

IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO GALLEGOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53423

FILED

SEP 28 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Gordon Stine was stabbed to death inside a motel room. Appellant Fernando Gallegos was charged in connection with Stine's murder and convicted of first-degree murder. Upon Gallegos' conviction, a separate penalty hearing was held before a jury and Gallegos was sentenced to life in prison without the possibility of parole. This appeal followed.

On appeal, Gallegos asserts that: (1) the district court abused its discretion in admitting hearsay evidence and evidence of uncharged criminal conduct, (2) the State presented insufficient evidence to convict him of first-degree murder, (3) the jury instructions concerning first-degree murder and consciousness of guilt were erroneous, and (4) the district court abused its discretion by admitting his criminal history and allowing victim impact testimony during the sentencing hearing.

For the reasons set forth below, we conclude that all of Gallegos' contentions are without merit. Accordingly, we affirm the judgment of conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Hearsay testimony and evidence of uncharged criminal conduct

Gallegos argues that the district court abused its discretion in admitting hearsay testimony and evidence of uncharged criminal conduct. He attacks multiple statements made at trial. We first address each hearsay statement and then turn to the evidence of uncharged criminal conduct.

Standard of review

We review the district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

John Herbaugh's testimony

Gallegos asserts that the district court abused its discretion when it allowed John Herbaugh to testify that he had received a message on his cell phone from Gallegos, wherein Gallegos stated, "I worked over [Stine]. So you want to come out and play?" Gallegos argues that this statement was improper hearsay testimony.

Hearsay is generally inadmissible. NRS 51.065. Hearsay is an out of court statement "offered in evidence to prove the truth of the matter asserted unless . . . [t]he statement is offered against a party and is . . . [t]he party's own statement" NRS 51.035(3)(a).

The State offered the cell phone message against Gallegos and Herbaugh testified that the message left on his cell phone was from Gallegos. Thus, the message was offered against Gallegos and was his own statement. Accordingly, Gallegos' message was not hearsay and, therefore, we determine that the district court did not abuse its discretion in admitting the testimony.

Geez Taylor's testimony

Gallegos contends that the district court abused its discretion when it permitted Geez Taylor to testify that Antonio Barajas told her on the afternoon of the murder that “[Gallegos] fucked up.” Gallegos asserts that Taylor’s testimony constituted inadmissible hearsay and was improperly admitted as a prior inconsistent statement.

Prior inconsistent statements are considered non-hearsay and admissible for purposes of impeachment if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [i]nconsistent with the declarant’s testimony.” NRS 51.035(2)(a).

Here, Barajas made the statement to Taylor; thus, he is the declarant. Barajas testified at trial and was subject to cross-examination. On direct examination, Barajas testified that he did not say anything to Taylor when he returned to his motel room after the murder. Taylor’s testimony, however, was inconsistent with Barajas’ testimony because Taylor testified that, upon returning to the room, Barajas told her that “[Gallegos] fucked up.” Because Barajas, the declarant, testified at trial and was subject to cross-examination concerning the statement, and Taylor’s statement was inconsistent with Barajas’ statement, Taylor’s testimony was properly admitted as a prior inconsistent statement. Therefore, the district court did not abuse its discretion in allowing Taylor to testify concerning Barajas’ statement.

Christi Weiss

Gallegos argues that the district court abused its discretion when it allowed Christi Weiss to testify that she overheard Herbaugh tell Gallegos, “I don’t have time for your bullshit” on the telephone. Gallegos also asserts that the district court abused its discretion when it permitted

Weiss to testify that Herbaugh told her, "That was [Gallegos]. I don't know why [Gallegos] has got [Stine's] phone." Gallegos contends that these statements were improper hearsay testimony.

Both of Herbaugh's statements were made out of court. We determine that neither statement was offered to prove the truth of the matter asserted; rather, the statements were offered to provide context to the events surrounding the phone call. Specifically, the State offered Weiss' testimony to provide context as to what she did after hearing Herbaugh's statement—namely, she called Stine's phone to find out what was going on. Moreover, prior to Weiss' testimony, Herbaugh testified that Gallegos called him from Stine's cell phone and that he was concerned that Gallegos was in possession of the phone. Thus, Weiss' testimony was not offered to prove that, in fact, Gallegos was in possession of Stine's phone. Accordingly, we conclude that the district court did not abuse its discretion in admitting Weiss' testimony.

Detective John Ferguson's testimony

Gallegos asserts that the district court abused its discretion when it admitted, as improper hearsay testimony, Detective Ferguson's testimony regarding Barajas' statements about what occurred in Stine's motel room on the day of his death.

A prior consistent statement is not hearsay if: (1) the declarant testifies at trial, (2) the declarant is subject to cross-examination concerning the statement, (3) the statement is consistent with the declarant's testimony at trial, and (4) the statement is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Patterson v. State, 111 Nev. 1525, 1531-32, 907 P.2d 984, 988-89 (1995).

Detective Ferguson testified about Barajas' statement to police; thus, Barajas is the declarant. Barajas testified at trial and was subject to cross-examination regarding the events surrounding the murder and his statement to police. Detective Ferguson testified that during his interview with Barajas, Barajas told him that (1) Gallegos was the first to enter Stine's motel room, (2) Gallegos and Stine engaged in a physical altercation, (3) Stine then approached Barajas and a physical altercation ensued between he and Stine, and (4) Stine and Gallegos then resumed their altercation. Barajas testified to the same version of events. Therefore, Detective Ferguson's testimony regarding Barajas' statement to police was consistent with Barajas' testimony at trial.

Further, Gallegos' counsel asked Barajas, on cross-examination, when he had come up with the version of events he testified to at trial and whether he had spoken to police or the State in preparing his trial testimony. Gallegos' counsel also asked him whether he understood that he could be prosecuted for Stine's murder. Therefore, Gallegos' cross-examination of Barajas suggested that the State or the police had influenced his testimony and that he fabricated his story to avoid being prosecuted for Stine's murder. Because Gallegos implied that Barajas fabricated his testimony or was improperly influenced, the State offered Detective Ferguson's testimony to rebut Gallegos' accusations. Accordingly, because Detective Ferguson's testimony met all four elements necessary to qualify as a prior consistent statement, we conclude that the district court did not abuse its discretion in admitting the testimony.

Uncharged criminal conduct—photograph of methamphetamine pipe

Gallegos contends that the district court abused its discretion in admitting a photograph of a methamphetamine pipe found at his

residence by investigators. He argues that the photograph was evidence of uncharged criminal conduct and did not qualify as res gestae evidence.

The res gestae doctrine is codified in NRS 48.035(3) and provides that “[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded.” NRS 48.035(3) is to be construed narrowly and, if it is invoked, the controlling question as to admissibility is whether the witnesses can describe the crime charged without referring to the related uncharged act. Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005).

Here, the State introduced the photograph of the methamphetamine pipe found at Gallegos’ residence through investigator Candis Potts. Over Gallegos’ objection, the district court determined that the photograph was admissible as res gestae evidence. The State’s theory of the case was that Gallegos’ motive in going to Stine’s motel room on the day of the murder was to either kill Stine or assault and batter him in order to get more methamphetamine. To establish Gallegos’ motive, the State elicited testimony from Tanya Burgess, Gallegos’ girlfriend, concerning Gallegos’ drug dealings with Stine in the days leading up to his death. Gallegos’ possession of the methamphetamine pipe contributed to the State’s theory that Gallegos was using methamphetamine and that he had returned to Stine’s motel room to get more. The State would not have been able to present the complete story of the crime without presenting evidence regarding Gallegos’ drug use and his drug interactions with Stine in the days before the murder. Therefore, we determine that the district

court did not abuse its discretion when it allowed investigator Potts to testify about the pipe found at Gallegos' residence.

Accordingly, for the foregoing reasons, we conclude that the district court did not abuse its discretion in admitting the above referenced testimony and evidence of uncharged criminal conduct.¹

Jury instructions

Gallegos argues that the jury instructions concerning first-degree murder and consciousness of guilt were erroneous. We disagree.

Standard of review

Gallegos did not object to the jury instructions regarding first-degree murder; therefore, we review those instructions for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "In conducting plain error review, [this court] . . . examine[s] whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Id. The appellant bears the burden of

¹Gallegos asserts that the district court erred in admitting certain portions of Charles Hobbs', Taunya Owens', and Burgess' testimony. He contends that their testimony contained inadmissible hearsay. Gallegos failed to object to their testimony and, therefore, this court employs plain error review. Green v. State, 119 Nev.542, 545, 80 P.3d 93, 95 (2003). After a thorough review of the record, it is clear that all of the statements elicited at trial were Gallegos' own statements, offered against him. NRS 51.035(3). Accordingly, the statements were non-hearsay and properly admitted by the district court.

Gallegos also complains that Burgess referred to him as "G, or Gangster G" in her testimony. Gallegos did not object to Burgess' testimony, and he has failed to demonstrate that her reference affected his substantial rights. Green, 119 Nev. at 545, 80 P.3d at 95. Accordingly, Gallegos' contention is without merit.

establishing that his substantial rights were affected by showing actual prejudice or a miscarriage of justice. Id. Gallegos did, however, object to the consciousness-of-guilt instruction; accordingly, we review that instruction for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

First-degree murder instructions

Gallegos contends that the first-degree murder instructions, as written, did not require proof of premeditation and deliberation.

