

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE NUNEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80660-COA

FILED

MAR 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rene Nunez appeals from a judgment of conviction, pursuant to a jury verdict, of grand larceny auto; possession of a stolen vehicle; grand larceny of a firearm; possession of stolen property; second-degree murder with the use of a deadly weapon; conspiracy to commit robbery; robbery with the use of a deadly weapon; stop required on the signal of a police officer; three counts of attempted murder with the use of a deadly weapon; three counts of assault with the use of a deadly weapon; three counts of discharging a firearm from or within a structure or vehicle; four counts of discharging a firearm at or into an occupied structure, vehicle, aircraft or watercraft; and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

In May of 2018, Nunez stole a black Ford Expedition, which also contained a firearm.¹ About two months later, Fidel Miranda drove past a car wash, parked at a senior living apartment complex, and began to walk back toward the car wash. Video surveillance footage contained in the record shows that approximately three minutes later, Nunez and Thomas Romero, Jr., traveled together in the stolen Expedition to the same car

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

wash. As Nunez washed the vehicle, Romero stood at the back of the Expedition near the street. A few minutes later, Miranda walked up to Romero, passing Nunez in the process, and shot him at close range multiple times, resulting in Romero's death. After the shooting, Miranda retrieved a gun from Romero's body and Nunez let Miranda into the passenger seat of the Expedition. They drove away, but returned a few hours later to pick up Miranda's vehicle at the apartment complex.

At this time, a police officer, based on eyewitness descriptions, recognized the Expedition, Nunez, and Miranda as the vehicle and persons potentially involved in the earlier shooting at the car wash. When the officer attempted to pull over the vehicle, Nunez refused to stop, and multiple police officers pursued him. During the pursuit, Nunez drove erratically and Miranda and Nunez shot at the officers involved. Ultimately, the chase ended when Nunez stopped the vehicle and ran into an elementary school. Police later detained and arrested Nunez with the aid of a K-9 unit. Miranda was subsequently shot when he attempted to strike the officer with the vehicle and later died as a result.

The State charged Nunez with 21 counts, including murder and attempted murder. At trial, the State presented, among other things, testimony from the officers, DNA and forensic evidence, and video footage. After an eight-day trial, the jury returned a guilty verdict on all counts. This appeal followed. On appeal, Nunez argues that (1) the district court erred in denying his oral motion for a mistrial when the State referenced his custody status and (2) there was insufficient evidence to sustain several of his convictions.

First, we address Nunez's argument that the district court erred in denying his oral motion for a mistrial. Nunez asserts that the

State, in front of the jury, improperly elicited testimony from a witness regarding Nunez's in-custody status, thereby depriving him of his presumption of innocence. The State argues that even if this was an error, it was harmless in light of the overwhelming evidence of Nunez's guilt. We agree with the State.

Generally, this court will not set aside a district court's denial of a motion for a mistrial absent a clear abuse of discretion. *See McCabe v. State*, 98 Nev. 604, 608, 655 P.2d 536, 538 (1982); *see also Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). Additionally, "[w]ith respect to trial errors such as a prosecutor uttering improper references to the defendant's in-custody status, this court examines such harms under a harmless error standard." *State v. Carrol*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). State-elicited references to a defendant's in-custody status are "not always prejudicial rather than harmless. When evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant." *Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (internal citation omitted); *see also Neder v. United States*, 527 U.S. 1, 18 (1999) (providing that a constitutional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error").

At trial, the State presented, among other things, testimony from 31 witnesses, including percipient witnesses, video surveillance, DNA and forensic evidence, and cellular phone data that supported its theory of the case. During the cross-examination of one of Nunez's witnesses, the State asked, "[a]nd your aspiration is if Mr. Nunez gets out of custody, to continue your romantic relationship; is that correct?" Nunez objected and orally moved for a mistrial. The district court found that the comment was

inadvertent and not elaborated on by the witness and, therefore, denied the request for a mistrial. Nevertheless, the district court offered to admonish the jury and/or to issue a curative instruction, both of which Nunez declined.

Although the State's reference to Nunez's in-custody status appears to have been unintentional, it was nonetheless improper as it made the jury aware of Nunez's custodial status. However, in light of the overwhelming evidence of guilt presented by the State and Nunez's rejection of the district court's ameliorative efforts, we conclude that the error was harmless beyond a reasonable doubt. *See Neder*, 527 U.S. at 18; *see also Rice v. State*, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992) (concluding that erroneously-admitted testimony about prior criminal activity was harmless where "[t]he statements were unsolicited, the references inadvertent, and the defense counsel declined the judge's offer to give the jury a limiting instruction"). Accordingly, we conclude that the district court did not commit reversible error in denying the oral motion for a mistrial.

Second, we address Nunez's sufficiency of the evidence arguments. Specifically, Nunez contends that the evidence was insufficient to establish that he (1) aided Miranda in shooting at police officers, (2) attempted to murder Officer Parker, and (3) actively participated in Romero's murder.

