

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASA JAVON BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74440-COA

FILED

NOV 08 2018

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

Asa Javon Brown appeals from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Brown shot and killed Jessie Bush after Bush confronted Brown regarding five dollars that Brown allegedly owed him. The State presented evidence and eyewitness testimony that Brown came to Bush's apartment complex to buy marijuana, and that Bush confronted Brown on the outdoor stairs. The State's witnesses testified that Brown retreated out the back of the apartment complex and was absent for several minutes before he returned through the front gates and immediately began shooting at Bush, who was seated on a balcony. The witnesses further testified that throughout these events, Bush did not threaten Brown and Bush was not carrying any weapons. In contrast, Brown testified that Bush punched him and explicitly threatened to kill him in their initial confrontation on the stairs. Brown further testified that when he confronted Bush a few minutes later in an attempt to amicably resolve that threat, Bush reached behind as if to grab a gun, at which point Brown shot Bush in self-defense. The State charged

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Brown with open murder, and the jury found him guilty of second-degree murder with the use of a deadly weapon.¹

On appeal, Brown contends the evidence was insufficient to support his conviction, and argues that under these facts he could not have been convicted of more than voluntary manslaughter. We disagree.²

To support a guilty verdict under NRS 193.165(6), NRS 200.010(1), and NRS 200.030(2), the State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought and used a deadly weapon in the commission of the crime. When reviewing a challenge to the sufficiency of the evidence, 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); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Circumstantial evidence is enough to support a conviction. *Lisle v. State*, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997), *holding limited*

¹We do not recount the facts except as necessary to our disposition.

²Brown also argues the district court erred by failing to sua sponte instruct the jury that under these facts there was a rebuttable presumption that Brown acted in self-defense. Brown relies on NRS 200.130(2), which creates a rebuttable presumption that a killing is justified if the defendant did not provoke the victim and, at the time of the killing, the defendant knew or reasonably believed that the victim was unlawfully entering an occupied habitation or motor vehicle of another to commit a violent crime. The district court did not plainly err by failing to instruct the jury on this presumption, as no evidence suggested that Bush was unlawfully entering a habitation or motor vehicle at the time of the shooting.

on other grounds by *Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

The jury could reasonably infer from the evidence presented that Brown was guilty of second-degree murder with the use of a deadly weapon. The State proved the malice aforethought element beyond a reasonable doubt by presenting evidence that Brown retreated out the back of the apartment complex, was gone for a period of five or more minutes, reentered the apartment complex through the front gates, and immediately fired several shots at Bush from approximately 30-40 feet away. Moreover, the fact that Bush died from a gunshot wound proves the use of a deadly weapon. Although Brown presented evidence that Bush threatened to kill him and that he acted in self-defense when Bush moved as if to draw a gun, the State presented contradicting evidence that Bush was not armed, did not threaten Brown, and did not move as if to reach for a gun. It was for the jury to determine the weight and credibility of this conflicting testimony, and we will not disturb the jury's verdict on appeal where, as here, substantial evidence supports that verdict. See *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Accordingly, we

ORDER the judgment of conviction AFFIRMED.³

 _____, C.J.

Silver

 _____, J.

Tao

 _____, J.

Gibbons

³We do not address whether the jury should have instead found Brown guilty of a lesser crime, such as voluntary manslaughter, as we do not reweigh the evidence on appeal. See *Mitchell*, 124 Nev. at 816, 192 P.3d at 727 ("This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.").

cc: Hon. Douglas W. Herndon, District Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk