IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWNDELL BRYANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53102

FILED

SEP 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count each of attempted murder with the use of a deadly weapon, discharging a firearm out of a motor vehicle, and discharging a firearm into a structure. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge; Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.[1] The district court sentenced appellant Shawndell Bryant to serve various consecutive and concurrent prison terms totaling 5 to 20 years.

First, Bryant contends that insufficient evidence was adduced at trial to support his conviction for attempted murder with the use of a deadly weapon. Bryant specifically claims that the State failed to present evidence of actual or express malice, and he argues that evidence of implied malice alone is insufficient to support a conviction for attempted murder.

[1]Senior Judge Bonaventure was the trial judge and District Judge Stewart Bell was the sentencing judge.

"[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). Accordingly, 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).

Murder is the unlawful killing of a person with 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 Bryant encountered the victim inside a convenience store and began arguing with him. Bryant told a store clerk to turn off the video cameras. When the clerk informed

him that she did not have access to the video camera system, Bryant left the store and returned to his car. The victim then told one of the store clerks to call 911 because he thought he was going to be shot. As the victim left the store, Bryant pointed a gun at him from inside a car, fired a single shot, and then drove away. A hole was subsequently found in the store wall that had not been there before the incident.

We conclude from this evidence that a rational juror could infer that Bryant intended to take the victim's life when he aimed and fired a gun at the victim. 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).

Second, Bryant contends that the district court abused its discretion by admitting a 911 call recording containing hearsay statements made by the victim despite the unavailability of the victim to testify at trial and the State's limited representations as to why the victim was unavailable.

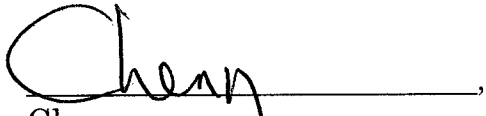
"The Confrontation Clause limits the state's ability to use hearsay as evidence in criminal trials when the hearsay declarant [is unavailable to] testify." Franco v. State, 109 Nev. 1229, 1239, 866 P.2d 247, 253 (1993). If the hearsay is testimonial, it is barred by the Confrontation Clause unless the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 68 (2004). If the hearsay is nontestimonial, it must be excluded unless it falls within a firmly rooted hearsay exception or possesses particularized

guarantees of trustworthiness. Ohio v. Roberts, 448 U.S. 56, 66 (1980), abrogated on other grounds by Crawford, 541 U.S. at 68-69; see Gaxiola v. State, 121 Nev. 638, 646, 119 P.3d 1225, 1231 (2005) (observing that Crawford does not overrule the test in Roberts as it applies to nontestimonial hearsay).

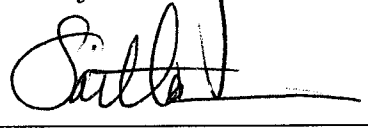
Here, Bryant has not shown that the statements that the victim made during the 911 call were testimonial, he has not shown that the exceptions to the hearsay rule did not apply, and he has not provided the 911 call recording in the record on appeal. "It is the appellant's responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); see also NRAP 30(b)(3). Because Bryant has failed to address these threshold issues and provide us with an adequate record, we decline to reach the issue of the victim's unavailability and we conclude that Bryant is not entitled to relief.

Having considered Bryant's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
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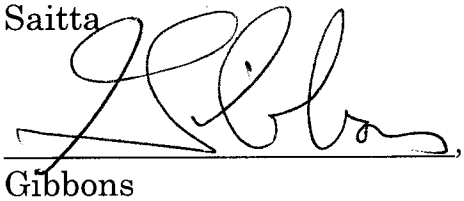

_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
Eichhorn & Hoo LLC
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk