

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENNIS VASQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85218-COA

FILED

JUN 28 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dennis Vasquez 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; Jacqueline M. Bluth, Judge.

In the early morning hours of October 18, 2020, Vasquez walked by Daniel Vesper and Dugan Hicks, who were drinking rum together on Hicks' apartment balcony.¹ Vasquez appeared to give them a dirty look, which irritated Vesper. Hicks tried to get Vesper to let it go, but Vesper was acting "on edge" and wouldn't leave it alone.

Vesper yelled out to Vasquez, "What's up, Killa?" and Vasquez responded, "Only if I have to." Vasquez kept walking, although he returned a short time later, at which point he stormed up to Hicks' balcony and began a verbal argument with Vesper. Hicks described it as an "alpha male situation," with each one trying to be louder than the other. As Vasquez and Vesper's argument grew louder, Hicks told them to take it away from his apartment. Vesper removed his shirt and his shoes, threw them on the ground, and "jumped over" the balcony towards Vasquez. He approached Vasquez and took a fighting stance.

¹We recount the facts only as necessary for our disposition.

When Hicks looked down at them, he saw that Vasquez had drawn a gun, at which point Hicks went into his apartment. Ramon Benitez, a resident of the apartment complex who looked outside when he heard the loud argument, described Vasquez and Vesper as “fist fighting or arguing or pushing.”² Vasquez pointed the gun directly at Vesper’s head. Vesper held both of his hands up in the air in a gesture of surrender and Vasquez led him around at gunpoint. Vesper walked away from Vasquez before he put his hands down and circled back towards him.

As Vasquez continued to hold the gun closely to Vesper’s head, Vesper walked to a flight of stairs and went up a few steps. Vesper then turned around to face Vasquez and threw a punch in an apparent attempt to push the gun away.³ Vasquez immediately fired his gun and continued to fire as Vesper ran at him until his gun jammed. Vasquez fired a total of four shots, all of which hit Vesper. Vesper collapsed in the parking lot and was unresponsive when first responders arrived. Vesper was taken to the hospital where he never regained consciousness and died on November 1, 2020. Vasquez was cooperative with law enforcement on the scene.

The State charged Vasquez with one count of open murder with the use of a deadly weapon. The primary issue at trial was whether Vasquez had acted in self-defense, with both Vasquez and the State offering

²Parts of the incident, including the actual shooting, were captured on a private residence’s surveillance video and another resident’s cell phone video.

³The State argued to the jury that Vesper was trying to push the gun away from him in self-defense. By contrast, Vasquez argued that Vesper was trying to *take* the gun from him, which caused Vasquez to fear for his life.

conflicting interpretations of the videos that depicted the incident.⁴ The State argued to the jury that Vasquez was the initial aggressor when he stormed up to Hicks' balcony and started the argument with Vesper, then escalated the verbal argument by brandishing a firearm before Vesper physically touched him. Even if Vasquez was in fear of Vesper, the State argued, Vasquez's fear was not reasonable because Vesper was unarmed and had surrendered by raising his hands in the air. Vasquez, on the other hand, argued that Vesper was the initial aggressor because Vesper removed his clothes, jumped over the balcony towards Vasquez and took a fighting stance, and Vasquez only used deadly force after Vesper had begun physically attacking him. The jury ultimately returned a verdict of second-degree murder with use of a deadly weapon. Vasquez was sentenced to serve an aggregate prison term of life with a minimum of 14 years.

On appeal, Vasquez raises two issues. First, he challenges the sufficiency of the evidence, arguing there was insufficient evidence of malice aforethought because Vasquez killed Vesper in self-defense. Second, he argues the district court abused its discretion when it failed to state on the record its specific findings in support of the deadly weapon enhancement, which is required under NRS 193.165(1).

When determining whether a verdict was based on sufficient evidence, this court will inquire "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." *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This court "will not reweigh the

⁴Vasquez did not testify and, instead, relied on the videos and the testimony of percipient witnesses to establish his defense.

evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.” *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). To sustain a jury verdict of second-degree murder with use of a deadly weapon pursuant to NRS 200.010, NRS 200.030 and NRS 193.165, “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.” *Mitchell*, 124 Nev. at 816, 192 P.3d at 727.

Vasquez contends that there was insufficient evidence of malice aforethought because the State failed to refute his claim of self-defense beyond a reasonable doubt. “Malice shall be implied when no considerable provocation appears, or when all of the circumstances of the killing show an abandoned and malignant heart.” NRS 200.020(2). “Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner. Malice can be present in the absence of an express intent to kill and as applied to murder . . . signifies general malignant recklessness of others’ lives and safety or disregard of social duty.” *Keys v. State*, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (citation and internal quotation marks omitted). However, self-defense “negates the unlawfulness element of murder,” and the State has the burden of disproving self-defense beyond a reasonable doubt. *St. Pierre v. State*, 96 Nev. 887, 891, 620 P.2d 1240, 1242 (1980).

In this case, the evidence presented to the jury was conflicting, and Vasquez and the State argued different interpretations of that evidence. On appeal, Vasquez presents the same interpretation that he offered to the jury. However, reviewing the evidence in the light most favorable to the prosecution, the jury could have reasonably concluded that

Vasquez acted with malice aforethought when he used a deadly weapon “in a deadly and dangerous manner [which] signific[d] general malignant recklessness of others’ lives and safety or disregard of social duty.” *Keys*, 104 Nev. at 738, 766 P.2d at 271 (internal quotation marks omitted). The jury heard evidence that Vasquez pointed a loaded gun at Vesper’s head, pulled the trigger, shot him in the head, and immediately shot him three more times in rapid succession until the gun jammed. Viewing this evidence, the jury could reasonably have found that Vasquez’s actions demonstrated a malignant and reckless disregard for Vesper’s life. *Id.*

Additionally, the jury could have reasonably found that Vasquez was not entitled to claim self-defense because he was the initial aggressor in this case. *See Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 241 (1990) (concluding that an initial aggressor must retreat or decline further struggle in order to regain the right to self-defense); NRS 200.120-.200 (defining justifiable homicide and self-defense). The jury heard evidence that Vasquez stormed up to Vesper and Hicks’ balcony and started the altercation with Vesper, at which point Vasquez had a legal duty to retreat before he could reclaim the right of self-defense. *Culverson*, 106 Nev. at 489, 797 P.2d at 241. Yet, the evidence indicates that Vasquez did not retreat or decline further struggle; instead, he pulled out his gun and, at one point, even led Vesper around at gunpoint with his hands up in the air, before eventually shooting Vesper four times.

Likewise, the jury could reasonably have rejected Vasquez’s self-defense argument by finding that Vasquez’s fear of bodily injury was not objectively reasonable under the circumstances. *Runion v. State*, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000) (providing that to justify a homicide, “the circumstances must be sufficient to excite the fears of a

reasonable person placed in a similar situation”). Vasquez argues that he feared for his life because he had a bad back, because Vesper was much larger than him, and because Vesper had allegedly struck him repeatedly during their altercation. The jurors were able to view the video for themselves and need not have credited Vasquez’s argument in this regard. Moreover, Vesper was shirtless and clearly unarmed throughout the encounter, while Vasquez was armed with a gun. Thus, the jury could reasonably have concluded his fear was unreasonable.

The jury was fully instructed on Vasquez’s theory of self-defense and was also provided a verdict form that included the lesser offense of voluntary manslaughter. Therefore, although the jury could have credited Vasquez’s self-defense argument, there was sufficient evidence to support the jury’s finding that Vasquez acted with malice aforethought and that his actions were not justified through self-defense. *Mulder v. State*, 116 Nev. 1, 15, 992 P.2d 845, 853 (explaining that the “trier of fact determines the weight and credibility to give conflicting testimony”); see also *Hankins v. State*, 91 Nev. 477, 477, 538 P.2d 167, 168 (1975) (“When there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.”).

As to Vasquez’s second argument, we conclude that the district court did not abuse its discretion at sentencing. Vasquez contends the court violated NRS 193.165(1), which required the district court to “state on the record that it has considered” the following factors in determining a deadly weapon sentence enhancement:

- (a) The facts and circumstances of the crime;
- (b) The criminal history of the person;
- (c) The impact of the crime on any victim;

(d) Any mitigating factors presented by the person; and

(e) Any other relevant information.

Vasquez did not object below and, therefore, his claim is reviewed for plain error. To establish plain error, Vasquez must demonstrate that: (1) there was an “error,” (2) the error is “plain,” and (3) the error affected his substantial rights. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

In this case, the district court properly considered each of the above factors on the record. As to factor (a), the court stated that it sat through the trial and believed that both Vasquez and Vesper made bad decisions that night. As to factors (b) and (c), the court acknowledged that Vasquez had no criminal history and heard victim impact testimony from Vesper’s sister. As to factor (d), the court also stated on the record that it considered substantial mitigation evidence submitted by Vasquez’s friends and family. Lastly, as to factor (e), the court heard a lengthy statement in allocution from Vasquez himself, as well as argument from Vasquez’s counsel, and she referenced relevant portions of those statements in her sentencing decision.

Vasquez’s reliance on *Delapinia v. State*, No. 68339, 2016 WL 3418566 (Nev. June 17, 2016) (Ordering Affirming in Part, Reversing in Part and Remanding) is misplaced. Although *Delapinia* held that the district court’s failure to make the required findings under NRS 193.165(1) constituted reversible plain error, in that case the district court made no reference whatsoever to any of the statutory factors, let alone findings regarding each factor, before it sentenced the defendant to the maximum sentences on each charge to run consecutive. Here, the district court properly considered each of the statutory factors required under NRS

193.165(1) and imposed a four-to-ten-year sentence, which was less than the four-to-twenty-year sentence requested by the State. Therefore, there was no error, plain or otherwise, that would entitle Vasquez to relief.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Westbrook


_____, Sr.J.
Silver

cc: Hon. Jacqueline M. Bluth, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.