IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRUE JEFFERSON A/K/A VINCENT JEFFERS A/K/A ANDRUE LEE JEFFERSON A/K/A AJ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62508

FILED

FEB 27 2014

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 second-degree murder. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Sufficiency of the evidence

Appellant Andrue Jefferson contends that insufficient evidence supports his conviction. He argues that the State failed to prove that he acted with malice, that the consequence of his act naturally tended to take human life, or that he aided and abetted another in committing an act that naturally tended to take human life. We review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that 40 to 60 young people gathered at the Stead race track for a bonfire party. Tyler DePriest brought Jared Hyde to the party in his Dodge Durango. Towards midnight, a fight broke

out between two girls. Taylor Pardick tried to break-up the fight but he was confronted by Jake Graves after he warned one of the girls that he was not afraid to hit her. Pardick did not want to fight with Graves, but several people egged the fight on.

Robert Schnueringer and Anrdue Jefferson were among those encouraging the fight. They identified themselves as belonging to a group called "Twisted Minds" or "TM," and they both shouted "TM" and urged Pardick to "rep for TM" by fighting Graves. When Pardick refused to fight, Jefferson reached around Graves and struck Pardick several times to get the fight started. Eric Boatman tried to intercede on Pardick's behalf, but ultimately Graves struck both of them and knocked them to the ground.

After these fights, Hyde headed towards the Durango. He walked alone and said out loud, "This is bullshit. You just knocked out my best friend." Zachary Kelsey, whose friends included Graves and Schnueringer, overheard Hyde and confronted him. Although Hyde's hands were held high, like he did not want to fight, Kelsey struck him twice in the head. Kelsey then grabbed Hyde as he fell and kneed him in the head twice. Zach Clough and Michael Opperman seized and restrained Kelsey, but Kelsey continued to yell at Hyde.

When Hyde picked himself up, he had blood running from his mouth, his shirt was torn, and he looked distraught. He said to DePriest, "Let's go, let's get out of here. I just got rocked," and he continued to move towards the Durango. While Kelsey continued to yell at him, Hyde approached the passenger side of the Durango where he was confronted by Schnueringer and Jefferson. They asked him if he was "still talking smack" and he replied, "No, I'm not, I'm not." Hyde was scared, about to

cry, and did not want to be there. He did not have his arms up and he was not defending himself when Schnueringer punched him in the head.

Schnueringer delivered a forceful, knockout punch that caused Hyde's knees to buckle and his body to fall to the ground. Jefferson got in front of Hyde's face, exclaimed, "You got knocked the fuck out," and then delivered a similar punch to Hyde's head. Schnueringer and Jefferson kicked Hyde as he lay on the ground, and Jefferson celebrated by jumping around and saying, "I slept him, I slept him." When Cliffton Fuller checked his friend for a pulse, he felt something at first and then it went away.

Hyde was not breathing when he arrived at the hospital and efforts to resuscitate him failed. The medical examiner, Dr. Ellen Clark, conducted a forensic autopsy of the body. She determined that the manner of death was homicide and the cause of death was subarachnoid hemorrhage due to blunt force trauma. She found five separate areas of bleeding beneath the scalp surface and testified that these injuries were the result of blunt force trauma and they were consistent with being punched or kicked in the head numerous times. She also testified that the first blow to Hyde's head could have been the fatal blow, she could not identify one fatal impact site, and, in her opinion, the multiple injuries to different parts of Hyde's brain were cumulative. Dr. Clark had consulted with Dr. Bennet Omalu during the autopsy. Dr. Omalu is an expert on brain trauma and he testified that each and every one of the blows delivered to Hyde's head contributed to his death due to the phenomenon of repetitive traumatic brain injury.

We conclude that a rational juror could reasonably infer from this evidence that Jefferson acted with malice when he attacked Hyde and

caused his death. *See* NRS 200.020; NRS 200.030(2); *Earl v. State*, 111 Nev. 1304, 1314, 904 P.2d 1029, 1035 (1995) (second-degree murder based on implied malice does not require an intentional killing but rather a killing under circumstances that show an abandoned and malignant heart). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Evidentiary decision

Jefferson contends that the district court erred by admitting gang-affiliation evidence. He argues that because the State did not seek a gang enhancement pursuant to NRS 193.168 or file a notice that it would present expert testimony to prove that TM was a gang, he did not receive adequate notice that he would have to defend against gang accusations and was thereby deprived of a fair trial. He asserts that prejudicial hearsay testimony of his alleged gang affiliation was presented to the jury as a result of prosecutorial misconduct and ineffective assistance of counsel. And he claims that this testimony violated NRS 48.045(2) because it was evidence of uncharged misconduct that had not been subjected to a hearing pursuant to *Petrocelli v. State,* 101 Nev. 46, 692 P.2d 503 (1985).

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The district court conducted a hearing on the defendants' motion to exclude the TM evidence. The State informed the district court that it was prepared to present evidence at a *Petrocelli* hearing, recited the facts in the case, argued that the evidence of who was

aligned with TM and whether they were making statements about TM was inextricably intertwined with the facts and circumstances of the case, and asserted that it did not intend to establish that TM was a criminal gang.[1] The defendants acknowledged that the State was not trying to prove a bad act and conceded that the evidence the State sought to admit was res gestae. The district court concluded that the evidence was res gestae and a *Petrocelli* hearing was unnecessary, and it denied the motion.

We conclude that the district court did not abuse its discretion by admitting this evidence, *see* NRS 48.035(3) (res gestae doctrine); *see generally Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78-79 (2004) (discussing the admission of gang-affiliation evidence), and Jefferson has not demonstrated that the prosecutor's conduct constituted plain error, *see Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved claims of prosecutorial misconduct for plain error), and we decline to consider Jefferson's ineffective-assistance claim, *see Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) (claims of ineffective assistance of counsel should be raised on a post-conviction petition for a writ of habeas corpus rather than on direct appeal).

Aiding and abetting instruction

Jefferson contends that the district court erred by instructing the jury that second-degree murder can be based on a theory of aiding and abetting. Relying on *Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002), he argues that jury instruction no. 31 provides an incorrect statement of the law because aiding and abetting requires specific intent whereas

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[1]The record indicates that after the homicide in this case, the Washoe County Sheriff's Office classified TM as a gang.

second-degree murder is a general intent crime.[2] And he asserts that the error was not harmless because the jury's general verdict did not indicate which theory it relied upon to find him guilty of second-degree murder.

We review a district court's decision to give a jury instruction for abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We review whether a jury instruction is a correct statement of the law de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). And, if an erroneous instruction has been given, we review for harmless error. *Santana v. State*, 122 Nev. 1458, 1463, 148 P.3d 741, 745 (2006).

In *Sharma*, we clarified "Nevada law respecting the requisite mens rea or state of mind for aiding and abetting a *specific intent crime*." 118 Nev. at 650, 56 P.3d at 869 (emphasis added). We held that

> in order for a person to be held accountable for the *specific intent crime* of another under an aiding or

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[2]Jury Instruction No. 31 provided,

> Under a theory of aiding and abetting for Murder in the Second Degree, the State has the burden to prove beyond a reasonable doubt that the defendant(s) did intend to commit or aid in the commission of a battery upon the victim with implied malice.
>
> To find defendant(s) guilty of Murder in the Second Degree under a theory of aiding and abetting, the State must prove beyond a reasonable doubt that the defendant(s) intended to commit a battery upon the victim and aided, abetted, counseled, or encouraged another defendant with malignant recklessness of another's life and safety or in disregard of social duty.

> abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.

Id. at 655, 56 P.3d at 872 (emphasis added). Because second-degree murder is a general intent crime, *see Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (specific intent is not necessary to support a second-degree murder conviction), our holding in *Sharma* does not apply, *see Bolden v. State*, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005) (appellant's reliance on *Sharma* was misplaced because the crimes he was accused of aiding and abetting were not specific intent crimes), *overruled on other grounds by Cortinas v. State*, 124 Nev. 1013, 195 P.3d 315 (2008). We conclude that jury instruction no. 31 correctly informed the jury of the state of mind necessary to support a second-degree murder conviction based on the State's theory of aiding and abetting and that the district court did not err by giving this instruction.

Additional peremptory challenges

Jefferson contends that the district court erred by denying the defendants' motion for additional peremptory challenges. He argues that each defendant was entitled to eight peremptory challenges because life imprisonment was a possibility in this case and the codefendants had positions that were adverse to one another. And he asserts that the district court's error in limiting the number of peremptory challenges is not subject to harmless error analysis. However, Jefferson fails to acknowledge NRS 175.041, which specifically states, "[w]hen several defendants are tried together, they cannot sever their peremptory challenges, but must join therein." *See also White v. State*, 83 Nev. 292, 297, 429 P.2d 55, 58 (1967); *Anderson v. State*, 81 Nev. 477, 406 P.2d 532 (1965). Accordingly, the district court did not err in this regard.

Having concluded that Jefferson is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Chief Judge, The Second Judicial District Court
Second Judicial District Court Dept. 10
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk