IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOMINICK LEMAR MABRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79484-COA

ORDER OF AFFIRMANCE

Dominick Lemar Mabry appeals from a judgement of conviction, pursuant to a jury verdict, of battery by strangulation. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Mabry was charged with battery-related offenses after two violent altercations with his roommate, Steven Tillman.[1] Mabry and Tillman, who had lived together for about two months, had agreed to pay rent in equal portions. At the end of May, Tillman confronted Mabry through text message about Mabry's half of the rent for June, which Mabry had not yet paid. Tillman and Mabry exchanged a series of contentious text messages over the next few days. In the last message, sent on June 5, 2018, Mabry said, "That's the last time you're going to disrespect me, I'm on my way." Moments later, while waiting for Mabry to arrive, Tillman called 3-1-1 to ask about the eviction process. During the phone call, Mabry arrived, entered Tillman's room, and attacked Tillman, got on top of Tillman, and placed his hands on Tillman's neck and squeezed for several seconds before he stopped and left Tillman's room. Upon arrival, the police arrested and charged Mabry with battery by strangulation. Mabry moved out of the residence two days later.

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

On June 10, 2018, Tillman returned to the residence. As he approached the front door, someone attacked him from behind and then left the scene with his phone and wallet. Tillman informed police that Mabry was the attacker because he saw Mabry, recognized his voice, and heard Mabry state, "Do you think this is funny, kicking me out?"

The police arrested Mabry, and he was initially charged in separate cases for battery by strangulation for the June 5th incident, and robbery and battery with substantial bodily harm for the June 10th incident. The State moved to join the offenses into one case, arguing that the two altercations occurred close in time, involved the same victim, and were motivated by the dispute over rent money. In the alternative, the State moved to admit evidence of the separate charges as evidence of prior bad acts. The district court granted the State's motion to join the offenses, holding that the offenses were related because they occurred close in time and "the Defendant could be acting under the emotion and anger of everything in the initial dispute."

At trial, the jury considered images of Tillman's injuries, a recording of the June 5th altercation caught on the 3-1-1 call, and various testimony, including that of Tillman and Mabry. Mabry admitted that he choked Tillman, but he claimed he did so in self-defense. With regard to the June 10th robbery and battery charges, Mabry claimed that he was not the perpetrator because he was sleeping at his mother's home when the robbery and battery occurred. The jury convicted Mabry of only battery by strangulation, acquitting him of the charges relating to the second attack. On appeal, Mabry argues that the district court abused its discretion by joining the offenses and that there was insufficient evidence to support the battery by strangulation conviction.

We first consider whether the district court abused its discretion by granting the State's motion to join the June 5 and June 10 offenses. Mabry argues that the district court abused its discretion because it failed to identify a common scheme or plan between the offenses as required by NRS 173.115. He argues that, as a result of the joinder of offenses, the jury convicted him of battery by strangulation because it could not discern his guilt for each offense. The State responds by arguing that joinder was appropriate because the June 5 altercation is connected to the June 10 altercation through the underlying dispute over rent, closeness in time, and both altercations involving the same victim. The State also contends that the offenses required joinder because the June 5 altercation established identity, motive, intent, and common scheme of the June 10 altercation, and, to the extent that joinder was in error, it amounted to harmless error because the joinder of offenses did not influence the jury's verdict.

We review a district court's decision to join offenses in a single charging document for an abuse of discretion. *See Farmer v. State*, 133 Nev. 693, 701, 405 P.3d 114, 122 (2017). An error in the joinder of offenses is reviewed for harmless error under the standard for nonconstitutional errors. *Rimer v. State*, 131 Nev. 307, 320-21, 351 P.3d 697, 708 (2015). We will reverse a conviction for misjoinder when the error caused by misjoinder had a "substantial and injurious effect or influence in determining the jury's verdict." *Mitchell v. State*, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1985)).

NRS 174.155, which addresses joinder of charging documents, states, in pertinent part:

> The court may order two or more indictments or information or both to be tried together if the offenses . . . could have been joined in a single

> indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Under NRS 173.115, the district court may join separate offenses if they are (1) "[b]ased on the same act or transaction" or (2) "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Separate offenses are part of a "common plan" when they are "related to one another for the purpose of accomplishing a particular goal." *Farmer*, 133 Nev. at 698, 405 P.3d at 120 (internal quotation marks omitted). Separate offenses are part of a "common scheme" when they "share features idiosyncratic in character." *Id.* (internal quotation marks omitted).

The district court emphasized the shared features and characteristics between the separate offenses, which suggests that it joined the offenses under the "common scheme" theory. For separate offenses to be joined under the "common scheme" theory, the offenses must share more than "some trivial elements," meaning "the offenses share a concurrence of common features as to support the inference that they were committed pursuant to a common design." *Id.* at 699, 405 P.3d at 120-21. These features may include "(1) degree of similarity of offenses; (2) degree of similarity of victims; (3) temporal proximity; (4) physical proximity; (5) number of victims; and (6) other context-specific features." *Id.* (internal citations omitted).

Additionally, "[c]ross-admissibility of the evidence in the . . . separate charges is one of the key factors in determining whether joinder is appropriate." *Honeycutt v. State*, 118 Nev. 660, 668, 56 P.3d 362, 367 (2002); *Rimer*, 131 Nev. at 322, 351 P.3d at 708-09 ("[T]he district court must still consider whether the evidence of either charge would be admissible for a relevant, nonpropensity purpose in a separate trial for the

other charge."). However, even if a proper basis for joinder exists, joinder is improper if it creates manifest prejudice against the defendant. *Rimer*, 131 Nev. at 323-24, 351 P.3d at 709 (providing that severance is required if "[t]he simultaneous trial of the offenses [would] render the trial fundamentally unfair" (internal quotation marks omitted)). The underlying concern is that "the jury may believe that a person charged with a large number of offenses has a criminal disposition, and as a result may cumulate the evidence against him or her or perhaps lessen the presumption of innocence." *Id.* at 323, 351 P.3d at 709 (quoting 1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 222 (4th ed. 2008)).

In this case, joinder was not an abuse of discretion because the June 5 offenses shared a common scheme with the June 10 offenses and there was a high degree of evidence cross-admissibility in the separate offenses. The two altercations were close in time, occurring five days apart, involved the same victim, and were related through the underlying dispute over rent. Tillman testified that Mabry himself linked the two incidents when he asked during the second attack, "Do you think this is funny, kicking me out?" This statement only makes sense in view of the June 5 attack and the fact that Mabry was forced to move out of the residence between the June 5 and June 10 attacks. Therefore, the district court was within its discretion to grant joinder of the offenses. *See* NRS 174.155; EDCR 3.10.

Moreover, the district court considered and rejected Mabry's arguments that joinder would be prejudicial. The joinder of offenses involving only two altercations did not result in manifest prejudice against Mabry because the offenses did not suggest he had a "criminal disposition," which was the concern noted in *Rimer*. Mabry's strangulation charge did not show that Mabry was more likely to attack and rob Tillman five days

later. In fact, the jury was obviously able to separate the two events, finding Mabry guilty of battery by strangulation in the June 5 altercation, but acquitting him of all charges associated with the June 10 altercation. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that the jury is presumed to follow the district court's instructions). Therefore, the district court did not abuse its discretion in granting joinder of offenses, and even if it did, any error was harmless.

Next, we consider whether substantial evidence supports Mabry's battery by strangulation conviction. Mabry argues that the only evidence supporting his conviction is Tillman's testimony, which lacks credibility because he struggled to identify Mabry as the attacker in the June 10 altercation. In response, the State argues that Mabry's battery by strangulation conviction is supported by the threatening text message Mabry sent Tillman; recorded 3-1-1 call where the jury could hear the June 5 fight; and the testimony of Tillman, the crime-scene analysist who testified that Tillman's injuries were consistent with those of a strangulation victim, Detective Jimenez, and, most importantly, Mabry.

We will not reverse a jury's verdict on appeal when that verdict is supported by substantial evidence. *Moore v. State*, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Leonard v. State*, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998). Conversely, evidence is insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." *Evans v. State*, 112 Nev.

1172, 1193, 926 P.2d 265, 279 (1996) (quoting *State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994) (emphasis omitted).

Here, Mabry's battery by strangulation conviction is supported by substantial evidence. Tillman testified in detail that Mabry strangled him twice during the June 5 altercation. *See Gatlin v. State*, 96 Nev. 303, 303-04, 608 P.2d 1100, 1100 (1980) (holding that the victim's testimony was sufficient to support conviction for robbery with use of a deadly weapon). Officer Jimenez further corroborated the strangulation by testifying that when he asked Mabry if he choked Tillman, Mabry said he "almost pulled [Tillman's] tongue out." Mabry conceded that he strangled Tillman, though he claimed he did so in self-defense. In addition to the aforementioned testimony, the jury considered images of Tillman's neck injuries, the text messages exchanged between Mabry and Tillman, and the 3-1-1 audio recording of the fight. Based on the evidence presented at trial, including Mabry's own admission, the jury had sufficient evidence to find that Mabry willfully and intentionally strangled Tillman, and he did not act in self-defense. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." (internal quotation marks omitted)).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Richard Scotti, District Judge
Law Office of Benjamin Nadig, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk