

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FABIAN LAZARO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67547

FILED

MAR 16 2016

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of battery with the use of a deadly weapon with substantial bodily harm. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Fabian Lazaro claims there was insufficient evidence to support one of his two battery convictions because the State failed to prove he conspired, aided and abetted, encouraged, counseled, or advised the alleged shooter to shoot victim Victor Najera.¹ 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).

Lazaro was charged with battery with the use of a deadly weapon with substantial bodily harm on a theory that he aided or abetted

¹Lazaro expressly conceded there was sufficient evidence to support his conviction for battering victim Kevin McDermott.

Phillip Gaines in the commission of the crime. “Under NRS 195.020, every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission is guilty as a principal.” *Sharma v. State*, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002). “A person aids and abets the commission of a crime if he aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed.” *Bolden v. State*, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1016, 195 P.3d 315, 317 (2008).

Here, the jury heard testimony that Lazaro used to live with Shawna Trueman and their relationship produced three children. Trueman ended the relationship due to Lazaro’s drinking and inability to obtain employment. After moving into a new residence, Trueman began dating Kevin McDermott and met McDermott’s friends, Victor Najera and Abraham Corrales.

Lazaro was unhappy that Trueman was dating McDermott and had asked her to come back to him. Lazaro later encountered McDermott while visiting his children at Trueman’s residence. The two argued and Trueman told them to take the argument elsewhere. Thereafter, Lazaro telephoned McDermott several times and the two exchanged threats.

A week or so before the shooting, Lazaro became angry with Trueman when he learned that Victor Najera had slapped one of Lazaro’s children. Around this timeframe, Lazaro also told Trueman he was going to have his friend Phillip Gaines shoot and kill McDermott. Lazaro said

Gaines had a gun and would shoot McDermott because McDermott would not leave Trueman alone.

Kevin McDermott, Victor Najera, and Abraham Corrales spent much of February 6, 2012, drinking beer and whiskey. Towards evening, McDermott called Trueman and asked her to give Najera and Corrales a ride home. After collecting Najera and Corrales, Trueman drove to a gas station. Along the way, her phone rang several times. The phone indicated Lazaro was calling, and she did not answer his calls.

At the gas station, the phone rang again and Najera answered it. Initially, he was speaking with Lazaro and told Lazaro, "I didn't purposely hit your son just to hit him." The phone was later passed to someone else and Najera believed he was speaking with a black male due to the speaker's speech pattern and use of the word "nigger." The conversation was heated and Najera agreed to meet with the speaker and fight.

Trueman dropped Najera and Corrales off at a 99 Cent store, and McDermott picked them up in his truck and drove them to Lazaro's mother's house. Lazaro was not there, so they drove to Trueman's house. At Trueman's house, they encountered Fabian Lazaro, Merley Lazaro, Jose Lazaro, Robert Kiel, and Phillip Gaines—all of whom had arrived in Merley's Impala.

When McDermott, Najera, and Corrales exited the truck, McDermott was wearing black gloves and carrying a crowbar. And when Fabian Lazaro, Merley Lazaro, Jose Lazaro, Robert Kiel, and Phillip Gaines exited the Impala, Fabian Lazaro was holding a beer bottle, Jose Lazaro was holding a brick or a boulder, and Phillip Gaines was holding a handgun.

Najera approached Gaines and Gaines shot him in the chest. Najera turned and ran and told McDermott to run as well. When McDermott turned to run, Gaines asked him where he was going and Fabian Lazaro told Gaines to shoot McDermott. Gaines shot McDermott in the back of the head, and then shot him again as he lay on the ground. Fabian Lazaro approached McDermott and kicked him in the face and swore at him. Najera suffered a collapsed lung, a broken rib, and a scar, and he continues to suffer pain during periods of cold weather.

We conclude a rational juror could reasonably infer from this evidence that Lazaro aided and abetted Phillip Gaines in battering Najera with a deadly weapon causing substantial bodily harm. *See* NRS 0.060; NRS 193.165(6); NRS 200.400(1)(a); *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (“Circumstantial evidence alone can certainly sustain a criminal conviction.”). 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).

Lazaro also claims the district court erred by refusing to take judicial notice of Phillip Gaines’ verdict of acquittal or allow Lazaro to introduce evidence that Gaines was tried and acquitted of the very same charges he was alleged to have committed.

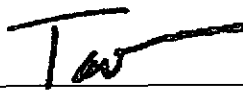
We review the district court’s judicial-notice decisions and evidentiary rulings for abuse of discretion. *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995); *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Generally, a district court will not take judicial notice of facts in a different case. *In re AMERCO Derivative Litigation*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 699 n.9 (2011). “Although relevant,


evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or misleading the jury." NRS 48.035(1).

Here, the district court declined to take judicial notice of the final result in Phillip Gaines' trial. The court further ruled that evidence of Gaines' trial would be more prejudicial than probative because evidence that was not admissible in Gaines' trial would be admissible in Lazaro's trial and "to give the final result [of Gaines' trial] without any of the details would [create] a collateral trial about a trial, about the case." We conclude the district court did not abuse its discretion in this regard.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Brent D. Percival
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk