

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY CRAIG ROSALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55948

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

Gary Rosales appeals from his judgment of conviction, pursuant to a jury verdict, of seven counts of discharging a firearm into an occupied structure, aggravated stalking, attempted murder with the use of a deadly weapon, and criminal anarchy. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

I.

Rosales was arrested in Whittier, California, for allegedly placing a string of threatening phone calls to Washoe County District Attorney Richard Gammick, painting scores of graffiti tags throughout Reno between 1999 and 2004 with messages generally directed at violence toward police, sending death-threat letters to Reno police officers, shooting into seven houses in Reno, and shooting Evelyn Castillo in the leg while she was cleaning a Reno office complex. At Rosales's Whittier residence, police found a .32 caliber gun with a drilled out barrel to prevent signature markings on bullets or casings.

Rosales was charged with criminal anarchy, seven counts of discharging a firearm into an occupied structure, aggravated stalking, and attempted murder. A jury convicted Rosales on all counts, and he appeals. We reverse Rosales's criminal anarchy conviction but otherwise affirm.

II.

A. Criminal anarchy

Rosales challenges the sufficiency of the evidence to support his criminal anarchy conviction. His challenge is well-taken. “Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.” NRS 203.115(1). To convict Rosales of criminal anarchy, the State had to show either that Rosales’s graffiti and other writings advocated the “overthrowing or overturning organized government by force or violence,” NRS 203.115(2)(a), or that his writings justified the killing of executive officers “with the intent to teach, spread or advocate the propriety” of the doctrine that organized government should be overthrown by force or violence. NRS 203.115(2)(c).

The State supported its criminal anarchy charge with evidence of graffiti sprayed on buildings throughout Reno. This graffiti encouraged killing of police officers and violently attacking their families. It also lauded as heroes those who had killed police officers in the past and generally supported enmity toward the police. The State also produced evidence of Rosales’s taunting phone calls to the police, in which he called 911 and asked that officers be sent “down here, so I can shoot [the]m in the face.” Shortly after the phone calls, menacing graffiti appeared that listed the response times of officers and identified them by squad car. A letter mailed to the police station said “another one must die, a cop in the wrong place at the right time will be end of games when they come across me.” Finally, Rosales allegedly created a flyer (though it’s not clear that it was distributed) that applauded Larry Peck for killing Officer John Bohach in the line of duty. It also exhorted others to kill police officers

and sodomize their wives. Other graffiti sprayed throughout south Reno threatened District Attorney Richard Gammick, warning, for example, that he “will die soon” and that he “must be killed now!!”

In reviewing the sufficiency of this evidence to sustain Rosales’s criminal anarchy conviction, we look at “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.” McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). “[A] verdict supported by substantial evidence will not be disturbed by a reviewing court.” Id. (citing Nix v. State, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975)).

Nevada’s criminal anarchy statute proscribes advocating the overthrow of organized government by force or violence, NRS 203.115, and because this statute has the potential to reach constitutionally protected speech, see Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969), we read its proscription narrowly. In re Hecht, 213 S.W.3d 547, 572 (Tex. Spec. Ct. Rev. 2006) (“A strict construction of a statute must be applied to [statutes that reach] . . . core political speech . . .”). Richard Gammick, though he is an elected official, is not “organized government.” Equating Rosales’s encouragement to kill a single elected official with the overthrow of organized government would call the constitutionality of NRS 203.115 into serious question. See 1 Wayne R. LaFave, Substantive Criminal Law § 3.5(b), at 230 (2d ed. 2003) (speech statutes “must be narrowly drawn to proscribe only that conduct which interferes with some superior interest”).

Rosales’s writings, including those directed at the police, are both hate-filled and heinous, but they provide no hint that he sought to rouse the populace to overthrow organized government by force or

violence. For this reason, we conclude that the evidence is legally insufficient to sustain his conviction of criminal anarchy. Although Rosales argues that NRS 203.115 violates the First Amendment and is unconstitutionally vague, we do not reach these arguments, because we conclude that the statute, properly construed, does not permit his conviction of criminal anarchy on the evidence presented. See Brewery Arts Ctr. v. State Bd. Examiners, 108 Nev. 1050, 1055, 843 P.2d 369, 373 (1992) (“This court will not decide a constitutional issue unless necessary to the determination of a case.”).

B. Discharging firearm into an occupied structure

Rosales argues that the State failed to establish the corpus delicti for the seven counts of discharging a firearm into an occupied structure. See Azbill v. State, 84 Nev. 345, 352, 440 P.2d 1014, 1018 (1968) (state must prove corpus delicti beyond a reasonable doubt). He also argues that there was insufficient evidence to connect him with the shootings. Neither argument has merit.

The corpus delicti is the “fact of a transgression.” Black’s Law Dictionary 369 (8th ed. 2004). “The corpus delicti of a crime must be proven independently of the defendant’s extrajudicial admissions.” Gaxiola v. State, 121 Nev. 638, 650, 119 P.3d 1225, 1233-34 (2005) (quoting Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004)).

“The independent proof may be circumstantial evidence . . . , and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. If the independent proof meets this threshold requirement, the

accused's admissions may then be considered to strengthen the case on all issues."

Id. at 650, 119 P.3d at 1234 (alteration in original) (quoting Doyle, 112 Nev. at 892, 921 P.2d at 910).

Rosales bases his corpus delicti challenge on an argument that the only evidence of the shootings into homes was his admission—after apprehension in California—that he shot into five homes. Rosales undermines his own argument, however, by conceding that the State supplied witnesses to all seven charges of discharging the firearm into an occupied structure. The concession is appropriate: the State produced testimony from police investigators and the occupants of homes to confirm that shootings had occurred in each of the seven homes.

Rosales's real argument is that the State failed to prove that he was the shooter, which is a sufficiency of the evidence argument. But the record contains substantial evidence that Rosales was the perpetrator of the gunshots into all seven of the homes. McNair, 108 Nev. at 56, 825 P.2d at 573 (“[A] verdict supported by substantial evidence will not be disturbed by a reviewing court.”). Rosales told Officers Jenkins and Hopkins, during an interview following his arrest in Whittier, that he shot into the kitchens of five houses. Witnesses to at least five of the shootings confirmed that bullets entered through kitchen windows. Richard Gammick's testimony reinforced Rosales's admission, and added to it; he attested that he received one threatening phone call in which the caller took credit for firing into seven houses using a “smooth-bore .32 ACP,” a description fitting the gun found when Rosales was apprehended in Whittier. A ballistics examination of bullets fired into several of the homes revealed that they lacked “land and groove impressions” that would exist in bullets fired from a gun that had not been altered. This confirmed

that the bullets at these locations likely came from a smooth-bore .32 caliber gun like Rosales's.

Based on this evidence, a rational juror could have concluded that Rosales fired into all seven homes and was guilty of all seven counts of discharging a firearm into an occupied structure, which defeats Rosales's substantial evidence challenge. McNair, 108 Nev. at 56, 825 P.2d at 573.

C. Aggravated stalking

Rosales also argues that the State failed to present sufficient evidence to sustain the aggravated stalking conviction. Specifically, he argues that the State's evidence fell short of NRS 200.575(2)'s standards for aggravation because the prosecution did not prove that Rosales intended to cause the victim "to be placed in reasonable fear of death or substantial bodily harm." NRS 200.575(2). We disagree. Based on the evidence introduced, a rational jury could have found that Rosales intended to place Gammick in "reasonable fear of death or substantial bodily harm." McNair, 108 Nev. at 56, 825 P.2d at 573.

The evidence at trial established that Rosales stalked Richard Gammick by means of "graffiti, messages, phone calls and/or letters." That evidence included photos of graffiti that said: "DA Dick Gam will die soon," "kill Gammick now," "Dick Gammick must be killed now!!," "Dick Gammick I will (kill) you!! Mother Fucker!," "Fuck you Gammick, October 1 Phone Conversation," "Dick Gammick drives a sport-utility kill him now!," and "Gammick will die." Additionally, Rosales made at least five threatening phone calls to Gammick at home and at work, telling Gammick, among other things, to "get a haircut," to "have a heart attack," and to "have a good fucking weekend." He cross-referenced the graffiti in the phone calls to Gammick.

Gammick testified that he felt harassed and, at some times, thought he was being watched because the caller seemed to know his schedule. Within several days of the October 1 phone conversation, for example, graffiti appeared that memorialized the talk. Responding to his fear, Gammick started carrying a gun and, at times, wearing a bulletproof vest. Gammick told the jury that, throughout the ordeal, the graffiti and repeated threatening phone calls left him frightened, intimidated, harassed, and fearing substantial bodily harm.

A jury could infer from this evidence that Rosales intended by his acts “to cause [Gammick] to be placed in reasonable fear of death or substantial bodily harm.” NRS 200.575(2); NRS 193.200 (intent is manifested by the circumstances of the offense). We thus decline to disturb the jury verdict finding Rosales guilty of aggravated stalking on this record.

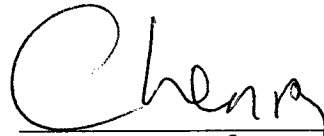
D. Attempted murder


Rosales argues that the State failed to prove the element of “express malice” as part of its attempted-murder-with-a-deadly-weapon charge. In Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988), this court explained that to prove attempted murder the prosecution must prove that the defendant acted with “deliberate intention to kill.” See NRS 193.330; 200.010. Rosales argues that the State did not produce enough evidence to prove a “deliberate intention to kill” because Ms. Castillo did not testify that she saw him aim the gun at her and the bored-out gun fired “knuckle balls” that flew every which way. We conclude that the record contains substantial evidence from which the jury could infer that Rosales acted with “express malice” and “deliberate intention to kill.” See McNair, 108 Nev. at 56, 825 P.2d at 573.

Intent “is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.” NRS 193.200. “NRS 200.020(1) defines ‘express malice’ as ‘that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.’” Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (emphasis omitted). In Sharma, an attempted-murder-with-a-deadly-weapon case, we noted that NRS 193.200 and 200.020 “implicitly acknowledge 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.” Id.

Here, the external circumstances support the jury’s inference that Rosales acted with express malice in shooting Ms. Castillo. When Ms. Castillo encountered Rosales in the office building, he fired two shots at her, hitting her with one. The jury could have concluded that firing two shots at her from the end of a hallway was sufficient evidence of intent to kill. See Valdez v. State, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) (“[T]he jury may infer intent to kill from the manner of the defendant’s use of a deadly weapon.”); Dearman v. State, 93 Nev. 364, 367, 566 P.2d 407, 409 (1977) (use of deadly weapon can be evidence of intent to murder); see also Jeffrey F. Ghent, Annotation, What Constitutes Attempted Murder, 54 A.L.R.3d 612 (1973) (firing a gun at victim and wounding her can be sufficient to prove intent to kill). Also supporting an inference of intent to kill was Rosales’s graffiti boasting that he “did the [Kietzke Lane office building] shooting . . . [one] hit, lower leg.”

For these reasons, we
ORDER the judgment of the district court AFFIRMED IN
PART AND REVERSED IN PART.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk