



IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANDRE TERELLE GATHRITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90032

*ORDER AFFIRMING IN PART, VACATING IN PART, REVERSING IN
PART AND REMANDING*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon, discharging a firearm at an occupied vehicle, discharging a weapon where a person might be endangered, murder with the use of a deadly weapon, and possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Deandre Gathrite was convicted at a single jury trial of offenses arising from a shooting at an occupied vehicle in an alleyway on March 11, 2021, and for an unrelated murder on March 22, 2021. Gathrite raises numerous challenges to the judgment of conviction.

Denial of the motion to sever was an abuse of discretion

We first address Gathrite's challenge to the district court's denial of a motion to sever the March 11 and March 22 counts into separate trials. We review a district court's decision on a motion to sever for an abuse of discretion. *Farmer v. State*, 133 Nev. 693, 702, 405 P.3d 114, 122 (2017). This is typically a deferential standard, but we are less deferential when the district court fails to explain its rationale, because we are forced to speculate about whether the district court applied the correct legal standard, supported its findings with evidence, or exercised its discretion at all. *Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629-30 (2011).

Two offenses that are not based on the same act or transaction may nonetheless be joined at a single trial when they are “[b]ased on two or more acts or transactions connected together or constitut[e] parts of a common scheme or plan.” NRS 173.115(1)(b); *see also Farmer*, 133 Nev. at 697-98, 405 P.3d at 119-20 (categorizing three theories under which joinder is appropriate: when there is a “common plan” or a “common scheme,” or when acts are “connected together”).

The district court summarily stated it was denying the motion to sever at the end of a hearing. No written order was entered. The State argued all three theories supporting joinder, both below and on appeal. We address each in turn.

First, the charges were not part of a common plan. No evidence indicated that the two shootings were intended to accomplish a particular goal. *See Farmer*, 133 Nev. at 698, 405 P.3d at 120 (explaining that charges properly joined as part of a common plan are “crimes that are related to one another for the purpose of accomplishing a particular goal”).

Second, the charges were not part of a common scheme. For charges to constitute part of a common scheme, the offenses must “share such 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 121. Such common features must be “idiosyncratic in character.” *Id.* at 698, 405 P.3d at 120. Although the two shootings occurred in the same neighborhood within two weeks, there are no characteristics of the crimes that are so idiosyncratic as to establish a common scheme, rather than two unrelated shootings by someone who frequents the area. *See id.* at 700, 405 P.3d at 121 (concluding crimes were part of a common scheme where the defendant, a hospital employee, sexually assaulted five women shortly after each was

brought to the same hospital by ambulance). The March 11 shooting appeared to be prompted by an ongoing shootout in a nearby alley, and the March 22 murder occurred after the victim antagonized Gathrite at a gas station. The similarities between the crimes only establish Gathrite's presence and criminal activity in a small neighborhood, which is insufficient to establish a common scheme.

Third, the charges were not "connected together." NRS 173.115(1)(b). For charges to be connected together, "a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime." *Weber v. State*, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005), *abrogated on other grounds by Farmer*, 133 Nev. at 698, 405 P.3d at 120. Thus, determining whether charges may be joined together requires us to determine whether other act evidence of each set of charges would be admissible at a trial for the other charges. *Id.* Other act evidence is admissible only when it is relevant for a permissible purpose, proven by clear and convincing evidence, and has probative value that is not substantially outweighed by the danger of unfair prejudice. *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001).

The State contends that ballistic evidence showing Gathrite used the same firearm on March 11 and March 22 helped prove Gathrite's identity as the March 22 murderer. See NRS 48.045(2) (providing that evidence of other acts may be admissible to prove identity). Although the district court made no findings to this effect, ballistic evidence that Gathrite used the same firearm shortly before the murder would likely have been admissible to prove Gathrite's identity at a trial on the March 22 counts.

Less clear is whether evidence of the March 22 murder would have been admissible at a trial for the March 11 shooting. Given the

overwhelming evidence of Gathrite's identity as the March 11 shooter, evidence that he used the same gun on another occasion would have had little probative value. And there would have been significant prejudice in allowing evidence of a subsequent shooting to prove Gathrite's identity on March 11 because the evidence would have led the jury to infer Gathrite's propensity for violence. The State also contends that videos of Gathrite at a nearby casino around the time of each crime would have been cross-admissible to show Gathrite's identity. But we are unpersuaded that Gathrite's presence at a casino near the crime scene on March 11 would be probative to his identity on March 22 and vice versa. We are therefore unconvinced any evidence about the March 22 shooting would have been admissible at a trial for the March 11 shooting, especially given the lack of findings by the district court. We thus conclude the March 11 and March 22 counts were not connected together. Because the counts were improperly joined, the district court abused its discretion by denying the motion to sever.

Denial of the motion to sever was harmless as to the March 11 counts, but requires reversal of the March 22 counts

Even where charges are erroneously joined, reversal is only warranted if the misjoinder caused a substantial and injurious effect on the jury's verdict. *Weber*, 121 Nev. at 570-71, 119 P.3d at 119. Overwhelming evidence, including clear video and eyewitness testimony of bystanders and participants in the shooting supports Gathrite's convictions on the March 11 counts. Thus, we conclude the district court's refusal to sever does not warrant reversal of the March 11 attempted murder and related convictions.

In contrast, weaker evidence supported the March 22 murder conviction. Video showed Gathrite and the victim interacting in the parking

lot of a gas station before the murder, but no video showed the murder itself. Nor did any witnesses testify to seeing the murder. Further, because Gathrite was convicted of first-degree murder under a challenge-to-fight theory, the State had to prove that Gathrite agreed to fight the victim, a fight occurred, and a death resulted. See NRS 200.450(3) (defining challenge-to-fight murder). Gathrite's acceptance of a challenge to fight was based only on witness testimony of Gathrite's interactions with the victim in the gas station parking lot. Those same witnesses gave inconsistent testimony about whether they knew the victim beforehand, and whether they stole the victim's phone, jacket, or money after the shooting. Any issues with the witnesses' credibility were likely negated by the introduction of the March 11 shooting, which implied Gathrite had a propensity for violence. Thus, we conclude the joinder caused a substantial and injurious effect on the verdict as to the March 22 murder. Accordingly, we reverse Gathrite's conviction for murder arising from the March 22, 2021 shooting and remand for a new trial on this charge.

The jury instruction on challenge-to-fight murder was erroneous, but the error did not affect Gathrite's substantial rights

Gathrite also contends the jury instruction on challenge-to-fight murder was erroneous because the instruction did not state that Gathrite had the specific intent to agree to a fight. Gathrite did not object to the instruction so we review only for plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* We review whether the instruction correctly stated the law de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Challenge-to-fight murder is defined by NRS 200.450. In relevant part, the statute makes it a crime to, “upon previous concert and agreement, fight[] with any other person.” NRS 200.450(1). “Should death ensue to a person in such a fight . . . the person causing or having any agency in causing the death . . . is guilty of murder in the first degree.” NRS 200.450(3). The district court instructed the jury according to the statute, but added “the State is not required to prove premeditation or deliberation. The killing constitutes murder of the first degree so long as it was committed with malice, either express or implied.” As this court has explained, it is the agreement to fight which supplies the mens rea for murder, much as felony murder uses the intent to commit an underlying felony to supply the intent for murder. *Pimentel v. State*, 133 Nev. 218, 226, 396 P.3d 759, 765-66 (2017). Thus the instruction was incorrect to the extent it required the State to show malice. But, contrary to Gathrite’s contention, the instruction correctly stated that to find guilt, the State needed to show Gathrite fought upon previous concert and agreement, and a death ensued.

Because we reverse Gathrite’s murder conviction on the misjoinder of the March 11 and March 22 counts, we decline to address whether this error affected Gathrite’s substantial rights.¹

¹Gathrite raises two other contentions related to the murder conviction, namely that sufficient evidence does not support the murder conviction, and the district court abused its discretion by excluding a late-disclosed defense orthopedic expert. We conclude Gathrite has not met his burden to show the murder conviction was supported by insufficient evidence. And, in light of our disposition, we decline to reach the argument about the exclusion of the late-disclosed expert.

Sufficient evidence supports the attempted murder conviction

We now turn to Gathrite's remaining arguments. First, Gathrite contends insufficient evidence supports the attempted murder conviction arising from the shooting at an occupied vehicle on March 11, 2021. Specifically, Gathrite asserts that the State failed to prove specific intent to kill, a necessary element of attempted murder. *See* NRS 200.010 (defining murder); NRS 200.020 (defining malice); NRS 193.153(1) (defining attempts). In reviewing the sufficiency of the evidence, 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." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (citation modified).

The fact that Gathrite shot at a vehicle which he knew to be occupied is sufficient for a rational juror to conclude Gathrite intended to kill the occupant. *See Washington v. State*, 132 Nev. 655, 663, 376 P.3d 802, 808 (2016) (concluding a jury could find intent to kill from the defendant's discharge of a firearm into an occupied building). Sufficient evidence therefore supports the attempted murder conviction.

Shooting in a place that may endanger another person is a lesser-included offense of shooting at an occupied vehicle or structure

Gathrite argues that his convictions for shooting at an occupied vehicle under NRS 202.285(1)(b) and for shooting in a place that may endanger another person under NRS 202.290(2) merge, and that he therefore cannot be convicted of both crimes for the same conduct. Reviewing for plain error, we agree. *See Jeremias*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (setting forth plain error requirements).

A defendant may not be convicted of two offenses that merge without offending the Double Jeopardy Clauses of the United States and

Nevada Constitutions. *McIntosh v. State*, 113 Nev. 224, 225, 932 P.2d 1072, 1073 (1997). The test for whether two offenses merge is whether each offense requires proof of a fact the other does not. *Id.* As a matter of statutory interpretation, we review de novo. *See id.* at 226-27, 932 P.2d at 1073-74.

NRS 202.285(1)(b) contains three elements: that the defendant (1) willfully and maliciously, (2) discharged a firearm, (3) at an occupied vehicle or structure. NRS 202.290(2) also contains three elements: that the defendant (1) willfully, (2) discharged a firearm, (3) “in any place where any person might be endangered thereby.” Thus, NRS 202.285(1)(b) clearly contains two of the three elements of NRS 202.290(2)—willfulness and discharging a firearm.

We also conclude that NRS 202.290(2)’s element of firing “in any place where any person might be endangered” is encompassed within NRS 202.285(1)(b)’s element of shooting at an occupied vehicle or structure. It is inconceivable that a person could shoot at an occupied vehicle or structure without shooting in a place that may endanger a person. *Cf. People v. Overman*, 24 Cal. Rptr. 3d 798, 808-10 (Ct. App. 2005) (holding that a person who shoots at a vehicle or structure necessarily endangers others under California’s analogous statutes). Because every element of NRS 202.290(2) is contained within NRS 202.285(1)(b), and NRS 202.290(2) does not require proof of any fact which NRS 202.285(1)(b) does not, NRS 202.290(2) is a lesser-included offense of NRS 202.285(1)(b). It is irrelevant that NRS 202.285(1)(b) contains additional elements that NRS 202.290(2) does not. *See LaChance v. State*, 130 Nev. 263, 274, 321 P.3d 919, 927 (2014). A defendant cannot be convicted of an offense and its lesser-included offense, so we vacate Gathrite’s conviction under NRS 202.290(2)

for shooting in a place where a person may be endangered. *See id.* at 275, 321 P.3d at 928 (holding that vacatur of the lesser offense is the proper remedy).

The inadvertent admission of other act evidence does not warrant reversal

Gathrite contends the inadvertent admission of other act evidence, along with the district court's subsequent denial of his motion for a mistrial, warrants reversal. We review a district court's decision to deny a mistrial for an abuse of discretion. *Mariscal-Ochoa v. State*, 140 Nev., Adv. Op. 42, 550 P.3d 813, 819 (2024). Gathrite was with an acquaintance, Lemontae Magnum, when Gathrite shot at the car on March 11. At trial, Magnum testified he was scared of Gathrite, who had a "record." The State quickly moved on and asked Magnum leading questions to avoid further references to other criminal conduct by Gathrite. At the end of Magnum's testimony, Gathrite requested a mistrial, which the district court denied. While the remark improperly referenced Gathrite's criminal history, the remark was brief and inadvertent, and the district court did not abuse its discretion by denying a mistrial. *See Collman v. State*, 116 Nev. 687, 705-06, 7 P.3d 426, 438 (2000) (holding that mistrial was unnecessary where witness's reference to defendant's criminal history was brief, non-specific, and not elicited by the prosecutor). Further, any prejudice would have likely been cured by an admonition, which Gathrite refused even after the district court offered to provide one. *See Tavares*, 117 Nev. at 731, 30 P.3d at 1132 (recognizing that if the defendant does not want a limiting instruction, none should be given).

A witness also referred to smoking with Gathrite, which Gathrite asserts could have led the jury to infer Gathrite was using illegal drugs. Taken in context, the witness was referring to smoking marijuana, a legal substance in Nevada. Any prejudice to Gathrite was negligible from

the brief, non-specific reference to using a legal substance, and the inadvertent admission of other act evidence does not warrant reversal.

The questioning and dismissal of a juror was not error

Gathrite contends the district court erred by inquiring into the jury's vote count, thereby coercing a juror to vote guilty. After the case was submitted, the foreperson sent a note to the district court stating that a juror refused to consider a first-degree murder verdict. The district court questioned the foreperson, who stated while the other jurors had reached a verdict on all counts, Juror 10 would not consider the first-degree murder charge because he was concerned Gathrite may receive the death penalty. The court then questioned Juror 10, who unequivocally stated he could not follow the instruction to refrain from considering potential punishments. The district court excused Juror 10. The district court recalled an alternate juror, instructed the jury it must restart deliberations anew, and directed the jury not to discuss the reasons for Juror 10's dismissal. The reconstituted jury then reached a verdict of guilty on all counts.

The district court acted properly by questioning and excusing Juror 10, and by restarting deliberations with an alternate juror. *See Viray v. State*, 121 Nev. 159, 163-64, 111 P.3d 1079, 1082 (2005) (permitting removal of a juror for failure to comply with the court's admonishments); *Martinoirellan v. State*, 131 Nev. 43, 46-47, 343 P.3d 590, 592 (2015) (allowing a district court to dismiss a juror mid-deliberations so long as the district court instructs the jury to restart deliberations with an alternate).

Gathrite is correct that inquiring into vote counts or questioning a holdout juror can be coercive. *See, e.g., State v. Clark*, 38 Nev. 304, 309-10, 149 P. 185, 187-88 (1915) (holding that an inquiry into vote counts was coercive). But he fails to demonstrate any coercive effect here where the questioned juror took no part in the final verdict, and the other

jurors had reached a guilty verdict before the district court's inquiries. We therefore conclude no relief is warranted on this claim.

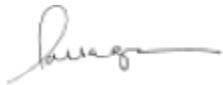
Cumulative error does not warrant relief

Lastly, Gathrite contends cumulative error warrants reversal. Because we reverse Gathrite's murder conviction and vacate the conviction for discharging a firearm in a way that may endanger another person, no errors remain to cumulate. *See Belcher v. State*, 136 Nev. 261, 279, 464 P.3d 1013, 1031 (2020). Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART, VACATED IN PART, AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



Pickering, J.



Parraguirre, J.



Bell, J.

cc: Hon. Michelle Leavitt, District Judge
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