

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROCKY NEIL BOICE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40799

FILED

JUL 01 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of principal to second degree felony murder with the use of a deadly weapon, principal to battery with the use of a deadly weapon, and a conspiracy to commit battery with the use of a deadly weapon. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

The district court sentenced appellant Rocky Neil Boice, Jr. to imprisonment for ten to twenty-five years on the second degree murder charge and additional ten to twenty-five years for the use of a deadly weapon.¹

On appeal, Boice argues the following: (1) there was insufficient evidence to support the second degree felony murder conviction; (2) the district court violated Boice's confrontation rights by admitting the testimony of non-testifying co-defendants; (3) the deadly weapon enhancement was improper; (4) there was insufficient evidence to sustain Boice's conviction for battery with the use of a deadly weapon; (5)

¹The district court also sentenced Boice to imprisonment for two to ten years on the principal to battery charge and one year on the conspiracy charge, to run concurrently with the second degree murder sentence.

the district court violated Boice's due process rights by precluding cross-examination on bad acts evidence regarding the victim and testifying witnesses; (6) the district court deprived Boice of a fair trial; (7) the district court admitted witness testimony in violation of NRS 174.061; (8) the district court erred in admitting a metal construction stake, a channel iron, a whiskey bottle, broken vodka bottle glass, and a socket wrench; (9) the jury did not receive a proper self-defense instruction; (10) the district court erred in giving a flight instruction to the jury; (11) the jury selection process was improper and deprived Boice of his constitutional rights; and (12) cumulative errors precluded a fair trial.

FACTS

On August 22, 1998, Jessica Evans, a twenty-year-old Native American, attended a party at the Roundhouse Inn in Carson City. Various members of a local Hispanic gang named the Eastwood Tokers were also present at the party. After consuming alcohol, Evans began arguing with Israel Ralla (Muppet), one of the Tokers. As a result of the altercation, Evans suffered a swollen lip and a bruised and bloody nose.

Upset and intoxicated, Evans left the party to telephone her nineteen-year-old Native American cousin, Rocky Boice. While Evans was attempting to reach Boice, the police arrived at the scene and inquired into the cause of Evans' injuries. Evans refused to cooperate with the police and told the officers that some people behind the motel had attacked her. She did not mention Muppet's name and did not truthfully represent the incident. After the brief encounter with the police, a girl who had also attended the party drove Evans to Evans' house. Once home, Evans paged Boice to tell him about the altercation.

At the time Boice received the page, he was at a local pool hall with a few other Native Americans: Jaron Malone (seventeen years old), Michael Kizer (fourteen years old), Julian Contreras (fifteen years old), David Moyle (eighteen years old), and Wayne Roberts (nineteen years old). Upon learning of Evans' predicament, the group decided to pick up Alejandro Avila (twenty-one years old) and drive to Evans' house. When the group arrived at Evans' residence, they met two more Native Americans, Sylvia Fred (seventeen years old) and Frederick Fred (eighteen years old). Evans explained that an Eastwood Toker named Muppet had hit her on the nose and she wanted someone to confront him. Evans also told the group that the police had arrived, but did nothing on the matter.

Upset about the incident, Boice decided to go to the Roundhouse Inn and confront Muppet. Boice testified that he wanted to "go talk to him, or find out why he did it, and try to stop it from happening again." "Mad and crying," Evans informed them that there were about thirty Tokers at the motel and that they had an insufficient number of people to deal with the situation. The Eastwood Tokers had a reputation for violence and carrying weapons; Boice himself had numerous conflicts with the Tokers, including harassment at school and death threats at his residence.

In light of Evans' statements and the Tokers' reputation, the group decided to seek reinforcements and drove to Lew Dutchy's house. Dutchy was twenty-five years old at the time. Two other Native Americans, Clint Malone (fifteen years old) and Elvin Fred (sixteen years old), were also at Dutchy's house. After discussing their intentions, the group reasoned that they "better not go down there with nothing" and

decided to arm themselves. Boice picked up a heavy wooden stick about eighteen to twenty inches long and about one inch thick, Dutchy obtained a metal chain, and Clint Malone took a rusted bar. Contreras quickly went to his mother's house and took her baseball bat. The Native Americans then piled into Sylvia Fred's and Moyle's cars and drove to the Roundhouse Inn.

Allegedly, there was no talk about fighting on the way to the motel. The group was supposedly a back-up for Boice who intended only to discuss the incident with Muppet. Testimony at trial, however, indicated that the group anticipated a fight because they were upset about Evans' injuries and fed up with the Tokers.

Once there, Evans led them to the room where the party took place. Boice testified that his initial position was in the back of the pack; but as they approached the room, he moved to the front to prevent unnecessary fighting. Evans knocked on the door, and Carolee Simpson, another Native American who had attended the party, opened the door. Evans pulled back and Boice stepped forward, yelling: "Where the f---'s Muppet?" Because the room was dark, Boice did not see how many people were in the room and could not identify any of them. He testified that he was still outside the room's threshold when an unidentified person threatened him: "F--- you, you f---. I'll shoot you. I'll shoot all of you." After hearing this statement, Boice entered the room carrying the wooden stick. Boice testified that at this point he intended to hit the person with the stick.

Because there was no lighting, Boice did not observe anyone with a weapon and did not see anyone else besides the person who allegedly threatened him verbally, Samuel Resendiz. Testimony at trial

showed that Resendiz was a Toker, but Boice did not recognize him at that time. Due to Evans' earlier statements, however, Boice believed that the room was full of Eastwood Tokers. Boice testified that Resendiz was in the middle of a bed, on his knees, reaching back toward the head of the bed. Boice was concerned that Resendiz had a gun, but he did not run away because "everyone else was still coming behind" him and he "didn't want anybody else to get shot." Instead of withdrawing, Boice "rushed in" and hit Resendiz on the forehead with the wooden stick, as hard as he could, using both hands. The majority of the group followed Boice inside the motel room. At the time of the incident, Boice was five feet, seven inches tall and weighed between 160-180 pounds; Resendiz was five feet, two inches tall and weighed 112 pounds. The hit knocked Resendiz backwards, but Boice did not stop. Still using the stick, Boice hit Resendiz on the reaching arm; and as Resendiz brought his arm forward without a weapon, Boice hit him one more time. Resendiz unsuccessfully attempted to fight back.

At the time the Native Americans entered the motel room, Carlos Lainez, another Toker, was asleep on an adjacent bed. Simpson testified that Contreras, Elvin Fred, Frederick Fred, Jaron Malone, and others began hitting Lainez. Lainez awoke from the assault and escaped severe injuries by rolling under a vanity in the bathroom area.

Evidence at trial showed that Boice was not the only one who hit Resendiz. Contreras admitted to hitting Resendiz three to four times with a baseball bat, after Boice had already struck Resendiz. Allegedly, Contreras focused on Resendiz' lower body. Contreras also stated that after Boice left the room and as Contreras was leaving, Clint Malone approached Resendiz with a rusted bar. Simpson testified that Dutchy,

Frederick Fred, and Jaron Malone were also involved in hitting Resendiz at different times.

After Boice hit Resendiz for the third time, Boice heard Simpson scream, "That's not the one," meaning that the person he was hitting was not Muppet. Unbeknownst to the group, Muppet had left the motel prior to the group's arrival and the only people left in the room were Resendiz, Lainez, and Simpson. Upon hearing that he confronted the wrong person, Boice ran out of the room yelling, "It's not the one" and "Cops, cops, cops" because he wanted to motivate people to leave the room. Boice awaited the return of his friends at the place where they parked the cars, and the entire group drove off to Voltaire Canyon after stopping at Dutchy's house to get beer. The Native Americans did not go to Voltaire Canyon as part of a prearranged plan; they merely felt that the Tokers would not look for them at the canyon.

There was conflicting testimony as to Boice's state of mind at the conclusion of the altercation. Boice testified that he did not know anyone was seriously hurt and felt ashamed to learn that the group had attacked two unarmed strangers. Avila, however, testified that Boice was bragging about hitting people and "kicking their a--." At trial, Moyle stated that the group was happy to avenge Evans because the Tokers would no longer bother her. Evans was hugging everyone and thanking them for what they did.

Resendiz subsequently died from his wounds. The autopsy revealed that Resendiz suffered blunt force injuries to the head, trunk, and extremities, as well as lacerations to the right side of his head. The cause of death was skull fracture due to blunt force trauma. The forensic pathologist determined that a metal bat could have produced the death-

causing injury, but did not believe that a wooden stick could have caused such an impact.

As a result of the incident, the prosecution initially charged Boice, Clint Malone, Frederick Fred, Dutchy, Jaron Malone, Elvin Fred, Evans, Sylvia Fred, Contreras, Moyle, and Kizer with the following: (1) principal to open murder with the use of a deadly weapon; (2) principal to battery with the use of a deadly weapon; (3) principal to burglary; and (4) conspiracy to commit battery with the use of a deadly weapon.² One of the open murder charge alternatives was first degree felony murder. The case was assigned to Judge Michael E. Fondi.

On February 29, 2000, Judge Fondi entered a pretrial order granting the defendants' motion to dismiss the first degree felony murder charge. Reasoning that a burglary committed with the intent to commit battery could not support a felony murder charge, the judge dismissed the part of the information charging first degree murder under the felony murder rule. The order also eliminated the deadly weapon enhancement because the use of a deadly weapon was a necessary element of the predicate felony. On appeal, this court reasoned that applying the merger doctrine when the underlying felony is a burglary is inappropriate, regardless of the intent of the burglary.³ Consequently, we reversed Judge Fondi's decision and remanded the case for further proceedings.⁴ We did

²The prosecution granted Avila immunity in exchange for his testimony. Prior to trial, Moyle pleaded guilty to conspiracy to commit battery with the use of a deadly weapon.

³State v. Contreras, 118 Nev. 332, 337, 46 P.3d 661, 664 (2002).

⁴Id.

not specifically address the district court's decision to strike the deadly weapon enhancement.⁵

Judge Fondi retired on August 11, 2000, and Judge Michael R. Griffin took over the case. Because of the defendants' varying degrees of involvement, the prosecution moved to sever the case into three groups: (1) Boice, Clint Malone, Frederick Fred, and Dutchy; (2) Contreras and Evans; and (3) Jaron Malone, Elvin Fred, Sylvia Fred and Kizer. The groups were to proceed to trial in that respective order. Judge Griffin granted the prosecution's motion to sever because of potential due process and fair trial problems and because the courtroom could not accommodate all defendants, counsel, and witnesses. Judge Griffin subsequently severed Frederick Fred from the Boice group because the judge felt that Fred was only "situationally involved" and was not an instigator. After conversing with Boice's counsel and determining that Boice's possible defenses were antagonistic to Dutchy's and Clint Malone's defenses, Judge Griffin severed Dutchy and Clint Malone from Boice's case as well. As a result, Boice remained the only defendant to proceed to trial first.

The Boice case proceeded to a jury trial beginning on August 29, 2002. On September 13, 2002, the prosecution moved to amend the criminal information and charge Boice as a principal to second degree murder. On September 18, 2002, the jury found Boice guilty as a principal to second degree felony murder with the use of a deadly weapon for Resendiz' death, principal to battery with the use of a deadly weapon for the injuries Lainez sustained, and conspiracy to commit battery with the use of a deadly weapon. The jury acquitted Boice as a principal to first

⁵Contreras, 118 Nev. 332, 46 P.3d 661.

degree felony murder with the use of a deadly weapon and as a principal to burglary.

Prior to trial, the prosecution informed Judge Griffin that it intended to reopen the enhancement issue because of a subsequent Nevada Supreme Court decision. After trial, Boice moved to strike the deadly weapon enhancement. In response, the prosecution moved for a reconsideration of Judge Fondi's ruling. Judge Griffin determined that our decision in Cordova v. State,⁶ which was filed after Judge Fondi's order, justified reinstating the deadly weapon enhancement. As a result, the district court sentenced Boice to imprisonment for ten to twenty-five years on the second degree murder charge and an additional ten to twenty-five year term for the use of a deadly weapon.⁷ This appeal followed.

DISCUSSION

Second degree felony murder

Boice argues that his principal to second degree felony murder with the use of a deadly weapon conviction cannot stand because the jury acquitted him of the burglary charge and there was insufficient evidence to support a conspiracy liability and a second degree murder charge. We disagree.

⁶116 Nev. 664, 6 P.3d 481 (2000).

⁷The district court also sentenced Boice to imprisonment for two to ten years on the principal to battery charge and one year on the conspiracy charge, to run concurrently with the second degree murder sentence.

Burglary acquittal

Boice asserts that we should set aside his second degree felony murder conviction because the jury acquitted him of the predicate felony of burglary, and battery with the use of a deadly weapon is not one of the enumerated felonies that would support a felony murder conviction. We find Boice's arguments unpersuasive.

A person who aids, abets or encourages another to commit a felony, gross misdemeanor or a misdemeanor is a principal to that offense.⁸ Pursuant to NRS 200.030(1)(b), first degree murder is murder in the perpetration or attempted perpetration of a sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of fourteen or child abuse. While NRS 200.030(1)(b) does not include battery with the use of a deadly weapon as one of the predicate felonies justifying a first degree felony murder conviction, a felony which is inherently dangerous in the abstract can support a second degree felony murder conviction.⁹

The amended criminal information charged Boice as a "principal to second-degree murder with the use of a deadly weapon, as defined by NRS 200.010, 200.020, 200.030, 195.020 and 193.165." At the end of trial, the district court instructed the jury on second degree murder, voluntary manslaughter, and involuntary manslaughter.¹⁰ The district

⁸NRS 195.020.

⁹Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999).

¹⁰These are the instructions which pertain to the relevant issue. The district court also instructed the jury on principal to first degree murder with the use of a deadly weapon, principal to first degree murder

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court, however, also instructed the jury on second degree felony murder. As a result of the district court's instructions, the jury found Boice guilty as "principal to second degree felony-murder with the use of a deadly weapon," although the criminal information charged him as a principal to second degree murder with the use of a deadly weapon. (Emphasis added.) The jury acquitted Boice of the principal to burglary charge.

Boice contends that the second degree felony murder conviction cannot stand because the jury acquitted him of the burglary and battery with the use of a deadly weapon is not one of the felonies NRS 200.030 enumerates as grounds for a felony murder conviction. This argument is inapposite for two reasons. First, the predicate felony for Boice's conviction was battery with a deadly weapon upon Resendiz, not burglary. Thus, the burglary acquittal is inconsequential. Second, the felonies NRS 200.030 enumerates relate to first degree felony murder; the jury convicted Boice of second degree felony murder. The second degree felony murder rule applies if the felony is one which is inherently dangerous in the abstract and there is an immediate and direct causal connection between the defendant's actions and the victim's death.¹¹ Because the district court's instructions required the jury to determine that battery with the use of a deadly weapon was inherently dangerous,

... continued

without the use of a deadly weapon, principal to burglary, conspiracy to commit battery, and principal to battery with the use of a deadly weapon.

¹¹Labastida v. State, 115 Nev. 298, 306-07, 986 P.2d 443, 448 (1999); Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983).

the application of the second degree felony murder rule to the case at bar was proper.¹²

Information charge

Boice also argues that we should set aside his conviction because the prosecution never specifically charged him with second degree felony murder. We conclude this argument is unavailing.

Where the information alleges the basic facts supporting the conviction and the defendant has notice of the factual allegations against him so he could defend himself against these allegations, an instruction on charges the information did not contain may be appropriate.¹³ The pertinent parts of the information stated that Boice, acting in concert and by a preexisting plan with the other defendants, "did kill and murder Samuel Resendiz, a human being, during the perpetration of the crime of battery with a deadly weapon, an inherently dangerous felony which in its natural and foreseeable consequences tends to result in serious bodily injury or death." The information specified that "at the request and inducement of Jessica Evans, the Defendant and others . . . gathered together and proceeded in at least two vehicles to the vicinity of Room #103 of the Roundhouse Inn . . . ; with the knowledge of all, several of them obtained metal or wooden implements to use as clubs to batter at

¹²We have previously determined that the sale and administration of drugs and child neglect constituted inherently dangerous felonies, justifying a second degree felony murder conviction. See Noonan, 115 Nev. 184, 980 P.2d 637; Morris, 99 Nev. 109, 659 P.2d 852. Similarly, battery with the use of a deadly weapon meets the "inherently dangerous" standard.

¹³Noonan, 115 Nev. at 188, 980 P.2d at 639.

least one of the occupants of said room." The information further alleged that one or more of the group of defendants

killed and murdered SAMUEL RESENDIZ by attacking and beating him repeatedly with wooden and/or metal clubs, resulting in multiple fractures to his arms and multiple blunt force fractures and trauma to his skull, thereby inflicting mortal injuries upon the said SAMUEL RESENDIZ, from which he died on August 23, 1998 as a natural and foreseeable consequence of a violent attack with said clubs.

Finally, the information stated that Boice aided and abetted, or directly or indirectly counseled, encouraged, commanded, induced or otherwise procured another person to commit the said crime. We conclude that the criminal information contained sufficient facts to apprise Boice of the allegations against him and allow him to prepare an adequate defense. The language about Boice killing and murdering Samuel Resendiz, "a human being, during the perpetration of the crime of battery with a deadly weapon, an inherently dangerous felony" unambiguously indicates the nature of Boice's felonious conduct.

Although in Alford v. State we reversed the defendant's felony murder conviction because the prosecution failed to charge felony murder, Alford is distinguishable.¹⁴ In Alford, the prosecution initially charged Alford with forcible home invasion, but dismissed the charges prior to trial because evidence showed that Alford entered peacefully and with permission.¹⁵ The information charged Alford with open murder alleging only that the murder was with malice aforethought and did not contain

¹⁴111 Nev. 1409, 906 P.2d 714 (1995).

¹⁵Id. at 1412 n.2, 906 P.2d at 716 n.2.

any felony murder allegations.¹⁶ Consequently, Alford's defense focused on his state of mind at the time of the killing.¹⁷ At the close of the evidence, the prosecution requested jury instructions on felony murder, based on Alford's supposed burglary of the trailer home, and the jury convicted Alford of first degree felony murder.¹⁸ We reversed the conviction because Alford did not receive fair notice of the charges against him, had no reason to anticipate these charges and had no opportunity to prepare an adequate defense.¹⁹ Unlike Alford, the criminal information contained ample allegations to apprise Boice of the felony murder charge.

Sufficiency of the evidence

Boice argues that the prosecution failed to present sufficient evidence to justify Boice's conviction, even under conspiracy liability principles. We disagree.

In reviewing a jury's verdict for sufficiency of the evidence, we "must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence."²⁰ Determining the weight and credibility of conflicting testimony is a question for the jury.²¹ The relevant inquiry for this court is "whether, after viewing the evidence in the light most

¹⁶Id. at 1411, 906 P.2d at 715.

¹⁷Id.

¹⁸Id. at 1413, 906 P.2d at 716.

¹⁹Id. at 1411-12, 906 P.2d at 715.

²⁰Garner v. State, 116 Nev. 770, 779, 6 P.3d 1013, 1019 (2000).

²¹Id. at 779-80, 6 P.3d at 1019.

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."²²

"[C]onspiracy is 'an agreement between two or more persons for an unlawful purpose.'"²³ Because direct proof of a conspiracy is seldom available, the prosecution usually demonstrates conspiracy by inference from the parties' conduct.²⁴ "Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction."²⁵

Boice asserts that the jury's burglary charge acquittal shows that Boice had no intent to commit assault or battery upon entering the motel room. Boice argues that absent such intent, there can be no agreement to sustain the second degree felony murder conviction on conspiracy liability grounds. Boice's conspiracy liability argument lacks merit because the information did not charge Boice as a co-conspirator, but as a principal to second degree felony murder.

A principal is a person who aids, abets or encourages another to commit a felony, gross misdemeanor or a misdemeanor.²⁶ The record contains ample evidence to support Boice's conviction as a principal. When Boice and the Native Americans learned of Evans' predicament,

²²Jackson v. Virginia, 443 U.S. 307, 319 (1979) (quoted in Garner, 116 Nev. at 780, 6 P.3d at 1019).

²³Garner, 116 Nev. at 780, 6 P.3d at 1020 (quoting Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998)).

²⁴Id.

²⁵Id.

²⁶NRS 195.020.

they decided to go to the motel and confront Muppet. In light of Evans' statements and the Tokers' reputation, the group decided to seek reinforcements and drove to Dutchy's house. After discussing their intentions, the group reasoned that they "better not go down there with nothing" and decided to arm themselves. Boice picked up a heavy wooden stick about eighteen to twenty inches long and about one inch thick, Dutchy obtained a metal chain, and Clint Malone took a rusted bar. Contreras took his mother's baseball bat.

Although the group was supposedly a back-up for Boice who intended only to discuss the incident with Muppet, evidence also indicated that the group anticipated a fight because they were upset about Evans' injuries and fed up with the Tokers. Avila testified that Boice said something about "kicking someone's a--." Moyle stated that "people were getting angry and riled up about what happened." Upon arrival at the motel, some of the Native Americans were taking off their shirts in preparation for a fight and were hitting themselves on the chest. Testimony also showed that Boice moved to the front of the group when they approached the motel room. We hold that this is sufficient evidence from which the jury can conclude beyond a reasonable doubt that Boice acted as a principal to second degree felony murder.

Boice's argument that the jury's acquittal on the burglary charge renders his conviction void lacks merit. We have previously held that inconsistent jury verdicts may result from the jury's clemency and do not constitute grounds for reversal.²⁷ Boice's contention that the disparate

²⁷Greene v. State, 113 Nev. 157, 173, 931 P.2d 54, 64 (1997); Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675-76 (1995).

punishments the different defendants received show a lack of conspiracy is also unpersuasive because the prosecution based its recommendation on the defendants' varying degrees of involvement.

Boice next argues that the evidence failed to demonstrate that Boice was responsible for Resendiz' death. We disagree. Although Dr. Raven, the forensic pathologist who performed Resendiz' autopsy, testified that the wooden stick Boice allegedly carried unlikely caused Resendiz' death, ample evidence supports Boice's conviction. The jury convicted Boice as a principal to second degree felony murder; all the jury had to find was that Boice aided, abetted or encouraged another in murdering Resendiz. As our prior analysis evidences, the jury could reasonably draw such a conclusion. Boice admitted to personally striking Resendiz three times. Although other defendants also hit Resendiz, a "principal" conviction does not require that Boice delivered the fatal blow. There was sufficient evidence to support the conviction.

Confrontation rights

Boice argues that the district court violated his confrontation rights in admitting testimony of non-testifying co-defendants. We conclude this argument lacks merit.

Absent an abuse of discretion, we will not overturn a district court's decision to admit or exclude evidence.²⁸ In Bruton v. United States,²⁹ "the United States Supreme Court held that in a joint trial, evidence of an incriminating statement by one defendant which expressly refers to the other defendant violates the Confrontation Clause of the

²⁸Daniel v. State, 119 Nev. ___, ___, 78 P.3d 890, 900-01 (2003).

²⁹391 U.S. 123 (1968).

Sixth Amendment."³⁰ As a preliminary point, the district court severed the case, so Boice was the only defendant at trial. Because there was no joint trial, there can be no Bruton implication.

Turning to Boice's Confrontation Clause arguments, Boice asserts that the district court violated his rights of confrontation by admitting statements made by other defendants at Voltaire Canyon, the place where the Native Americans retreated after the altercation. