IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA KENNETH ESPINOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66984

FILED

SEP 01 2015

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of home invasion and conspiracy to commit home invasion. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Joshua Espinoza claims insufficient evidence supports his convictions. Espinoza argues the State failed to prove he conspired to commit home invasion and failed to overcome the evidence supporting his necessity defense beyond a reasonable doubt. We review the evidence in the light most favorable to the prosecution and determine whether a "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); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that Espinoza and Monique Banks went to the victims' home together. Espinoza was able to kick the victim's door open, Banks helped him by banging on the door, and they both entered the home together. Shortly after entering the home, they were

detained by the victims and arrested by the police. The jury heard Espinoza's and Banks' testimony that they entered the home to get away from three men who threatened them, chased them, and fired guns at them, and they begged the victims for help and asked the victims to call the police. The jury also heard testimony there were no reports of gunfire in the residential area where the victim's home was located, a police officer in the vicinity did not hear any gunfire, and Espinoza did not attempt to call for help on his cell phone before kicking the door in and entering the home.

We conclude a rational juror could reasonably infer from this testimony that Espinoza and Banks conspired to forcibly enter the home without the homeowner's permission and the illegal home invasion was not necessary to avert a greater harm.[1] *See* NRS 199.480(3); NRS 205.067(1); *Hoagland v. State*, 126 Nev. 381, 385, 240 P.3d 1043, 1046 (2010) (describing the common law defense of necessity); *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) ("Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. Therefore, if a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement, then sufficient evidence exists to support a conspiracy conviction." (internal quotation marks and citations omitted)). It is for the jury to

[1]We conclude the jury was adequately instructed on the common law defense of necessity, and we decline Espinoza's invitation to formulate specific elements for this defense. *See Hoagland*, 126 Nev. at 386, 240 P.3d at 1046.

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 its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

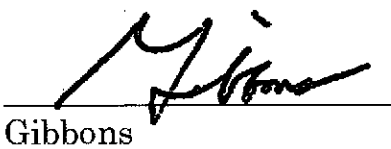
Espinoza also claims the district court erred by issuing a blanket ruling that statements made by the codefendants and offered into evidence through the State's witnesses were inadmissible. Espinoza argues the statements about being chased fell within the excited-utterance and present-sense-impression exceptions to the hearsay rule and the statements about begging the victims for help and asking them to call the police were verbal acts that did not constitute hearsay.

"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). "Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and is inadmissible unless [it falls] within an exemption or exception." *Coleman v. State*, 130 Nev. ___, ___, 321 P.3d 901, 905 (2014) (internal quotation marks and citation omitted). "Hearsay errors are evaluated for harmless error." *Id.* at ___, 321 P.3d at 911.

Here, the district court erred in ruling the statements about being chased and begging for help did not fall under the excited-utterance exception to the hearsay rule. *See* NRS 51.095; *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006) ("The proper focus of the excited utterance inquiry is whether the declarant made the statement while under the stress of the startling event. The elapsed time between the event and the statement is a factor to be considered but only to aid in

determining whether the declarant was under the stress of the startling event when he or she made the statement."). However, we conclude the error was harmless because the statements were admitted into evidence through Espinoza's and Bank's testimony.

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



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk