

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAXIMILIANO CISNEROS A/K/A
MAXIMILLIANO CISNEROS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46840

FILED

OCT 31 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. First Judicial District Court, Carson City; William A. Maddox, Judge. The district court sentenced appellant Maximiliano Cisneros to serve two consecutive terms of ten years to life in prison.

Cisneros argues that jury instructions 29, 30, and 54 were incorrect and improper. As he did not object to these instructions at trial, we review them for plain error.¹

Instructions 29 and 30 advised the jury on voluntary and involuntary manslaughter, respectively. Both instructions provided, in relevant part, that in order to convict Cisneros of manslaughter, the jury had to find that Cisneros "did not reasonably believe that force was necessary to defend against an immediate use of unlawful force or the defendant used more force than was reasonably necessary in the circumstances." Cisneros argues that the quoted provision is not an

¹See State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998); NRS 178.602.

element of manslaughter. While this is correct,² Cisneros argued at trial that his actions were justified by self-defense, defense of others, and defense of property. Thus, the instructions properly advised the jury that the State had to prove the absence of justification in order for the jury to convict Cisneros of manslaughter.³ Accordingly, there was no plain error here.

Cisneros also argues that instruction 29 incorrectly stated that voluntary manslaughter was charged in count one of the charging documents. Cisneros is correct that count one does not specify voluntary manslaughter; in relevant part, count one alleged that Cisneros "did, willfully and unlawfully, kill a human being, with malice aforethought, either express or implied, with the use of a deadly weapon." But we perceive no plain error that affected Cisneros's substantial rights in this respect. We note that the State and defense counsel both argued on the propriety of voluntary manslaughter in closing argument, with defense counsel saying that if any crime had been committed, it was at most manslaughter.

Cisneros argues that instruction 54 was an improper "acquittal first" transition instruction. In relevant part, that instruction provided as follows:

Before you return a verdict as to Count I contained in the Criminal Information in this case, you must agree unanimously whether or not the Defendant is guilty or not guilty of an unlawful

²See NRS 200.040; NRS 200.050; NRS 200.070.

³See Hill v. State, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982).

killing. If you decide he is guilty of an unlawful killing, you must then agree unanimously as to whether he is guilty of Second Degree Murder, Voluntary Manslaughter, or Involuntary Manslaughter. . . .

. . .

The offense of Second Degree Murder necessarily includes the lesser offenses of Voluntary Manslaughter, Involuntary Manslaughter, and Battery with the Use of a Deadly Weapon.

If you have a reasonable doubt that a Defendant is guilty of Second Degree Murder, but you do believe from the evidence beyond a reasonable doubt that the Defendant is guilty of manslaughter, you will acquit him of murder and find him guilty of Voluntary Manslaughter or Involuntary Manslaughter.

We conclude that giving this instruction did not constitute plain error. The jury was not specifically instructed that it had to unanimously agree that Cisneros did not commit second-degree murder before it could consider the lesser offenses.⁴

Cisneros argues that the cumulative effect of errors in instructions 29, 30, and 54 requires reversal. Having found no plain error in these instructions, we disagree.

Finally, Cisneros argues that there was insufficient evidence to support his conviction. The relevant inquiry is "whether, after viewing

⁴Cf. Green v. State, 119 Nev. 542, 546-47, 80 P.3d 93, 96 (2003) (disapproving of an instruction advising the jurors that they had to unanimously agree on acquittal as to the primary charged offense before they proceed to deliberate on the lesser-included offense).

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."⁵

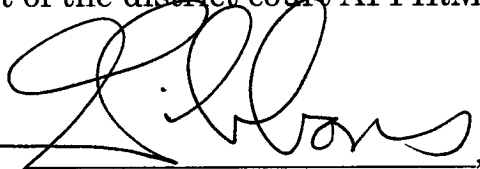
Testimony at trial indicated that Cisneros was inside the apartment of Katie Armstrong at about 11:30 p.m. on the night of the killing. Around that time, someone began banging on the front door and windows. Armstrong looked through the peephole in her front door and saw Fidel Fuentes, her former boyfriend, with a man standing about eight feet behind him. Fearing an altercation between herself and Fuentes or between Fuentes and Cisneros, Armstrong told Cisneros to leave through a back bedroom window. Cisneros went into the back bedroom. Fuentes kicked in the door and went in, and Armstrong evaded Fuentes and fled out the front door. Juan Carlos Alegria was outside the apartment, "just standing there." Fuentes remained inside and began looking through the apartment. Shortly after, Fuentes came running out of the front door, followed by Cisneros at a distance of two or three feet. Cisneros had a gun in his right hand, and his right hand behind his back. Armstrong's neighbor saw a gun in Cisneros's right hand and his right hand behind his back. As the neighbor tried to go back into her own apartment, she heard gunshots. Fuentes was shot once in the leg, and Alegria was shot three times in the torso. Two of Alegria's wounds indicated the shots were fired from behind him. No weapon was found on Alegria or Fuentes. Alegria died of his injuries. Cisneros testified that he fired in self-defense and had not intended to kill anyone. We conclude that this evidence, along with

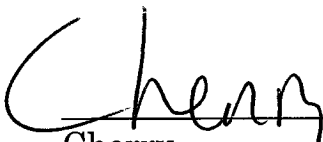
⁵Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

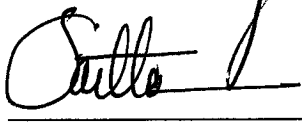
the other evidence adduced at trial, was sufficient for the jury, acting reasonably, to convict Cisneros of the second-degree murder of Alegria.

Having reviewed Cisneros's contentions and concluded they do not entitle him to relief, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. William A. Maddox, District Judge
Robert B. Walker
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk