IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL P. MOTEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44598

FILED

JUL 12 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of attempted murder with use of a deadly weapon, two counts of discharging a firearm at or into a vehicle, and one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The relevant facts in this case derive from events that occurred on June 15 and 16, 2003. On June 15, a drive-by shooting occurred in which the perpetrator discharged a rifle from a vehicle into another vehicle. Approximately ten hours later, on June 16, officers and detectives with the Las Vegas Metropolitan Police Department and the North Las Vegas Police Department were shot at upon arriving at the Little Carey Arms apartment complex. During the shootout, the detectives identified appellant Samuel P. Moten as the triggerman based on their previous encounters with him. Moten was subsequently apprehended and the shell casings discharged by Moten at the apartment complex were later determined to come from the same rifle that was used in the drive-by shooting ten hours earlier.

Moten was charged with eleven separate counts stemming from the June 15 and 16, 2003, events. Prior to trial, Moten filed a motion to sever the June 15 charges from the June 16 charges. The district court

denied this motion finding that the events were connected together and/or part of a common scheme or plan. Subsequently, a jury could not reach verdicts on all of the charges stemming from the June 15 events but convicted Moten on all of the charges stemming from the June 16 events.

Moten raises five arguments on appeal: (1) that the district court abused its discretion in denying his motion to sever the June 15 charges from the June 16 charges since they were unrelated; (2) that NRS 202.285 is unconstitutionally vague because it does not proscribe the discharging of a firearm at or into a vehicle that is unoccupied; (3) that the jury instruction defining express malice improperly defined implied malice; (4) that the jury instruction for attempted murder included superfluous and ambiguous language; and (5) that the jury was improperly permitted to consider Moten's prior contacts with the police as consciousness of guilt. We disagree and affirm the judgment of conviction.

Joinder of the June 15 charges with the June 16 charges

Pursuant to NRS 173.115(2), the district court held that joinder of the June 15 charges with the June 16 charges was proper because the acts were connected together and/or constituted a common scheme or plan. Additionally, the district court found that joinder did not prejudice Moten pursuant to NRS 174.165. Moten argues that the district court abused its discretion by denying his motion for severance because the drive-by shooting on June 15 was not sufficiently connected with the shooting at the apartment complex on June 16. Additionally, Moten argues that the failure to sever the two events resulted in unfair prejudice. We disagree with both arguments.

"It is the established rule in Nevada that joinder decisions are within the sound discretion of the trial court and will not be reversed

absent an abuse of discretion."[1] NRS 173.115(2) permits joinder of offenses where they are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Pursuant to NRS 174.165(1), "even if charges could otherwise be properly joined, severance may still be mandated where joinder would result in unfair prejudice to the defendant."[2]

We conclude that the district court did not abuse its discretion in denying Moten's motion to sever the June 15 charges from the June 16 charges. The officers and detectives had contact with Moten on several prior occasions. On these prior occasions, Moten had never discharged a firearm at the officers and detectives. Yet, just ten hours after the drive-by shooting, Moten discharged numerous gunshots at the officers and detectives who arrived at his apartment complex with the same rifle allegedly used in the drive-by shooting. Thus, the district court did not abuse its discretion in concluding that Moten was attempting to avoid apprehension by police, which was effectively an extension of fleeing the drive-by shooting scene ten hours earlier and, therefore, constituted a common scheme or plan under NRS 173.115.[3]

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[1]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990).

[2]Weber v. State, 121 Nev. ___, ___, 119 P.3d 107, 121 (2005).

[3]While the evidence of the prior incident did not demonstrate a common scheme or plan, the evidence provided a motive for the second. Regardless, we would conclude that any error committed by the district court's joinder was harmless because Moten has not shown that joinder of the charges had a substantial and injurious effect on the jury's verdict. See Weber, 121 Nev. at ___, 119 P.3d at 119 ("Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict.").

Similarly, we conclude that Moten has not shown that the district court abused its discretion by declining to order severance pursuant NRS 174.165(1). The jury was instructed to consider each charge separately and we presume the jury followed this instruction.[4] Notably, the jury could not agree on verdicts concerning the charges stemming from the June 15 events while convicting Moten on all charges stemming from the June 16 events.

NRS 202.285 – discharging a firearm into an occupied vehicle

On June 16, Officers Ryan Miller and Shane Arrendale were shot at immediately upon arriving at Moten's apartment complex. Pursuant to NRS 202.285(1), Moten was charged with discharging a firearm at or into an occupied vehicle with respect to both officers. The jury determined that the vehicles were not abandoned and therefore, found that Moten was guilty pursuant to NRS 202.285(1). Moten argues that NRS 202.285(1) is unconstitutionally vague because it is silent with respect to situations in which the vehicle is unoccupied as opposed to occupied or abandoned. We disagree.

"The interpretation of a statute is a question of law subject to de novo review by this court."[5] Unless a statute is ambiguous, we attribute the plain meaning to the statute's language.[6] "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations."[7] Pursuant to NRS 202.285, it is a misdemeanor to

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[4]Weber, 121 Nev. at ___, 119 P.3d at 121.

[5]Butler v. State, 120 Nev. 879, 892, 102 P.3d 71, 81 (2004).

[6]Id.

[7]State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

discharge a firearm at or into an abandoned vehicle and a felony if the vehicle is occupied.

We conclude that NRS 202.285(1) is unambiguous since its language lends itself to only one reasonable interpretation. The language of NRS 202.285(1) plainly limits its application to two situations: (1) where a person discharges a firearm at or into an abandoned vehicle; or (2) where a person discharges a firearm at or into an occupied vehicle. When Officers Miller and Arrendale arrived at the apartment complex, both officers initially exited their vehicles. Immediately thereafter, Officer Arrendale was shot at while leaning into his vehicle in an attempt to retrieve his shotgun. Likewise, Officer Miller was shot at while leaning into the sergeant's vehicle located nearby. Thereafter, the officers shielded themselves from gunfire on the side of Officer Miller's vehicle while observing bullets striking the ground on the opposite side of the vehicle. Consequently, the evidence presented was sufficient for the jury to find Moten guilty of discharging a firearm at or into an occupied vehicle.

Jury instruction no. 8 – express and implied malice

Jury instruction no. 8 instructed the jury, in part, that "[m]alice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." Moten argues that because a conviction for attempted murder requires a showing of express malice, the district court erred in giving jury instruction no. 8 which included implied malice.

"Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial."[8]

We conclude that Moten's failure to object to jury instruction no. 8 during trial precludes review on appeal. Prior to giving jury instruction no. 8, the district court asked Moten's counsel whether she had a problem with it. Moten's counsel stated that she did not. Thus, Moten not only failed to object to the jury instruction but acquiesced to it as well. Moreover, the alleged error was not patently prejudicial because while jury instruction no. 8 quoted NRS 200.020[9] almost verbatim, jury instruction no. 16 dealt explicitly with the charge of attempted murder.

Jury instruction no. 16 – superfluous and ambiguous language

Jury instruction no. 16 instructed that attempted murder requires express malice, "namely, with the deliberate intention unlawfully to kill," but that it was unnecessary "to prove the elements of premeditation and deliberation in order to prove attempted murder." Moten argues that jury instruction no. 16 contained superfluous and ambiguous language which misled the jury to believe that a specific intent to kill was not necessary to support a conviction for attempted murder. We disagree.

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[8]McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998); see also, Manley v. State, 115 Nev. 114, 125, 979 P.2d 703, 709 (1999).

[9]NRS 200.020 defines malice, express and implied, for purposes of homicide.

"The district court has broad discretion to settle jury instructions and decide evidentiary issues."[10] "As such, this court will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error."[11] A district court's jury instructions for attempted murder must unequivocally state that a conviction for attempted murder requires a criminal intent to kill.[12]

We conclude that the district court did not abuse its discretion in giving jury instruction no. 16 because it unequivocally stated that a conviction for attempted murder requires the deliberate intention to kill a human being. Moten's argument that jury instruction no. 16 included superfluous, confusing language is without merit.

Jury instruction no. 24 – consciousness of guilt

Jury instruction no. 24 permitted the jury to consider evidence of Moten's prior contacts with police for the limited purpose of determining identity, motive or consciousness of guilt. Moten argues that jury instruction no. 24 lessened the State's burden of proof, deprived him of a fair trial, and inaccurately recited the law because "consciousness of guilt" is not explicitly contained in the language of NRS 48.045(2). We disagree.

NRS 48.045(2) states that, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

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[10]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[11]Id.

[12]Keys v. State, 104 Nev. 736, 740, 741-42, 766 P.2d 270, 273-74 (1988).

. . . [or] plan."[13] This court has held that NRS 48.045(2) "permits the admission of prior bad acts for limited purposes, such as to show consciousness of guilt."[14]

We conclude that the district court did not abuse its discretion in giving jury instruction no. 24 as it accurately recited the law.[15] The State presented evidence that Moten had previous encounters with the officers and detectives involved in the June 16 shooting, but he had never previously discharged a firearm at them. Thus, when Moten shot at police officers on June 16, it evinced a consciousness of guilt for the drive-by shooting that occurred approximately ten hours earlier. Moreover, NRS 48.045(2) states "such as" which is not restrictive and this court has previously held that a showing of consciousness of guilt under NRS

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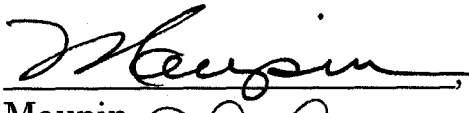
[13]Emphasis added.

[14]Bellon v. State, 121 Nev. ___, ___, 117 P.3d 176, 180 (2005) (citing Santillanes v. State, 104 Nev. 699, 700, 765 P.2d 1147, 1148 (1988)).

[15]Abeyta v. State, 113 Nev. 1070, 1080, 944 P.2d 849, 855 (1997) ("It is this court's responsibility to ensure that the jury instructions stated existing law."); see also, NRS 175.161.

48.045(2) is proper.[16] Accordingly, Moten's argument is without merit.[17] Consequently, we

ORDER the judgment of the district court AFFIRMED.



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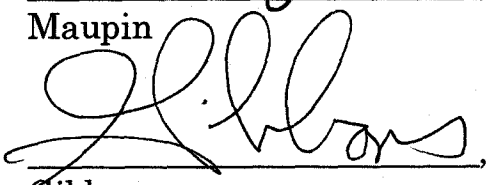

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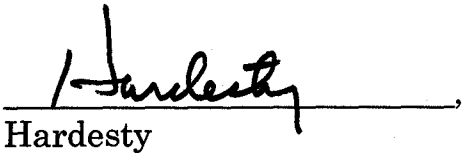

_____, J.
Hardesty

cc: Hon. Sally L. Loehrer, District Judge
Special Public Defender David M. Schieck
Clark County District Attorney David J. Roger
Clark County Clerk

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[16]Bellon, 121 Nev. at ___, 117 P.3d at 180.

[17]We have considered all collateral arguments made by Moten and find them to likewise lack merit.