

Order modified per Order filed 5-3-10

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD SCHUSTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50269

FILED

FEB 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

Order Affirming in Part, Reversing in Part, and Remanding

~~ORDER OF REVERSAL AND REMAND~~

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 and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Donald Schuster was sentenced to life with the possibility of parole after ten years for second-degree murder, plus an equal and consecutive term of ten years for the deadly weapon enhancement, and 156 months in prison with parole eligibility after 35 months for battery, to run concurrently.

On appeal, Schuster argues that the district court erred in refusing to give an instruction on involuntary manslaughter, a lesser-included offense of murder. For the reasons set forth below, we agree, and therefore, reverse the judgment of conviction and remand for further proceedings consistent with this order.¹

¹Schuster also argues that: (1) the district court committed judicial error by failing to instruct the jury on the burden of disproving provocation in a murder case; (2) the prosecutor committed misconduct during the opening statement, cross-examination of witnesses, and the closing argument, which warrants reversal of his conviction; (3) the State did not present sufficient evidence to support his convictions for second-

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The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

Jury instruction

“The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.” Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Only an arbitrary or capricious decision, or a ruling that goes outside of the law or reason, constitutes an abuse of discretion. Id.

“[I]t is ‘beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.’” Rosas v. State, 122 Nev. 1258, 1264, 147 P.3d 1101, 1105-06 (2006) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973), and citing Beck v. Alabama, 447 U.S. 625, 635-36 n.11 (1980), and Schmuck v. United States, 489 U.S. 705, 717 & n.9 (1989)). And “if there is any evidence to support a lesser-included offense, the trial court should instruct on it, ‘leaving the jury to determine all questions of fact about which there might be any controversy among reasonable men.’” Id. at

... continued

degree murder and battery causing substantial bodily harm; (4) the district court committed error in sentencing when it failed to consider the application of judicial sentencing discretion as mandated by newly enacted amendments to NRS 193.165, and thus, he is entitled to be resentenced; and (5) cumulative error warrants reversal of the judgment of conviction. After considering these issues, we conclude that these additional challenges are without merit.

1268-69, 147 P.3d at 1108-09 (quoting State of Nevada v. Millain, 3 Nev. 409, 449-50 (1867)). “The governing principle is that a defendant is entitled to a jury instruction on his or her theory of the case as long as there is some evidence to support it, regardless of who introduces the evidence and regardless of what other defense theories may be advanced.” Id. at 1269, 147 P.3d at 1109.

Schuster argues that the district court erred in refusing to instruct on the lesser-included offense of involuntary manslaughter. We agree.²

One of Schuster’s theories of defense was that he did not intend to kill Ginolous.³ Schuster presented this theory in his opening statement and there was some evidence to support this theory admitted at trial. The State placed Schuster’s statement to the police into evidence. In that statement Schuster said: “I didn’t think, honestly I didn’t think I was even gonna shoot anybody, you know. I didn’t think that was gonna happen. I thought I was gonna be able to like just have a gun and they

²This court has held that involuntary manslaughter is a lesser-included offense of murder, and neither party disputes that here. Sepulveda v. State, 86 Nev. 898, 899, 478 P.2d 172, 173 (1970).

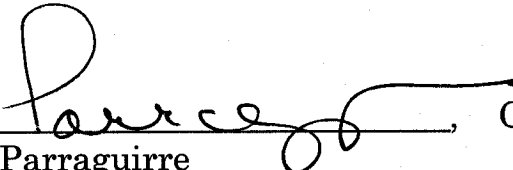
³NRS 200.070 defines involuntary manslaughter as:

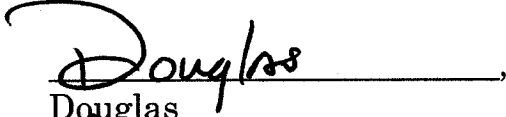
the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

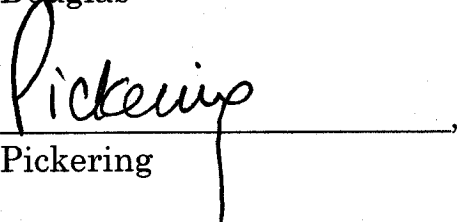
would leave." Schuster told the police: "He came at me, and I just reacted. I just, just went off and just hit him, you know. And I didn't even think I hit him." Thus, there was some evidence introduced that Schuster did not intend to shoot Ginolous and that the killing occurred in the "commission of a lawful act which probably might produce such a consequence in an unlawful manner." Because there was evidence to support the lesser-included offense of involuntary manslaughter, the district court should have instructed the jury on involuntary manslaughter.

We therefore conclude that it was an abuse of discretion for the district court to refuse to instruct the jury on involuntary manslaughter. Accordingly, we

~~ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.~~


Parraguirre, C.J.


Douglas, J.


Pickering, J.

cc: Hon. Donald M. Mosley, District Judge
Cristalli & Saggese, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

↓
"Order the judgement of the district court AFFIRMED as to the battery conviction, REVERSED as to the second-degree murder conviction, and REMAND this matter to the district court for proceedings consistent with this order."