS

### *Transfer to Juvenile Court.*

Ramirez assigns error to the district court's denial of his motion to waive jurisdiction and transfer the case to the separate juvenile court.

Neb. Rev. Stat. § 29-1816 (Cum. Supp. 2010) provides that after considering evidence presented pursuant to Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010), a case shall be transferred to the juvenile court unless a sound basis exists for retaining the case. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). The burden of proving a sound basis for retention lies with the State. *Id.* When a court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court. *Id.*

At the time the district court considered Ramirez' motion, it was statutorily required to consider the following factors:

- (1) The type of treatment such juvenile would most likely be amenable to;
- (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner;
- (3) the motivation for the commission of the offense;
- (4) the age of the juvenile and the ages and circumstances of any others involved in the offense;
- (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence;
- (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof;
- (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile;
- (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose;
- (9) whether the victim agrees to participate in mediation;
- (10) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07;
- (11) whether the juvenile has been convicted of or has acknowledged unauthorized use or possession of a firearm;
- (12) whether a juvenile court order has been

issued for the juvenile pursuant to section 43-2,106.03; (13) whether the juvenile is a criminal street gang member; and (14) such other matters as the county attorney deems relevant to his or her decision.

§ 43-276.

In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. *State v. Goodwin, supra*. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile. *Id.*

The evidence at the hearing on the motion to transfer shows that Ramirez was born in June 1994, making him 16 years old at the time of the offense. Ramirez was a self-reported member of the 18th Street gang. Before he was detained on the current charges, Ramirez was struggling with poor grades and attendance at school, although while he was detained in this case, his grades were improving.

Ramirez has four prior charges in juvenile court. When he was 11 years old, after being verbally taunted at school, Ramirez pulled a pocketknife on another student and threatened to cut the victim's throat. Ramirez was charged with terroristic threats, a Class IV felony, which was reduced to attempted terroristic threats. At 14 years old, Ramirez was charged with minor in possession of alcohol and theft by shoplifting when he and another gang member stole alcohol from a store. Ramirez was satisfactorily released from probation in both cases. At the time of this case, Ramirez was serving probation for two separate cases which both occurred when he was 15 years old. In the first case, Ramirez was charged with assault by mutual consent. In the second case, Ramirez was charged with minor in possession of marijuana, 1 ounce or less, and for minor in consumption of alcohol.

Jeff Banholzer was Ramirez' probation officer from September 13 to October 31, 2010, when Ramirez was detained on the current charges. Banholzer described Ramirez as noncompliant, although Ramirez would appear presentable and on time to his appointments. Ramirez was required to complete a total of 120 community service hours, the Moral Reconciliation Therapy (MRT) program, the RISE Program offered through the probation office, and counseling. Ramirez reported completing 20 hours of community service prior to the current charges; however, he had not yet provided documentation. MRT is a 12-step program for those at a high risk to reoffend. Banholzer decided to have Ramirez wait to complete the program due to a gang affiliation conflict. Ramirez graduated from the RISE program, which helps with education and employment. Ramirez completed a drug and alcohol evaluation, which recommended that he complete individual outpatient treatment. He was diagnosed with cannabis abuse, but he had not followed up on the treatment recommendations. While on probation, Ramirez missed five tests and tested positive for drugs on six separate occasions; all six included marijuana, one included cocaine, and one included opiates. Ramirez claimed that a prescription medication caused the positive result for opiates, but Banholzer had not been able to verify that information.

Banholzer testified regarding the treatment options available through the juvenile court. The Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska, has services that would "address one who engages in gang violence," which services included an affiliated drug

and alcohol rehabilitation program in Hastings, Nebraska. Banholzer testified that the length of a youth's stay at YRTC was approximately 5½ months, and then the youth would usually be on parole until age 19. Banholzer testified that the other options would be Boys Town and the Omaha Home for Boys, but due to the violent nature of Ramirez' charges, they probably "would not accept him."