In reviewing the sufficiency of the evidence, we must decide "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). We will not disturb a verdict

supported by substantial evidence. *Nix v. State*, 91 Nev. 613, 614, 541 P.2d 1, 2 (1975); *see also Sanders v. State*, 90 Nev. 433, 434, 529 P.2d 206, 207 (1974). Further, co-conspirator and aiding and abetting theories of liability are means of finding a defendant culpable when the defendant did not directly commit the criminal act. *See Bolden v. State*, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

As it relates to the charges of aiding or abetting Miranda in shooting at officers, most of the officers testified that Nunez's driving appeared aimed toward assisting Miranda's conduct. Additionally, the jury observed Nunez's conduct via footage from multiple police body cameras. Other evidence presented at trial demonstrated that Nunez had a gun as well, with expended cartridges matching a gun found at the scene.

While Nunez elicited some conflicting testimony as to the manner in which he was driving, it is the jury's role to weigh conflicting testimony. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Therefore, based on the testimony of the police officers, as well as their body camera footage, we conclude that the State presented sufficient evidence for a rational jury to find Nunez guilty of aiding, abetting or conspiring with Miranda beyond a reasonable doubt.

Next, regarding the attempted murder of Officer Parker, Nunez argues that the State did not present sufficient evidence because Officer Parker's trial testimony conflicted with an earlier report he gave to investigators as to the timing of when Nunez fired shots at him. The State argues that it presented sufficient evidence to show that Nunez either directly attempted to murder Officer Parker or aided or abetted Miranda in doing so.

“Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice.” *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988). The jury may infer the intent to kill from “the individualized, external circumstances of the crime” and “the manner of the defendant’s use of a deadly weapon.” *Valdez v. State*, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) (internal quotations omitted).

Here, despite the purported inconsistencies in the accounts given by Officer Parker, he ultimately testified that he was in fear of his life, that Nunez shot at him, and that he saw Nunez holding a firearm during the pursuit. In addition to Officer Parker’s testimony, the State presented testimony from crime scene analysts and forensic scientists who testified that Nunez’s DNA was on the firearm, that the firearm matched Officer Parker’s description, and that they found expended cartridges from the firearm wielded by Nunez in an intersection where part of the pursuit took place. Additionally, the State presented body camera footage from each of the officers, providing the jury with a view of Nunez’s conduct.² The State also demonstrated, as mentioned above, that Nunez drove in a manner that assisted Miranda in shooting at the officers. Therefore, based upon the totality of the evidence presented by the State, we conclude that a reasonable jury could find, beyond a reasonable doubt, that Nunez attempted to murder Officer Parker, either directly or by aiding or abetting

²We note that the video files submitted with the record on appeal are from only one of the body cameras. Officer testimony in the record, however, establishes the contents of each file.

Miranda. See *McNair*, 108 Nev. at 56, 825 P.2d at 573; see also *Valdez*, 124 Nev. at 1197, 196 P.3d at 481.

Finally, as it relates to the murder of Romero, Nunez argues that the State did not present sufficient evidence to demonstrate that he was more than merely present at the murder. The State argues that it presented sufficient evidence beyond a reasonable doubt to demonstrate that Nunez aided, abetted or conspired with Miranda to kill Romero.

To support a guilty verdict for second-degree murder under NRS 200.030(2), the State must prove beyond a reasonable doubt that the defendant killed another person with implied malice. 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) (quoting *Labastida*, 115 Nev. at 307, 986 P.2d at 449); see 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.”).

Here, the State offered multiple theories of liability, including that Nunez was the principal actor, a conspirator, and/or an aider and abettor. To support its case, the State demonstrated through video surveillance and testimony that Nunez took Romero to the location of the murder within minutes after Miranda had parked nearby, that Romero stood away from where Miranda approached, and that Miranda walked passed Nunez then shot Romero at close range multiple times. After the shooting, the video also showed Nunez pointing to Romero’s body and Miranda then retrieving a firearm from Romero. In addition, eyewitnesses

described both Nunez and Miranda's demeanors as "calm" as Nunez drove them away. Further, despite the opportunity to flee, Nunez continued to drive Miranda to various locations after the shooting.

The State also demonstrated through cell phone data and cellular positioning that there were a total of 565 cellular communications between Nunez and Miranda in the three weeks leading up to the murder. Further, both Nunez and Miranda's cell phones "pinged" the tower near the car wash over 26 times in the three weeks leading up to the day of the shooting.


Finally, to show a conspiracy or a concert of actions between Nunez and Miranda, the State presented Miguel Hernandez, an acquaintance of Miranda, Nunez, and Romero, who testified that before the murder, Nunez told him that he and Miranda had a "beef" with Romero and that Hernandez needed to pick a side. Hernandez gave Nunez one of the firearms used in the shooting of police officers and during the subsequent vehicle pursuit. Thus, the State presented sufficient evidence to support its various theories of liability. *See Bolden v. State*, 121 Nev. at 913, 124 P.3d at 194.

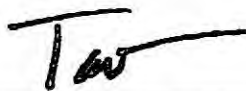
Therefore, based on the evidence presented, we conclude that a reasonable jury could have determined beyond a reasonable doubt that Nunez was more than merely present at the shooting, that he intended to assist Miranda in the murder Romero, or that he conspired with or aided or abetted Miranda in killing Romero. *See Collman v. State*, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (noting that circumstantial evidence alone may sustain a conviction); *see also Bolden*, 121 Nev. at 913, 124 P.3d at 194 ("When alternate theories of criminal liability are presented to a jury and


all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories.”).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Sanft Law, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk