IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK ANTHONY MACIAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52332

FILED

NOV 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, and one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge. The district court sentenced appellant Frank Anthony Macias to four consecutive terms of 6 to 15 years for the robbery, attempted murder, and deadly weapon enhancements. The remaining 13 to 60 month term for possession of a firearm by an ex-felon was imposed concurrent to the other sentences.

Macias raises two claims on appeal: (1) there was insufficient evidence to support his conviction for attempted murder and (2) the district court erred in admitting evidence of prior bad acts. We conclude that these claims lack merit and affirm the judgment of conviction.

Sufficiency of the Evidence

First, Macias contends that the evidence presented at trial was insufficient to support the jury's findings that he was guilty beyond a reasonable doubt of attempted murder with the use of a deadly weapon. Specifically, he argues that the State failed to prove that he had the intent

to kill the victim. Macias submits that the evidence adduced at trial merely showed that his act of shooting the victim was a reflexive reaction to a comment the victim made to Macias. He contends that the facts adduced at trial are more consistent with the crime of battery with the use of a deadly weapon.

The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Circumstantial evidence is enough to support a conviction. Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), holding limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

"Murder is the unlawful killing of a [person] . . . [w]ith malice aforethought," NRS 200.010(1), and attempted murder is "[a]n act done with the intent to commit [murder], and tending but failing to accomplish it," NRS 193.330(1). In other words, attempted murder occurs when a person tries but fails to unlawfully kill someone with malice aforethought. While malice may be express or implied, only express malice will support a conviction for attempted murder. Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988). "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." NRS 200.020(1). In contrast,

implied malice may exist "when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2).

Here, the State presented evidence that Macias robbed the victim at gunpoint. After Macias had finished robbing the victim, the victim turned to walk away and called Macias a "piece of shit." Macias then shot the victim in the back, ran to his car, and drove away.

We conclude from this evidence that a rational juror could infer that Macias intended to take the victim's life when he aimed and fired a gun at the victim while the victim was walking away. See Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (observing that "intent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime, which are capable of proof at trial"); see also NRS 193.200. The jury's verdict will not be disturbed where, as here, it is supported by substantial evidence. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Prior Bad Act Evidence

Second, Macias argues that the district court improperly permitted the introduction of other bad act evidence. At trial, Detective Jeffrey Swanbeck testified that while Macias was detained on the day of the shooting, he discovered that Macias had felony warrants, and Detective Douglas Bishop testified that Macias' companion, James McKay, had information regarding stolen vehicles. Macias objected to both comments.

Evidence of uncharged bad acts is presumed to be inadmissible. Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131

(2001), modified on other grounds by Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 111 (2008). Before admitting prior bad acts evidence, the district court must conduct a hearing outside the presence of the jury and determine whether "'(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the [other act] is not substantially outweighed by the danger of unfair prejudice.'" Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). Failure to conduct this hearing is "reversible error unless '(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . .; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" Id. at 22, 107 P.3d at 1281 (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

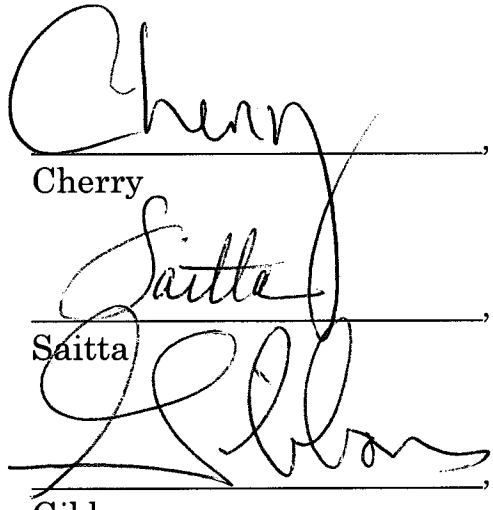
The testimony about Macias' arrest based on felony warrants and McKay providing information related to stolen vehicles alluded to prior bad acts involving Macias and his companion. While Macias had stipulated that Detective Swanbeck could testify that Macias was arrested based on outstanding warrants, Macias did not stipulate to felony description of those warrants. Therefore, the challenged testimony was inadmissible. See NRS 48.045(1).

Nevertheless, we conclude that the result of the trial would have been the same if the district court had not admitted the evidence. At trial, the victim identified Macias as the man who robbed and shot him. The victim had also identified Macias in a photographic lineup after the crime, as he had met him in the previous weeks. A search of Macias' car revealed ammunition consistent with the bullet retrieved from the victim,

and a gunshot residue test revealed that Macias may have discharged a firearm. In addition, McKay told police that morning that Macias had come to his home and stated that "he had had an altercation where he had to use the gun." Based on this evidence, we conclude that any error in admitting the challenged testimony was harmless.

Having considered Macias' contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Terrence M. Jackson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk