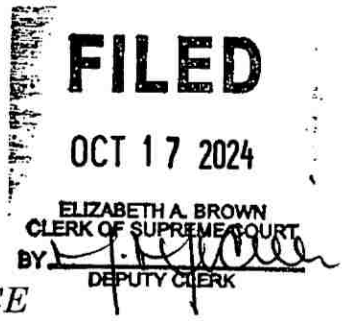
IN THE SUPREME COURT OF THE STATE OF NEVADA

CODY DEVON MCGREW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87043



ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to verdicts following a jury trial and a bench trial, of robbery with use of a deadly weapon and killing, maiming, disfiguring, or poisoning the animal of another person. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Appellant Cody Devon McGrew first argues the State produced insufficient evidence that he used a deadly weapon or that he maliciously killed the animal of another. Viewing the evidence "in the light most favorable to the prosecution," we disagree. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (concluding that sufficient evidence supports a conviction where "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"); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (same).

As to the weapon enhancement, the State produced evidence that McGrew had a knife visible in a sheath on his hip when he confronted an HVAC technician performing a service call on McGrew's mother's property and ordered the technician to leave. The technician testified that, as he disconnected his equipment, McGrew stood over him in a threatening

manner and opened and closed a latch on the knife's sheath several times in a way that called the technician's attention to the knife. When McGrew demanded to examine a tank of refrigerant and then pulled the tank away from the technician while insisting that the tank was now McGrew's, the technician let go because of the threat of the knife. Based on this evidence, we conclude that a rational trier of fact could have found that McGrew intentionally called attention to the knife and maintained it on his person before using force to steal the tank of refrigerant and that this sufficiently established the use of a deadly weapon. *See* NRS 193.165; NRS 200.380(1); *Carr v. Sheriff*, 95 Nev. 688, 690, 601 P.2d 422, 424 (1979) ("In order to use a deadly weapon for purposes of that statute, there need only be conduct which produces a fear of harm or force by means or display of a deadly weapon.").

As to the charge that McGrew maliciously killed the animal of another, evidence showed that McGrew tied rope from his truck to his neighbor's pigpen and pulled the structure down onto the neighbor's pig. The neighbor testified that the pig was previously healthy and that McGrew later admitted killing the pig in retribution for an imagined slight. A veterinarian testified that a structure collapse as here could cause stress that would kill a pig and that stress contributed to the pig's death. We conclude that sufficient evidence was thus produced for a rational trier of fact to conclude that McGrew willfully and maliciously killed the pig. *See* NRS 206.150(1).

McGrew next argues that the district court erred in denying a request to substitute counsel. On the day of trial, McGrew orally sought to substitute counsel, asserting that he had identified alternative representation and that the relationship with existing counsel had broken

down. McGrew insisted that current counsel did not represent him. Counsel confirmed that McGrew had refused to cooperate with him in preparing for trial. The district court inquired into the conflict and found that appointed counsel was ready for trial, had successfully litigated several pretrial matters, and knew the case. The court further found that the attorneys McGrew asserted were prepared to substitute in were not present and had made no filings to do so. The court concluded that the request was dilatory and denied McGrew's motion to substitute counsel.

In reviewing the denial of a motion to substitute appointed counsel, we consider the nature of the conflict with existing counsel, the district court's consideration of the conflict, and the timeliness of the request. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). The record shows that the conflict arose from McGrew's refusal to work with counsel, which is not good cause to substitute appointed counsel. *See id.* (providing that a request to substitute counsel must rest on adequate cause); *Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) (determining that adequate cause to substitute counsel does not arise from a "refusal to cooperate with appointed counsel[, as] [s]uch a doctrine would lead to absurd results" (internal quotation marks omitted)), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). The district court adequately considered the request when it inquired into the contacts between McGrew and counsel and the extent of the conflict. And finally, the request was untimely where it was made on the day of trial. We therefore conclude that McGrew has not shown that the district court abused its discretion in declining to substitute counsel.

McGrew next argues that the district court erred in admitting evidence of other bad acts. "Evidence of other crimes, wrongs or acts is not

admissible to prove the character of a person in order to show that the person acted in conformity therewith." NRS 48.045(2). McGrew highlights several instances of police officer testimony, which we address in turn.

The first alleged instance of bad act evidence involves an officer's testimony that he was familiar with McGrew's mother's property because he had been there "a few times on the various calls." This vague comment does not identify the nature of the calls, any specific bad acts, or any acts ascribable to McGrew rather than another. The comment thus falls outside the scope of NRS 48.045(2). *See Lamb v. State*, 127 Nev. 26, 41, 251 P.3d 700, 710 (2011) (providing that NRS 48.045(2) is not implicated where the conduct referenced is not a bad act or crime). For the same reason, we reject McGrew's suggestion that the district court should have instructed the jury regarding evidence of other bad acts, though we note that McGrew also declined the district court's offer of a contemporaneous admonition and cannot now assert that its omission was error.

The next alleged instance of bad act evidence involves several officers' testimony about a three-hour stand-off while executing the arrest warrant relating to the robbery charge. This testimony described the arrest for the charged offense, not an "other" act. The testimony thus did not implicate NRS 48.045(2). *See State v. Shade*, 111 Nev. 887, 895, 900 P.2d 327, 331 (1995) (concluding the State may present evidence that "completed the story leading up to [the defendant's] ultimate arrest").

The last alleged instance of bad act evidence involves an officer's testimony that police had warrants for McGrew's arrest; reference to "the history of the officers out there" before the prosecutor cut him off; and mention of a search incident to arrest. These vague and unobjected-to comments likewise did not identify any bad acts by McGrew, convey the

nature of any bad acts by McGrew, clearly indicate McGrew had been arrested for offenses other than those at issue, or suggest anything specific regarding McGrew's character to imply that he acted in accordance with that character. Even if the challenged testimony could be construed to imply McGrew engaged in other criminal activity, the references were brief, indirect, unsolicited by the prosecutor, and not prejudicial. *See Byford v. State*, 116 Nev. 215, 226, 994 P.2d 700, 708 (2000) (deeming harmless a reference to prior criminal activity that was "unsolicited and inadvertent [where] the reference to criminal activity was brief and indirect"); *see also Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unpreserved error for plain error causing actual prejudice). And unobjected-to testimony in the bench trial that that an officer "put together some cases reference [sic] Mr. McGrew" does not clearly indicate other criminal activity. We conclude that McGrew has not shown that relief is warranted in these regards. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (reviewing "a district court's decision to admit or exclude evidence for an abuse of discretion").

Lastly, McGrew argues cumulative error. As McGrew has only shown at most a single instance of error for which he has failed to show prejudice, there is nothing to cumulate. We conclude that relief is not warranted in this regard.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Carli Lynn Kierny, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk