

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK BRIAN DUNN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62676

FILED

MAR 02 2015

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second degree murder and evidence concealment. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

I.

The appellant, Patrick Dunn, went out drinking in downtown Elko with three friends on the same night that Erik Espitia went out drinking in downtown Elko with three of his relatives. No one in the Dunn party had ever met the members of the Espitia party; they first encountered each other in the downtown Elko parking corridor as they headed to their respective vehicles to go home. Upon that encounter a fist fight ensued in which every member of both groups became involved. At one point, Dunn extricated himself from the fight, ran to his vehicle, loaded the gun he kept in his car, and returned to shoot and kill Erik Espitia. Thereafter, Dunn left the parking corridor, made a stop to "get rid of the gun," and drove back to his house where he put his clothes in the laundry hamper and fell asleep.

The State later charged Dunn with first-degree murder and concealment of evidence. At trial, Dunn claimed self-defense. Because self-defense would not be available to Dunn if he were the first-aggressor, see NRS 200.200, he attempted to introduce circumstantial evidence that

the Espitia group had instigated the brawl, specifically evidence of Espitia's and his brother Sal's violent characters. This evidence included:

- (1) Two articles from the Elko Daily Free Press identifying Sal Espitia as having been involved in a physical altercation at La Cantina (the bar the Espitias visited on the night in question) on dates following Espitia's death;
- (2) A declaration of probable cause in the arrest of one, Enrique Valencia, in which a police officer wrote that he "recognized one male as Sal Espitia";
- (3) Preliminary hearing testimony by a police officer that there were often fights at La Cantina and that "[s]ometimes [Espitia has] maybe been involved, sometimes not";
- (4) Preliminary hearing testimony by an officer that he had previously arrested Espitia;
- (5) Testimony from Esther Espitia that her brother, Erik, "gets in fights."

The State filed a motion in limine seeking to limit evidence of the Espitias' alleged characters for violence to reputation and opinion testimony on direct examination and evidence of specific conduct on cross examination. The district court granted the State's motion, and a jury later convicted Dunn of second-degree murder and concealment of evidence.

Dunn appeals the second-degree murder conviction, making two principal arguments: (1) the district court erred by not permitting him to admit evidence of specific acts of violent conduct by Espitia and Sal, which he was unaware of at the time of the killing, as circumstantial evidence that Espitia or Sal had been the first aggressor in the fight that ultimately culminated in the killing, and (2) insufficient evidence supported his second-degree murder conviction. We affirm.

II.

Generally, evidence of specific acts of violence by a victim is not admissible to prove that the victim acted in conformity with character on a particular occasion, though in certain instances, evidence of such acts may be admitted as circumstantial evidence of a defendant's state of mind. *Daniel v. State*, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003). This is not such a case because Dunn was not aware of the acts in question and they therefore had no bearing on his perceptions of either Espitia or Sal. *Id.* Thus Dunn relies on, what he argues is, an alternative theory of relevance, namely that the specific acts tended to corroborate his theory that the Espitia group started the fight.

Dunn's theory seems to belie his argument that the evidence was not submitted to prove that the Espitias acted in conformity with their supposed violent propensities because absent such an improper inference the evidence does not obviously support that the Espitias were the first aggressors. Still, citing *State v. Maples*, 300 P.3d 749, 755 (N.M. App. 2013) (holding that evidence was not improper propensity evidence where admitted to prove that a victim acted in conformity with her body's response to a significant amount of methamphetamine rather than her character) and *State v. Fish*, 213 P.3d 258, 273 (Ariz. Ct. App. 2009) (holding that evidence was not admitted for the improper purpose of propensity where it also rebutted the State's argument that a defendant fabricated or exaggerated a victim's acts on the date of the shooting where defendant's credibility was central to case), Dunn argues to the contrary. But, even if we consider the foreign authorities to which Dunn cites, neither *Maples* nor *Fish* would apply in this case. Unlike *Maples*, 300 P.3d at 755, evidence about Sal Espitia did not corroborate anything that Erik Espitia, the decedent, said or did directly before the killing. And

unlike *Fish*, 213 P.3d at 271-73, there were many witnesses to the killing, and as such, Dunn's credibility was not the main issue.

Nonetheless, even if the evidence is not admissible under Nevada's present rules of evidence, *see, e.g., Daniel*, 119 Nev. 498, 78 P.3d 890, Dunn presses that the excluded evidence was "relevant to the critical questions in the case—how did the brawl start and what happened to cause Patrick Dunn to pull out a gun" and that this court should overrule *Daniel* to allow in "highly probative and relevant 'other acts' evidence" when a defendant claims self-defense, even where that defendant had no knowledge of his victim's other acts. Assuming *arguendo* that Dunn properly proffered the above evidence and that he preserved this argument for appeal, we reject his invitation to overrule *Daniel* because Dunn did not proffer "highly probative" specific conduct evidence. The newspaper articles and probable cause report describe events that occurred *after* the incident in this case where Sal Espitia *defended* another person and himself, *i.e.*, Sal was not the aggressor. Similarly, the testimony that Erik Espitia "[got] in fights" is not meaningfully different from the reputation evidence that Dunn admitted through cross-examination, namely, that the Espitias have a reputation for "being tough" and fighting. And because of the probative reputation and opinion testimony, Dunn effectively argued about the Espitias' characters throughout his closing argument, emphasizing that he was up "against fighters, violent people, bullies," and that Erik Espitia, in particular "was very aggressive when he drank . . . He is violent, he's a fighter."

Accordingly, the district court did not abuse its discretion by excluding the specific act evidence. *Holmes v. State*, 129 Nev. ___, ___, 306 P.3d 415, 418 (2013) ("A decision 'to admit or exclude evidence will not be

reversed on appeal unless it is manifestly wrong.” (quoting *Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006)).

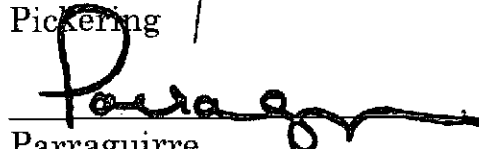
III.


“A reviewing court will not disturb a verdict on appeal if it is supported by substantial evidence.” *Gordon v. State*, 121 Nev. 504, 508, 117 P.3d 214, 217 (2005) (citation omitted). Here, it was not disputed that Dunn shot and killed Espitia. In terms of his intent to do so, Dunn told officers that he had aimed below Espitia’s waist so as to avoid hurting him, but the jury could have reasonably inferred his intent to kill from the evidence that: Dunn retreated from the fight and returned with a loaded gun; aimed it at an unarmed man and fired though witnesses for both sides testified that the fight had since ceased; fled; disposed of the weapon and other physical evidence; lied to the police about his recollection of the events; and eventually admitted that he had just “snapped.” Therefore, sufficient evidence supported the jury’s verdict.

For these reasons, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

¹We have carefully considered Dunn’s remaining assertions of error and find that they are without merit.

cc: Hon. Alvin R. Kacin, District Judge
Franny A. Forsman
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk