IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD CARL MCCASKILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55147

FILED

MAR 09 2011

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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. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

This case stems from a violent altercation between appellant Leonard McCaskill and Rodney Morris. Todd Holbert, one of Morris's friends, was present for the fracas between McCaskill and Morris. During the altercation, McCaskill obtained a shotgun and Morris fled from the scene. McCaskill then shot Holbert once in the chest and once the head, killing him instantly. McCaskill was charged with the murder of Holbert. At trial, McCaskill claimed that he feared Morris, mistook Holbert for Morris, and thus was acting in self-defense when he killed Holbert. The jury found McCaskill guilty of second-degree murder with the use of a deadly weapon.

On appeal, McCaskill argues that his conviction should be reversed because: (1) the district court violated his Sixth Amendment right to compel witnesses in his defense by allowing a witness to assert his Fifth Amendment privilege against self-incrimination, (2) the verdict was not supported by sufficient evidence, (3) the district court committed plain

error by instructing the jury on transferred intent and failing to give a mistake-of-fact instruction, and (4) cumulative error warrants reversal.[1]

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

DISCUSSION

The district court did not violate McCaskill's Sixth Amendment right to compel witnesses by allowing a witness to assert his Fifth Amendment privilege against self-incrimination

McCaskill contends that his Sixth Amendment right to compel the production of witnesses for his defense was violated when the district court permitted Morris to invoke his Fifth Amendment privilege. McCaskill hoped to elicit testimony from Morris about Morris's various prior acts of domestic violence, assault, and intimidation. Through this testimony, McCaskill hoped to establish that he reasonably feared Morris and, mistaking Holbert for Morris, acted in self-defense when he killed Holbert. McCaskill argues that the limited testimony he sought would not have incriminated Morris because the applicable statutes of limitations had run for any charges that could have been implicated by the testimony.

Standard of review

The validity of a witness's assertion of the Fifth Amendment privilege against self-incrimination is reviewed de novo. U.S. v. Bright, 596 F.3d 683, 690 (9th Cir. 2010); U.S. v. Rubio-Topete, 999 F.2d 1334,

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[1]We have reviewed each of McCaskill's remaining arguments and conclude that they are without merit.

1338 (9th Cir. 1993); Jones v. State, 108 Nev. 651, 657, 837 P.2d 1349, 1353 (1992).

Morris validly asserted his Fifth Amendment privilege

The Sixth Amendment provides a criminal defendant "a right to compel production of witnesses in his or her own behalf." Palmer v. State, 112 Nev. 763, 766, 920 P.2d 112, 113 (1996). But the "'valid assertion of the witness'[s] Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights.'" Id. (quoting United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980)).

The Fifth Amendment provides witnesses in criminal cases a right to refuse to answer questions when doing so might subject him or her to future prosecution. Jones, 108 Nev. at 657, 837 P.2d at 1352. A witness's assertion of his Fifth Amendment privilege is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951). The privilege "requires more than a vague and subjective fear of prosecution." Jones, 108 Nev. at 657, 837 P.2d at 1352.

The evidence at trial demonstrated that McCaskill sustained significant injuries at the hands of Morris. It is likely that if Morris were compelled to testify regarding his prior run-ins with McCaskill, he would have built a case against himself for the attempted murder of McCaskill. Morris's testimony might have shown that, in light of his history of animosity toward McCaskill, he had the intent to kill McCaskill during the altercation. See Ochoa v. State, 115 Nev. 194, 197, 981 P.2d 1201, 1203 (1999) (noting that "[i]ntent to kill . . . is an element of attempted murder"). The statute of limitations for attempted murder is three years. NRS 171.085(2). Morris attacked McCaskill in 2008 and was called to testify at McCaskill's trial in 2009. Thus, only one year had elapsed, and

the statute of limitations had not run against Morris on a charge of attempted murder. Finally, the State had not given Morris immunity.

In sum, Morris's testimony, even in the limited fashion sought by McCaskill, would have been highly relevant in showing that on the day of the altercation, Morris intended to kill McCaskill, a key element of attempted murder. Thus, when Morris asserted his privilege, he had reasonable cause to fear prosecution, and that fear was neither vague nor simply subjective. We therefore conclude that McCaskill's Sixth Amendment right to compel witnesses was not violated because Morris validly asserted his Fifth Amendment privilege against self-incrimination.

Sufficient evidence supported the judgment of conviction

McCaskill argues that there was insufficient evidence to support his conviction for second-degree murder with the use of a deadly weapon.[2] We disagree.

Standard of review

In determining if a jury verdict was supported by sufficient evidence, we inquire "'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.'"

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[2]McCaskill also asserts that based upon the evidence presented, the only rational conclusion the jury could have reached was that he acted in self-defense or that he committed heat-of-passion manslaughter. When analyzing if sufficient evidence supported a verdict, however, "[t]he question . . . is not whether there is evidence from which the jury could have reached some other conclusion." People v. Falck, 60 Cal. Rptr. 2d 624, 630 (Ct. App. 1997).

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)).

Substantial evidence supported the verdict

Second-degree murder with the use of a deadly weapon is the killing of a human being with a firearm or other deadly weapon, with malice aforethought, without premeditation or deliberation. NRS 200.010(1); NRS 200.030. Malice aforethought may be express or implied. NRS 200.010(1). "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975). In addition, "[m]alice is implied from the unlawful use of the deadly weapon." Sheriff v. Morris, 99 Nev. 109, 114 n.3, 659 P.2d 852, 856 n.3 (1983). Finally, an "act that tends to destroy human life . . . is reflective of express or implied malice." Labastida v. State, 112 Nev. 1502, 1510, 931 P.2d 1334, 1339 (1996), modified on reh'g, Labastida v. State, 115 Nev. 298, 307-308, 986 P.2d 443, 449 (1999).

Viewing the evidence in the light most favorable to the prosecution, malice may be implied from McCaskill's use of a deadly weapon—a shotgun—in a deadly manner. Both eyewitnesses to the shooting, Bret Schucker and Samuel Brooksher, testified that McCaskill shot Holbert once in the chest, pumped the shotgun, readjusted his aim, and then shot Holbert in the head at close range, causing Holbert's immediate death. Malice is reflected by the fact that McCaskill delivered calculated shots to Holbert's chest and head at close range, acts which undoubtedly tend to destroy human life. Edward Lattyak, the State's criminalist, determined that McCaskill was six feet away when he shot Holbert the first time and six inches away when he shot Holbert the second time. This evidence demonstrates that McCaskill killed Holbert

with malice aforethought. Accordingly, we conclude that sufficient evidence supported McCaskill's conviction of second-degree murder with the use of a deadly weapon.

The district court did not commit plain error by instructing the jury on transferred intent or by not instructing the jury on mistake-of-fact

McCaskill argues that the district court's instructions on transferred intent were erroneous. He also claims that the district court erred by not instructing the jury on mistake of fact. We disagree.

Standard of review

When a defendant fails to preserve an issue, we employ plain-error review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Plain-error analysis requires us to consider: (1) if there was an error, (2) if that error was plain or clear, and (3) if that error affected the substantial rights of the defendant. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Appellant bears the burden of showing "actual prejudice or a miscarriage of justice." Id. Because McCaskill did not object to the transferred intent instructions or request a mistake-of-fact instruction at trial, we review for plain error.

The district court did not err by instructing the jury on transferred intent

McCaskill contends that the district court erred by instructing the jury on transferred intent because the doctrine of transferred intent was inapplicable since this case does not involve the classic transferred intent scenario where the defendant, intending to kill A, misses A and, instead, accidentally kills B.

Ochoa is instructive on this issue. In Ochoa, the defendant, Arturo Ochoa, shot and killed Luis Ortiz. Id. at 195-96, 981 P.2d at 1202. Ricky Smith, a bystander, was struck and injured by one of the shots

intended for Ortiz. Id. at 196, 981 P.2d at 1202. Ochoa was convicted of the murder of Ortiz and the attempted murder of Smith. See id. at 198, 981 P.2d at 1204.

On appeal, Ochoa contended that because he killed the intended victim, Ortiz, his intent to kill could not be transferred to the unintended victim, Smith. Id. at 198, 981 P.2d at 1204. We rejected this narrow conception of the applicability of the transferred intent doctrine, stating that

> [w]hile imputed liability through transferred intent is most often seen in "bad aim" situations, the rationale of the doctrine need not be limited to such cases. Theoretically, the doctrine applies in any case where there is intent to commit a criminal act and the only difference between the actual result and the contemplated result is the nature of the personal or property injuries sustained.

Id. After considering relevant caselaw from other jurisdictions, we held that "the doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended victim is injured." Id. at 200, 981 P.2d at 1205. Applying this rule, we concluded that because there was evidence showing that Ochoa intended to kill Ortiz, "that intent [could] be transferred to the unintended victim, Smith." Id. We therefore held that Ochoa was properly convicted of the attempted murder of Smith. Id.

Here, McCaskill intended to kill Morris. He claims he only killed Holbert because he mistook him for Morris. Thus, the only difference between McCaskill's desired result—the death of Morris—and the actual result—the death of Holbert—is the nature of the injuries sustained; that is, Holbert was shot instead of Morris. Stated differently,

Holbert was harmed as a result of McCaskill's specific intent to harm Morris. Under these circumstances, we conclude that the doctrine of transferred intent was applicable. See id.; see also People v. Birreuta, 208 Cal. Rptr. 635, 639 (Ct. App. 1984) (stating that the doctrine of transferred intent ensures that "a defendant will not be allowed to defend against a murder charge by claiming to have made a mistake of identity, a poor aim or the like" (emphasis added)), overruled on other grounds by People v. Flood, 957 P.2d 869, 870 (Cal. 1998); Ford v. State, 625 A.2d 984, 999 (Md. 1993) ("[T]he purpose of transferred intent is not to multiply criminal liability, but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime."), superseded by statute on other grounds as stated in Robinson v. State, 728 A.2d 698, 702 (Md. 1999); People v. Fernandez, 673 N.E.2d 910, 913 (N.Y. 1996) ("[T]he identity of the victim is irrelevant if the requisite intent to kill is established and death of a person results. In such cases, the defendant's intent to kill the intended victim is said to be 'transferred' to the actual victim to establish all of the elements of the completed crime of intentional murder." (emphases added)). Accordingly, we conclude that the district court did not err by instructing the jury on the doctrine of transferred intent.

The district court did not err by not instructing the jury on mistake-of-fact

McCaskill contends that it was plain error for the district court to not instruct the jury on the defense of mistake-of-fact. He argues that although he did not request this instruction, the district court had a duty to give a mistake-of-fact instruction sua sponte.

The defense "is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how

weak or incredible, to support it." Roberts v. State, 102 Nev. 170, 172-73, 717 P.2d 1115, 1116 (1986) (emphasis added). McCaskill cites to Ouanbengboune v. State, 125 Nev. ___, 220 P.3d 1122 (2009), for the proposition that the district court had an obligation to sua sponte instruct the jury on mistake-of-fact.

In Ouanbengboune, the defendant was charged with first-degree murder and robbery with the use of a deadly weapon where he fatally shot the victim, took the victim's car keys, and drove away in her car. 125 Nev. at ___, 220 P.3d at 1125, 1130. The district court instructed the jury on felony murder but did not give the instruction that robbery may not serve as a predicate for felony murder where the evidence shows that the accused killed a person and only later formed the intent to rob that person. Id. at ___, 220 P.3d at 1129-30. This court held that it was error for the district court to not instruct the jury on the proper circumstance in which robbery could stand as the predicate offense for a felony murder conviction. Id. at ___, 220 P.3d at 1129. Thus, Ouanbengboune stands for the proposition that the district court has an obligation to ensure that the content of the particular instructions it gives accurately states the law. It does not stand for the proposition that a district court has a sua sponte obligation to instruct the jury on the defense's theory of the case.

Moreover, here, the jury was fully and accurately instructed on self-defense. Jury Instruction Nos. 33 through 37, the self-defense instructions, directed the jury to consider all of the circumstances to determine whether McCaskill shot Holbert because he maintained a reasonable belief that he was in imminent danger of death or great bodily harm and that self-protection was necessary. See NRS 200.200. As a

result, the jury was instructed as to the legal effect of McCaskill's alleged misidentification. Because the jury's instructions were sound, there was no need for the district court to provide further instruction. See People v. Watie, 124 Cal. Rptr. 2d 258, 270-71 (Ct. App. 2002) (separate mistake-of-fact instruction was unnecessary where self-defense instructions already adequately explained the impact of the defendant's mistake). Accordingly, we conclude that the district court did not err by not instructing the jury on mistake-of-fact.[3]

Cumulative error does not warrant reversal

McCaskill asserts that cumulative error warrants reversal of his conviction. In addressing a claim of cumulative error, we consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Although the crime with which McCaskill was charged, first-degree murder with the use of a deadly

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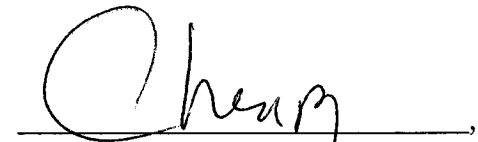
[3]McCaskill also contends that the district court erred by not correcting the prosecutor's statement to the jury that if McCaskill was the first aggressor, it must find that he did not act in self-defense. Because McCaskill did not object to this statement at trial on the same ground that he now asserts, we review for plain error. See Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008). We have repeatedly confirmed the accuracy of the principle that self-defense is not available to the first aggressor. Harkins v. State, 122 Nev. 974, 990, 143 P.3d 706, 716 (2006) ("[S]elf-defense is not available to an original aggressor."); Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) ("The right of self-defense is not available to an original aggressor."). Because the prosecutor's comment was not improper, McCaskill has failed to demonstrate plain error. See Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (explaining that the first step in analyzing prosecutorial misconduct is to consider whether the conduct was improper).

weapon, is serious, there were no errors at trial and the question of McCaskill's guilt is not close. Accordingly, cumulative error does not warrant reversal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



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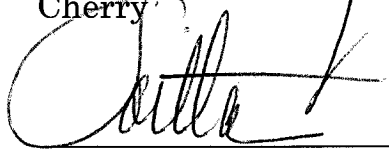

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Gibbons

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Washoe District Court Clerk