Jury instruction no. 22 informed the jury on the elements of murder. It stated that the jury could find Gallegos guilty of murder if he willfully and unlawfully killed Stine with malice aforethought, either express or implied, or during the perpetration of a burglary with a deadly weapon. Jury instruction no. 23 further instructed the jury that first-degree murder is “murder which is willful, deliberate and premeditated.” Jury instruction nos. 24 through 26 specifically defined willfulness, deliberation, premeditation, malice aforethought, express malice, and implied malice. Therefore, the jury instructions distinctively defined the difference between first-degree murder and second-degree murder. The jury instructions specifically stated that first-degree murder required the elements of deliberation and premeditation. Further, jury instruction no. 24, which defined first-degree murder, was an exact duplicate of the instruction we instructed district courts to use in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing. Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000). Accordingly, the jury instructions concerning first-degree murder were correct statements of the law and, therefore, we determine that the district court did not commit plain error in providing the jury with jury instruction nos. 22 through 26.

Consciousness-of-guilt instruction

Gallegos asserts that the district court abused its discretion in instructing the jury on consciousness of guilt and that the instruction was not supported by the evidence.

A defendant's flight from the scene of a crime or affirmative attempts to suppress evidence is admissible at trial and has probative value in demonstrating consciousness of guilt or wrongful conduct. E.g., Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979). Where there is sufficient evidence of a defendant's flight or suppression of evidence, a jury instruction on consciousness of guilt is proper. E.g., Matthews v. State, 94 Nev. 179, 181, 576 P.2d 1125, 1126 (1978).

Here, jury instruction no. 18 was supported by the evidence elicited at trial. The evidence showed that after Gallegos left Stine's motel room on the day of the murder, he went to Charles Hobbs' residence and told Hobbs to get rid of the knife he was carrying. Hobbs washed the knife with bleach and put it in a vent at his residence. Gallegos asked Hobbs if there was blood on him, and Hobbs responded that there was. Gallegos washed his hands, changed his clothing, and left the bloody clothing at Hobbs' residence. This evidence demonstrates Gallegos' desire to destroy incriminating evidence and it had probative value in demonstrating his consciousness of guilt. Because we have upheld consciousness-of-guilt instructions where there is sufficient evidence supporting the instruction, we conclude that the district court did not abuse its discretion in providing the jury with instruction no. 18.

Accordingly, we determine that the first-degree murder instructions were not erroneous and that the district court did not abuse its discretion when it instructed the jury on consciousness of guilt.

Sufficiency of evidence

Gallegos argues that the State presented insufficient evidence to convict him of first-degree murder or felony murder. Because the jury was instructed on both theories, we address each contention in turn.

Standard of review

In reviewing whether there is sufficient evidence to support the jury's verdict, we seek to determine "whether, after viewing 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." Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)).

Premeditation and deliberation

Gallegos contends that the State presented insufficient evidence to establish premeditation and deliberation.

"Murder of the first degree is murder which is . . . [p]erpetrated . . . by any other kind of willful, deliberate and premeditated killing." NRS 200.030(a) (emphasis added). "Evidence of premeditation and deliberation is seldom direct." Briano v. State, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978). Circumstantial evidence may be considered and provide sufficient evidence to infer the elements of premeditation and deliberation. Id.

In the present case, Barajas testified that he did not cause Stine's death and Hobbs testified that Gallegos, and not Barajas, handed him the knife and told him to get rid of it. Burgess confirmed that the recovered knife was Gallegos'. Gallegos confessed to Burgess and Taunya Owens that he stabbed Stine in the neck. He also called Herbaugh and told him that he had "worked over" Stine. Thus, Barajas' testimony was

corroborated by the events following Stine's death, as well as by Gallegos' own statements. Viewing this evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find that Gallegos caused Stine's death.

Moreover, the evidence established that in the days leading up to Stine's murder, Gallegos was mad at Stine for not accepting his watch in exchange for methamphetamine. Gallegos asked Barajas to go somewhere with him and stated before they left that he had to go "take care of some business." Gallegos led Barajas to Stine's motel room and took a knife with him. When Gallegos arrived at Stine's room, he rushed the door and engaged Stine in a physical confrontation. Gallegos fled the scene and went directly to Hobbs' residence, where he attempted to dispose of the knife and his bloody clothes. Importantly, while at Hobbs' residence, Gallegos repeatedly stated that he should not have returned to Stine's motel room. Later that afternoon, Gallegos confessed to Burgess that he had stabbed Stine in the neck. He also confessed to Owens when he was attempting to leave town and trying to sell her a scooter. Finally, Gallegos called Herbaugh and told him, "I worked over [Stine]. So you want to come out and play?"

This evidence, viewed in the light most favorable to the prosecution, sufficiently establishes "willful" and "deliberate" actions on the part of Gallegos. The evidence also indicates that he deliberated and premeditated the killing of Stine. Accordingly, we conclude that there was sufficient evidence for a rational juror to find the elements of first-degree murder beyond a reasonable doubt.

Felony murder

Gallegos argues that the State presented insufficient evidence to show that he intended to commit burglary before entering Stine's motel room.

"Murder of the first degree is murder which is . . . [c]ommitted in the perpetration . . . of . . . burglary . . ." NRS 200.030(b). A person commits burglary if he "enters any house, room, [or] apartment . . . with the intent to commit . . . assault or battery on any person." NRS 205.060(1).

Here, the evidence showed that Gallegos was upset with Stine prior to the murder. Gallegos asked Barajas to go somewhere with him and stated, "I've got to take care of some business." Gallegos then lead Barajas to Stine's motel room. Gallegos then rushed Stine's door, and Stine shouted, "I have no dope, man. I have no dope." Barajas testified that by the time he reached Stine's motel room, Gallegos was already engaged in a heated argument with Stine. A physical confrontation ensued. After fleeing from Stine's motel room, Gallegos repeatedly told Barajas, "I shouldn't have gone back. I shouldn't have gone back. It was a mess." We determine that this statement, combined with the events leading up to Stine's death, sufficiently established that Gallegos intended to commit assault or battery when he went to Stine's room. Because Stine's death was caused during the perpetration of a burglary, there was sufficient evidence to convict Gallegos of felony murder.

Accordingly, we conclude that the State presented sufficient evidence to convict Gallegos of first-degree murder under both a deliberate-and-premeditated theory and the felony murder rule.²

The sentencing hearing

Gallegos contends that the district court abused its discretion and violated his due process rights when it admitted his criminal history and allowed victim impact testimony during the sentencing hearing before the jury. We address Gallegos's criminal history and then turn to the victim impact testimony.

Standard of review

The district court's decision to admit particular evidence during the penalty phase is within the sound discretion of the district court and "will not be disturbed absent an abuse of [that] discretion." Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

Gallegos' criminal history

Gallegos asserts that the district court abused its discretion in admitting evidence of Gallegos' prior felony and gross misdemeanor convictions because they were unduly prejudicial.

Where a defendant is found guilty of first-degree murder, the district court must conduct a separate penalty hearing. NRS 175.552(1). "During the hearing, evidence may be presented concerning . . . any other matter which the court deems relevant to the sentence, whether or not the

²Gallegos asserts that Barajas and Burgess were not credible witnesses. We determine that this argument is without merit given that "it is the function of the jury . . . 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).

evidence is ordinarily admissible.” NRS 175.552(3). Evidence of the defendant’s character and specific instances of conduct is admissible in the penalty phase, but the evidence must be relevant and the danger of unfair prejudice must not substantially outweigh its probative value. Pellegrini v. State, 104 Nev. 625, 630-31, 764 P.2d 484, 488 (1988).

Consequently, “[o]ther criminal conduct may properly be considered at the sentencing hearing, even though the defendant was never charged or convicted of it.” Sheriff v. Morfin, 107 Nev. 557, 560, 816 P.2d 453, 455 (1991). Consideration of a defendant’s uncharged crimes and prior criminal history “is solely for the purpose of gaining a fuller assessment of the defendant’s ‘life, health, habits, conduct, and mental and moral propensities.’” Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (quoting Williams v. New York, 337 U.S. 241, 245 (1949)).

During the penalty phase, the State introduced certified judgments of conviction for Gallegos’ five prior felony convictions and three prior gross misdemeanor convictions. The State elicited testimony from Detective Reed Thomas concerning the facts surrounding Gallegos’ 1992 conviction for battery with a deadly weapon. Detective Thomas also testified that Gallegos was a target of the Repeat Offender Program and one of the worst offenders in the program. Finally, the State presented Officer Judy Holladay’s testimony regarding the facts surrounding Gallegos’ 2005 conviction for battery on a police officer.

