IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE MURRDOCK BRASS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55252

FILED

DEC 10 2010

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 murder with the use of a deadly weapon, two counts of attempted murder with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, and two counts of attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stefany Miley, Judge. Appellant George Murrdock Brass raises four contentions on appeal.

First, Brass argues that the district court erred in admitting evidence related to a firearm recovered from his parents' home. We discern no abuse of discretion. See Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) ("District courts are vested with considerable discretion in determining the relevance and admissibility of evidence."). As the firearm was recovered days after the shooting from a home where Brass had been staying and was of a similar caliber to bullet fragments recovered at the scene, Brass did not demonstrate that the district court's decision was "manifestly wrong." Id. Moreover, as Brass was acquitted of the charges resulting from the incident where only two of the three assailants were armed, he did not demonstrate that the jury was misled. See NRS 48.035(1) ("Although relevant, evidence is not admissible

if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.").

Second, Brass argues that the district court improperly joined two separate instances for trial. However, because the two separate transactions, which were temporally and geographically proximate as well as methodically similar, "constitut[ed] parts of a common scheme or plan," see NRS 173.115(2), we conclude that the district court did not abuse its discretion. See Graves v. State, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996) (concluding that defendant's systematic walk from one casino to another where he attempted to steal while in each constituted a common scheme); Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606-07 (1996) (holding that vehicle burglaries 17 days apart were part of a common scheme or plan). Moreover, as Brass was acquitted of the charges resulting from the September 15, 2006, incident, he did not demonstrate "a substantial and injurious effect on the jury's verdict," Weber v. State, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005), as the jury carefully considered the evidence relating to each charge and did not infer from the joinder of charges that Brass had a criminal disposition.

Third, Brass argues that the district court erred when it denied his instruction on the theory of defense. We disagree. While a defendant "'is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence . . . to support it,'" Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (quoting Roberts v. State, 102 Nev. 170, 172-73, 717 P.2d 1115, 1116 (1986)), the district court may refuse such an instruction if it is substantially covered by other instructions, Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). As the district court provided a correct "mere presence"

instruction, see Walker v. State, 113 Nev. 853, 869, 944 P.2d 762, 772-73 (1997), we discern no abuse of discretion in denying the proposed instruction, see Nelson v. State, 123 Nev. 534, 548, 170 P.3d 517, 527 (2007) (reviewing district court's decision concerning jury instructions for abuse of discretion).

Fourth, Brass argues that the district court erred in permitting the introduction of the preliminary hearing testimony of two witnesses as violative of Crawford v. Washington, 541 U.S. 36 (2004), and unfairly prejudicial. We disagree. The admission of the preliminary hearing testimony did not violate the Confrontation Clause because Brass was represented by counsel at the preliminary hearing, counsel cross-examined the witnesses at the hearing, and the witnesses were not in the United States at the time of trial. See Chavez v. State, ___ Nev. ___, ___, 213 P.3d 476, 485-86 (2009) (providing that admission of deceased victim's preliminary hearing testimony did not violate defendant's Confrontation Clause rights); Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001) ("[T]he admission of prior testimony comports with the requirements of the Sixth Amendment of the United States Constitution provided that defense counsel had the opportunity to, and in fact did, thoroughly cross-examine the witness, and the witness was actually unavailable for trial."); see also Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997). Moreover, both witness testified to the manner in which they were accosted and the injuries they received in the shooting and thus their testimony had probative value that was not outweighed by the prejudicial effect. See NRS 48.035(1). Therefore, the district court did not err in admitting the preliminary hearing testimony.

Having considered Brass's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Stefany Miley, District Judge
Attorney General/Carson City
Clark County District Attorney
Daniel J. Albregts, Ltd.
Eighth District Court Clerk