Zywiec testified that he has had multiple police contacts with Ramirez. Since 1997, the Columbus Police Department has had approximately 49 police contacts with Ramirez, although they were not all due to law violations.

The district court's 4-page order explained its consideration of various factors set forth in § 43-276. The court noted that Ramirez was 16 years old and a self-reported gang member of the 18th Street gang. He was charged with gang-related crimes and appeared to be motivated by gang retaliation. The charges involved a driveby shooting, and there was evidence demonstrating it was committed in an aggressive and premeditated manner, involved the use of a firearm, and was violent in nature. The court specifically noted that when one of the victims attempted to pursue the pickup Ramirez was riding in to obtain a license plate number, Ramirez allegedly fired another round toward the victim's vehicle.

The district court also outlined Ramirez' previous juvenile court cases and Ramirez' performance while on probation in his two latest cases. While on his most recent probation, Ramirez consistently tested positive for drugs, and on other occasions, he failed to appear for mandatory drug testing. Although his educational efforts improved in the structured environment of the detention facility where he was presently housed, his previous performance in school was poor. Although Ramirez was supposed to live with his parents, there was evidence that he either lived at or spent a great deal of time at the "gang house."

The district court found, after examining all the relevant facts, that Ramirez' contacts with the juvenile system, gang affiliation, and the serious and violent nature of the current charges would likely require keeping him in custody beyond the period of his minority. Ramirez argues that he is amenable to treatment and rehabilitation because he had never been removed from the home and had been successful at juvenile probation on other occasions. Ramirez also disagrees with the district court's characterization that he was performing poorly on probation in his latest two juvenile cases. Ramirez argues that he had completed a number of the requirements, although he acknowledged that he had performed poorly on drug testing and had not yet completed the recommended treatment. Ramirez also notes that the court's finding that he spent time at the "gang house" referred to his sister's house. Finally, Ramirez argues that because no property or people were hit by the gunfire, there should be some mitigation of the seriousness of the charges.

Keeping in mind the balancing test required for consideration in transfer proceedings, we find that the district court did not abuse its discretion in denying Ramirez' motion to transfer. Clearly, this crime was violent in nature. Ramirez has a history of criminal behavior. He has not complied with all of the requirements of his previous probation, and he clearly needs continuing treatment and intervention. Given the nature of these crimes and Ramirez' past and continuing criminal activity, we cannot say that the district court erred in concluding that a transfer to juvenile court would not allow for a sufficient time for corrective services or treatment. This assignment of error is without merit.

*Motion for Mistrial.*

Ramirez contends that the court erred in not granting a mistrial based upon Zywiec's testimony that Ramirez was uncooperative when Zywiec attempted to speak with him during the investigation. Ramirez argued at trial that this testimony was a violation of his constitutional right to remain silent.

The constitutional basis for objecting to evidence of a defendant's invocation of the right to counsel is set forth in the U.S. Supreme Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and its progeny. See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002). In *Doyle*, the U.S. Supreme Court determined that the State's use of a defendant's postarrest, post-*Miranda* silence to impeach the defendant would be "fundamentally unfair" and a violation of the due process clause of the 14th Amendment. 426 U.S. at 618. See, also, *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). In *State v. Huff*, *supra*, the jury heard testimony that the defendant said he would not answer questions until he had spoken to an attorney and that one of the reasons field sobriety tests were not performed was because the defendant had invoked his right to counsel. Although the Nebraska Supreme Court found this testimony constituted "silence," it concluded the testimony was admissible given there was no evidence that *Miranda* warnings had been given at the time of the defendant's remark and that the testimony was limited by the court's instruction to the jury that it be admitted solely for the purpose of explaining why the field sobriety tests were not conducted. *Id.* at 112, 802 N.W.2d at 104-05.

In this case, there was no evidence that *Miranda* warnings had been given at the time of Zywiec's attempt to speak with Ramirez. Zywiec's statement that Ramirez was "uncooperative" when he tried to speak with him is ambiguous and does not amount to an assertion that Ramirez invoked his right to remain silent after being given *Miranda* warnings. The State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or postarrest, is not unconstitutional. *State v. Huff*, *supra*.

Defense counsel's objection was sustained, and Zywiec's answer was stricken from the record. In light of the entire record, we cannot say that Zywiec's statement, which the trial court ordered the jury to disregard, prevented Ramirez from receiving a fair trial. The damaging effect, if any, of Zywiec's statement was removed by the court's proper admonition to the jury. Under these circumstances, the court did not abuse its discretion in refusing to declare a mistrial.

In his brief to this court, Ramirez also argues that although counsel objected to the testimony as a *Doyle* violation, it was, in fact, a violation of *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (holding comment by prosecution on accused's silence or instructions by court that such silence is evidence of guilt violates self-incrimination clause of Fifth Amendment). On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). Therefore, we decline to address this argument.

Ramirez' motion for mistrial based upon *Doyle* was properly denied, and this assignment of error is without merit.

*Improper Jury Instruction.*

Ramirez argues that jury instruction No. 3 should not have been given, because it included the uncharged felony of attempted first degree assault of Trujillo or Hernandez as the basis for the charge for use of a deadly weapon to commit a felony. Ramirez objected to the jury instruction, which objection was overruled. The district court ruled that when charging a defendant with use of a deadly weapon to commit a felony, the State is not required to separately charge a defendant with the underlying felony.

In an appeal based upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

Neb. Rev. Stat. § 28-1205(1)(a) (Cum. Supp. 2010) defines the charge of use of a deadly weapon to commit a felony as the use of “a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which *may be* prosecuted in a court of this state.” (Emphasis supplied.) The district court concluded that the statutory language indicates that the underlying, or predicate, felony does not require prosecution in order to be the basis of the use charge.

This court was presented with a similar issue in *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009). The defendant was originally charged with first degree murder, use of a weapon to commit a felony, and possession of a deadly weapon by a convicted felon. However, the underlying felony for the use of a weapon charge was neither charged nor alleged in the information. Following a bench trial, the district court found the defendant guilty of manslaughter, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. In connection with the use of a deadly weapon conviction, the court found that the underlying felony was either first or second degree assault and/or terroristic threats. *Id.* On appeal, the defendant argued that there was insufficient evidence to support the conviction of use of a deadly weapon to commit a felony, because the court found that he did not intentionally kill the victim. We affirmed the conviction, finding that the evidence supported a finding that the defendant used or possessed a gun while committing the unlawful intentional act of terroristic threats. *Id.* Significantly, the defendant did not challenge the use of a deadly weapon conviction as a violation of his due process rights or otherwise argue that the terroristic threats conviction was not alleged as the underlying felony in the information or charged as a separate offense.

In this case, Ramirez also does not assert a due process violation, but, rather, he challenges the jury instruction. Although uncharged, the underlying assault felony was specified in the amended information, and evidence was adduced to support the charge. Therefore, Ramirez had the opportunity to defend against the charge and was not prejudiced. The instruction at issue conformed to the amended information, was a proper statement of the law, and did not adversely affect a substantial right of Ramirez. This assignment of error is without merit.

*Insufficiency of Evidence.*

Ramirez claims the district court erred in finding that there was sufficient evidence to support his convictions. Ramirez contends that although evidence might show there was a shot fired in the alley, it was insufficient to show the intended target, that Ramirez was the one who possessed or shot the gun, or that he did so with the intent to cause serious bodily injury to Trujillo or Hernandez.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010).

In accordance with the relevant statutes, the jury had to find that the State proved beyond a reasonable doubt that Ramirez committed the crime of use of a deadly weapon to commit a felony, meaning that Ramirez intended to commit the crime of first degree assault; intentionally engaged in conduct that, under the circumstances as he believed them to be, was a substantial step toward committing the crime of first degree assault; that Ramirez' conduct strongly corroborated his intent to intentionally or knowingly cause serious bodily injury to either Hernandez or Trujillo; and that he used a firearm to commit the felony of attempted first degree assault. See § 28-1205(1)(a). To prove unlawful discharge of a firearm at an occupied motor vehicle, the State needed to prove that Ramirez discharged a firearm, that he did so at an occupied motor vehicle, and that he did so unlawfully and intentionally. See Neb. Rev. Stat. § 28-1212.02 (Cum. Supp. 2010). The elements that the State was required to prove for possession of a stolen firearm was that Ramirez possessed, received, retained, or disposed of a stolen firearm and that he did so knowing that it had been or believing that it had been stolen. See Neb. Rev. Stat. § 28-1212.03 (Cum. Supp. 2010). Finally, possession of a short rifle required the State to prove that Ramirez possessed a short rifle and that he did so knowingly or intentionally. See Neb. Rev. Stat. § 28-1203 (Reissue 2008).

We have set forth the evidence in some detail in the background section above, which evidence we do not repeat here. The evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support a finding that Ramirez is the individual who shot the rifle, which had been stolen and shortened, toward the vehicle driven and occupied by Hernandez. This evidence is sufficient to show that Ramirez engaged in conduct that constituted a substantial step toward intentionally or knowingly causing serious bodily injury to Hernandez. Thus, the evidence was sufficient to support each of Ramirez' convictions. It is not our province to substitute our judgment for that of the jury. This assignment of error is without merit.

*Excessive Sentences.*

Ramirez asserts that the district court erred in imposing excessive sentences. Ramirez was found guilty of use of a deadly weapon to commit a felony, a Class IC felony punishable by a mandatory minimum of 5 years' imprisonment to 50 years' imprisonment; unlawful discharge

of a firearm at an occupied motor vehicle, a Class ID felony punishable by a mandatory minimum of 3 years' imprisonment to 50 years' imprisonment; possession of a stolen firearm, a Class III felony punishable by 1 to 20 years' imprisonment, a \$25,000 fine, or both; and possession of a short rifle, a Class IV felony punishable by up to 5 years' imprisonment, a \$10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Reissue 2008).

The sentences imposed on Ramirez were within the statutory limits, and Ramirez does not challenge this finding. Rather, he argues that given his age, lack of prior "adult" convictions, and previous successful completion of juvenile probation, it was error to sentence him to more than the minimum sentences.

We review Ramirez' sentences for an abuse of discretion. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). Based upon the record in this case, we do not believe that the district court abused its discretion.

In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* But the court must have some reasonable factual basis for imposing a particular sentence. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *State v. Kass*, *supra*.

At the sentencing hearing, the district court noted that Ramirez had just turned 17 years of age, but he was no stranger to the court system. In each of his previous juvenile cases, Ramirez was placed on probation, but the court felt that the rehabilitation efforts were unsuccessful, because he was now facing sentencing on four serious felonies. Further, two of the convictions carried mandatory minimum sentences.

The court also commented that some of the charges were violent in nature and were gang related. The court further stated that although Ramirez was young and was capable of succeeding if he was motivated, he had made extremely poor decisions and stood convicted of very serious felonies.

Given the entirety of the record and the mandatory minimum sentences required by law, the court concluded Ramirez was not a fit and proper person to be sentenced to a term of probation. The court also found that to do so would depreciate the seriousness of the crimes and promote disrespect for the law.

It is clear that the district court took all of the appropriate factors into consideration in sentencing Ramirez. We cannot say that the district court abused its discretion in sentencing Ramirez.

## CONCLUSION

For the reasons discussed above, we find no merit to Ramirez' assigned errors, and so we affirm his convictions and sentences.

AFFIRMED.