

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDMUNDO OLIVERAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79482-COA

FILED

JUL 22 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Edmundo Oliveras appeals a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit murder, one count of second-degree murder with use of a deadly weapon, and one count of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

One evening in December 2009, Edmundo Oliveras was at the home of his sister, Elba Oliveras, with Elba's husband, Rene Zambada. Oliveras and Zambada left the home with Ulises Mendez, the victim, in the victim's Jeep.¹ A while later, Oliveras and Zambada returned to the home in the victim's Jeep, without the victim.

Scotty Heer, driving on Kyle Canyon Road on his way from Las Vegas to Mount Charleston, saw a flashing light on the side of the dark road. Heer pulled over to investigate and discovered the victim waving a flashlight. Heer could tell that the victim had been shot, called 9-1-1, and asked the victim who shot him. The victim stated that Rene Zambada shot him and stole his truck. First responders transported the victim to the hospital where he later died due to three shotgun wounds.

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

Investigators searched Zambada's home and found one 12-gauge sawed-off shotgun underneath his bed. Ballistics testing determined the shotgun slug shells found at the Kyle Canyon Road crime scene were fired from the gun found under the bed. In addition, Oliveras's DNA was discovered on the gun. Investigators also found a blue backpack in Zambada's bedroom with the victim's name on it. Inside the backpack, investigators found documents with the victim's name and a wallet that contained the victim's identification.

Detectives interviewed Oliveras and asked him what happened the night of the murder. Initially, Oliveras claimed that he did not know the victim and was not with Zambada that night. However, the detective told Oliveras that there were cameras showing Oliveras in the victim's Jeep that night. Oliveras began to cry and stated that he did not know the person that he and Zambada were going to kill and that he had gotten himself into "some shit." He also said that he was holding the shotgun prior to Zambada taking it and shooting the victim. Oliveras then changed his story again, stating that he had left the gun in the vehicle and gotten out on the side of the road to urinate, and then he heard gunshots.

Elba told police that prior to Oliveras and Zambada leaving with the victim, they were angry, and that she heard Oliveras and Zambada talking about needing the shotgun. Right after the conversation, Oliveras walked back to Elba and Zambada's bedroom, returned, and then immediately left with Zambada and the victim in the victim's Jeep. Elba did not reveal if Oliveras was carrying anything. Oliveras and Zambada came back to her home a short time later, and Oliveras immediately went into her bedroom; the same bedroom where the shotgun was later found underneath the bed. Oliveras then took a shower and put his clothes in a plastic bag; Elba told police that it was unusual for Oliveras to place his clothes in a

plastic bag. She also told police that Zambada had told her and Oliveras that the victim was going to hurt her and her child. Uriel Delgado, another witness, told police that Oliveras told him that he had killed the person who was going to harm Elba.²

The State charged Oliveras with conspiracy to commit murder, open murder with use of a deadly weapon, and robbery with the use of a deadly weapon. The State's theories for the open murder charge were conspiracy, aiding and abetting, and felony murder. A jury convicted Oliveras of conspiracy to commit murder, second-degree murder with the use of a deadly weapon, and robbery with the use of a deadly weapon.

On appeal, Oliveras argues (1) the district court abused its discretion when it did not take judicial notice of Zambada's murder conviction, (2) the State violated the Confrontation Clause by asking Elba questions about what Zambada told her Oliveras had said, (3) the district court abused its discretion by giving the standard reasonable doubt and exact justice jury instructions, (4) cumulative error requires reversal, and (5) there is insufficient evidence to support his second-degree murder conviction as the evidence showed he was merely present.³

The district court did not abuse its discretion by not taking judicial notice of Zambada's murder conviction

Oliveras argues that the district court erred when it did not take judicial notice of Zambada's first-degree murder conviction. The State argues

²Oliveras was originally tried and convicted of first-degree murder in 2012. The supreme court affirmed his conviction. *Oliveras v. State*, Docket No. 60005 (Order of Affirmance, December 13, 2013). In June 2016, the district court granted habeas corpus relief and ordered a retrial.

³Oliveras does not challenge the sufficiency of the evidence pertaining to the other charges.

that the murder conviction was irrelevant. We conclude the district court did not abuse its discretion by excluding the evidence.

A district court's decision to admit evidence is usually reviewed for an abuse of discretion. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "A judge or court shall take judicial notice if requested by a party and supplied with the necessary information." NRS 47.150(2). A fact that may be acceptable for judicial notice might still be excluded if it is irrelevant or unduly prejudicial.⁴ *United States v. Mitrovic*, 890 F.3d 1217, 1225 n.8 (11th Cir. 2018) (approving of a two-step inquiry where first the evidence must be of the type that can be judicially noticed, and second the evidence must be admissible); *United States v. Carrasco-Castillo*, 427 F. Supp. 3d 266, 270 (D.P.R. 2019) ("Numerous authorities hold that a fact may not be established pursuant to judicial notice if barred by other provisions of law [O]ther rules of evidence may justify the denial of judicial notice if the proffered fact is irrelevant, unduly prejudicial, or otherwise excludable." (internal quotations omitted)). "Due to the extreme and unfair prejudice suffered by defendants . . . courts and prosecutors generally are forbidden from mentioning that a codefendant has either pled guilty or been convicted." *United States v. Griffin*, 778 F.2d 707, 710 (11th Cir. 1985); see also *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983); *United States v. Corona*, 551 F.2d 1386, 1388 (5th Cir. 1977).

⁴FRE 201(c)(2) contains similar operative language as NRS 47.150(2): "The court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." FRE 201(c)(2). Cases interpreting the FRE provide persuasive authority to Nevada's courts when interpreting Nevada's evidence statutes. *Rodriguez v. State*, 128 Nev. 155, 160 n.4, 273 P.3d 845, 848 n.4 (2012).

At trial, Oliveras asked the district court to take judicial notice of Zambada's first-degree murder conviction, as Zambada had previously pleaded guilty. However, the district court expressed concern that admitting evidence of Zambada's conviction would either confuse the jury or prejudice Oliveras. The district court explained that had it taken judicial notice, the jury could have concluded that it needed to convict Oliveras since his alleged coconspirator was already convicted or could exonerate Oliveras as someone else was already convicted of the crime. Because of the potential to confuse the jury and/or prejudice Oliveras, the district court did not abuse its discretion when it did not take judicial notice of Zambada's conviction.

Assuming arguendo the State violated the Confrontation Clause any error was harmless

Oliveras argues that the State violated his Confrontation Clause rights when it asked Elba if Zambada told her that Oliveras was the one who wanted to shoot the victim. The State argues that Oliveras opened the door to this line of questioning during cross-examination when Oliveras asked Elba if Zambada manipulated her and Oliveras into thinking the victim was dangerous. *Assuming arguendo* there was error, we conclude the error was harmless.

Appellate courts review Confrontation Clause violations for harmless error. *Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 476 (2006). An error pertaining to the federal constitution "can be held harmless" if the appellate court can "declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 355, 143 P.3d at 477 (internal quotations omitted). When considering harmless error in the Confrontation Clause context, courts should consider four factors: (1) the importance of the witness' testimony to the State's case, (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony

of the witness on material points,” and (4) the strength of the State’s case.
Id.

Here, the statement in question is helpful to the State’s case as it shows Oliveras’s intent to kill the victim. However, the statement was brief and the State did not draw any attention to it in its closing argument to show Oliveras’s intent, and the jury convicted Oliveras of second-degree murder, not first-degree murder. Additionally, the statement was cumulative and corroborated by Oliveras’s statements to the police. Further, Uriel Delgado, the mechanic, gave a statement to the police saying that Oliveras called Elba’s apartment and told Delgado on the phone that Oliveras killed the person that was going to hurt Elba. Delgado recanted this statement on the stand, but he was impeached with it. Moreover, Oliveras, in his statement to police, stated that he did not know the person—meaning he did not know him well—that he and Zambada were going to kill. Furthermore, he told the police that he was holding the shotgun when Zambada took it from him and shot the victim. These statements, along with the other evidence of the case that established a conspiracy to commit murder and placed Oliveras at the scene of the murder, suggest that the State’s case was strong.