We determine that the evidence presented during the penalty hearing was relevant, had a high probative value in showing Gallegos’ propensity to commit crime and acts of violence, and was not unduly prejudicial. It demonstrated that Gallegos had a lengthy criminal history that began in 1981 and that, despite numerous convictions and

incarcerations, he has not been rehabilitated or deterred from criminal behavior. Further, Detective Thomas' and Officer Holladay's testimony concerning Gallegos' battery convictions showed that, over time, Gallegos has become more violent and dangerous to society. Therefore, Gallegos' overall criminal history and propensity for violence was relevant to the sentence and had a high probative value in gaining a full assessment of Gallegos' "life, health, habits, conduct, and mental and moral propensities." Id. (quoting Williams v. New York, 337 U.S. 241, 245 (1949)).

Accordingly, we conclude that the district court did not abuse its discretion in admitting Detective Thomas' and Officer Holladay's testimony and evidence of Gallegos' prior felony and gross misdemeanor convictions.

Victim impact testimony

Gallegos contends that the district court abused its discretion when it allowed Stine's sisters to "recommend" a sentence to the jury. Specifically, he argues that a victim may not express an opinion regarding a defendant's sentence during a noncapital sentencing hearing before a jury.

In Nevada, "before imposing sentence, the court shall afford the victim an opportunity to . . . [r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution." NRS 176.015(3)(b).

In Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993), we had the opportunity to address the breadth of NRS 176.015 and the proper use of victim impact testimony in noncapital cases. In Randell, the defendant was convicted of first-degree murder. 109 Nev. at 6, 846 P.2d at 279. During the sentencing hearing, the district court permitted a victim to

express his views as to the amount of prison time he felt the defendant should receive. Id. The district court ultimately sentenced the defendant to a life term without the possibility of parole. Id.

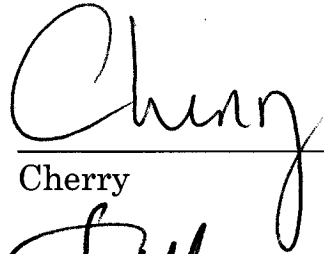
On appeal, the issue presented was whether the district court erred when it allowed the victim to recommend a sentence for the defendant. Id. We concluded that it was not. Id. at 7, 846 P.2d at 280. In reaching our holding, we distinguished United States Supreme Court precedent concerning the use of victim impact evidence on two grounds; namely, that the United States Supreme Court's holdings were (1) expressly limited to capital cases, and (2) involved jury sentencing determinations. Id. at 7-8, 846 P.2d at 280. As part of the basis of our reasoning, we recognized that a "district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision." Randell, 109 Nev. at 8, 846 P.2d at 280. Accordingly, we held that NRS 176.015 was deemed broad enough to encompass the victim's views about sentencing and that "[a] victim may express an opinion regarding the defendant's sentence in a noncapital case." Id. at 8, 846 P.2d at 280.

During the penalty hearing, the court allowed Stine's sisters to "recommend" to the jury that Gallegos be sentenced to life in prison without the possibility of parole. Although the sentencing body in Randell was a judge and not a jury, as is the case here, we have repeatedly reaffirmed Randell and conclude that its general holding applies here. E.g., Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) ("A victim can express an opinion regarding the defendant's sentence only in noncapital cases."). Moreover, NRS 176.015 is broad and does not differentiate between sentencing bodies, i.e. judges and juries; rather, it


plainly permits the victim to “[r]easonably express any views concerning . . . the person responsible.” NRS 176.015(3)(b). Because Randell holds that a victim may express an opinion regarding the defendant’s sentence in a noncapital case, and NRS 176.015 does not differentiate between sentencing bodies, we determine that the district court did not abuse its discretion when it allowed Stine’s sisters to express an opinion regarding Gallegos’ sentence.

Therefore, the district court did not abuse its discretion or violate Gallegos’ due process rights when it admitted his criminal history and allowed victim impact testimony during the sentencing hearing before the jury.³ Accordingly, we

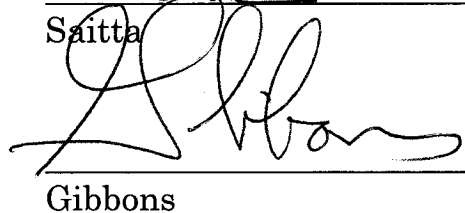
ORDER the judgment of the district court AFFIRMED.


_____, J.

Cherry


_____, J.

Saitta


_____, J.

Gibbons

³Gallegos argues that cumulative error warrants reversal of his conviction. We conclude that Gallegos’ argument is without merit because there is substantial evidence supporting the jury’s verdict and Gallegos has failed to successfully assign any error to the underlying proceedings. See Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

cc: Hon. Steven R. Kosach, District Judge
Glynn B. Cartledge
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk