IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SCHNUERINGER A/K/A ROBERT JOSEPH SCHNUERINGER A/K/A BOBBY SCHNUERINGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62509

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 Robert Schnueringer contends that insufficient evidence supports his conviction. He argues that the State failed to prove that he acted with malice and the consequences of his act naturally tended to take human life. And he asserts that at most he is guilty of involuntary manslaughter. 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 Andrue 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 Schnueringer 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, P.2d 904 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 ruling

Schnueringer contends that the district court erred by admitting gang-affiliation evidence. He argues that this evidence should not have been admitted because the State did not seek a gang enhancement and did not present expert testimony about gangs. And he asserts that the issue of whether TM was a gang was irrelevant, the lay testimony about TM was misleading and more prejudicial than probative, and the testimony about his involvement with TM was inadmissible as evidence of an uncharged act.

"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' pretrial motion to exclude the TM evidence. The State informed the district court that it was prepared to present evidence at a hearing conducted pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), argued that the evidence of how people were aligned 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).

Additional peremptory challenges

Schnueringer 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. He claims that whether codefendants with antagonistic defenses should each be entitled to eight peremptory challenges is an open question of law and asserts that the rule should depend on whether the interests of the codefendants are adverse and therefore constitute *separate sides* for the purposes of NRS 175.051(1). However, Schnueringer 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*,

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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.

81 Nev. 477, 406 P.2d 532 (1965). Accordingly, the district court did not err in this regard.

Tavares instruction

Schnueringer contends that the district court erred by failing to give a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), *as modified by Mclellan*, 124 Nev. at 270, 182 P.3d at 111. During Michael Opperman's direct examination it became necessary to conduct a *Petrocelli* hearing regarding a possible uncharged bad act or criminal offense. The district court heard testimony that Opperman received a telephone call from Kelsey shortly after he returned home from the bonfire party and that Opperman recognized Schnueringer's voice in the background saying, "You better not rat me out because I'm not going down for murder." The district court determined that Schnueringer's statement was proven by clear and convincing evidence, was more probative than prejudicial, and was admissible under NRS 48.045(2) for the limited purpose of proving intent and identity. However, the district court neglected to instruct the jury on the limited purpose for which this evidence could be considered. We conclude that the failure to give a limiting instruction was harmless error under the facts of this case. *See Rhymes v. State*, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005) (reviewing the failure to give a *Tavares* instruction for harmless error).

Aiding and abetting instruction

Schnueringer 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 both second-degree murder and battery (the underlying offense) are general intent crimes.[2]

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 and battery are general intent crimes, *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.[3]

Victim impact statements

Schnueringer contends that the district court erred by considering unsworn victim impact statements at sentencing, asserts that Hyde's aunt is not a victim for purposes of the victim-impact-statement statute, and claims that the victim impact statements exceeded the permissible scope of such statements. "When properly preserved for appellate review, we analyze the erroneous admission of victim impact

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[3]To the extent that Schnueringer also argues that this instruction is incorrect because "the crime alleged to have been aided and abetted . . . must be one different from the cause of the murder," he has failed to support this argument with legal authority and we conclude that it is meritless.

statements for harmless error." *Dieudonne v. State*, 127 Nev. ___, ___ n.3, 245 P.3d 1202, 1207 n.3 (2011). The record reveals that Schnueringer expressly stated that he had no objection to Hyde's aunt reading the victim impact statements prepared by Hyde's father and sisters, he did not object to the contents of the father's and sisters' written statements, and his objection to the grandmother's testimony that the codefendants chose to inflict violence on another person was overruled. We conclude from this record that Schnueringer has not demonstrated error. *See* NRS 176.015(3)(b) (victims may "[r]easonably express any views concerning the crime, *the person responsible*, the impact of the crime on the victim and the need for restitution" (emphasis added)); *see also Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) ("A victim can express an opinion regarding the defendant's sentence . . . in non-capital cases."), *overruled on other grounds by Nunnery v. State*, 127 Nev. ___, 263 P.3d 235 (2011).

Having concluded that Schnueringer 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
Janet S. Bessemer
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Washoe County District Attorney
Washoe District Court Clerk