After weighing the factors, we conclude that any Confrontation Clause error was harmless beyond a reasonable doubt. Thus, this alleged error does not require reversal.⁵

⁵Oliveras also argues that the district court violated his constitutional rights when it gave the reasonable doubt and exact justice jury instructions. We disagree. The Nevada Supreme Court has already determined that these instructions do not violate a defendant’s constitutional rights. *Leonard v. State* 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998); *see also Oliveras v. State*,

There was sufficient evidence for a jury to convict Oliveras of second-degree murder

Oliveras challenges the sufficiency of the evidence only as to his second-degree murder conviction. He specifically argues that he was “merely present” at the murder. The State argues that the evidence is sufficient to uphold Oliveras’s murder conviction.

When reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, we consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Stewart v. State*, 133 Nev. 142, 144, 393 P.3d 685, 687 (2018) (emphasis omitted) (internal quotations omitted). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.” *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alterations in original) (internal quotations omitted). We will not disturb a verdict supported by substantial evidence. *Stewart*, 133 Nev. at 144-45, 393 P.3d at 687. “Circumstantial evidence alone may support a judgment of conviction.” *Collman v. State*, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

To support a guilty verdict for murder under 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. First-degree murder is a “willful, deliberate and premeditated killing.” NRS 200.030(1)(a). Second-degree murder “is all other kinds of murder,” NRS 200.030(2), and requires a finding of implied malice without premeditation

Docket No. 60005 (Order of Affirmance, December 13, 2013) (approving of the language in the reasonable doubt instruction in Oliveras’s first trial).

and deliberation, *see Labastida v. State*, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999). Implied malice is demonstrated when the defendant “commit[s] an[] affirmative act that harm[s] [the victim].” *Desai v. State*, 133 Nev. 339, 347, 398 P.3d 889, 895 (2017) (alterations in original) (quotations omitted); *see also* NRS 193.190 (requiring unity of act and intent to constitute the crime charged); NRS 200.020(2) (“Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.”); *Nunnery v. State*, 127 Nev. 749, 786-87, 263 P.3d 235, 260 (2011) (concluding there was sufficient evidence to uphold a first-degree murder conviction under the theory of aiding and abetting when the defendant directed his coconspirators to bring their guns, chose to load his gun with two types of ammunition to confuse police, and chose the victims).

Here, Elba testified that on the evening of the murder, Oliveras walked back to Elba and Zambada’s bedroom and then immediately left with Zambada and the victim in the victim’s car. A short time later, only Oliveras and Zambada returned in the victim’s car and Oliveras immediately went to their bedroom and Zambada sat at the dinner table. The victim had three shotgun wounds, and before he died, he told Scotty Heer that Rene Zambada shot him. Forensics showed that the shotgun slug shells found at the murder scene were fired from the same gun found underneath Zambada’s bed in the bedroom where Oliveras went prior to leaving with the victim and immediately upon his return without the victim. Oliveras’s DNA was found on the gun.

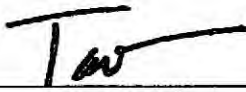
Oliveras told police that he did not know the person that he and Zambada were going to kill and that he was holding the shotgun before Zambada took the gun and shot the victim. Also, a week after the murder, Oliveras told Delgado that he killed the person that was going to hurt Elba.

Furthermore, Elba's previous statements to police indicated that she heard Zambada and Oliveras talking about taking the shotgun with them before leaving with the victim. Finally, the district court included a mere presence jury instruction, which the jury rejected. Thus, there was sufficient evidence for a jury to conclude that Oliveras acted with implied malice based on his actions that led to the killing of the victim and was guilty of second-degree murder.⁶

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁶Oliveras argues that cumulative error requires reversal. Cumulative error requires multiple errors to cumulate. See *Belcher v. State*, 136 Nev., Adv. Op. 31, 464 P.3d 1013, 1031 (2020). Here, assuming *arguendo* that Oliveras has shown the State violated the Confrontation Clause, he has only shown one error. Thus, there are not multiple errors to cumulate that could require reversal, and this argument is without merit.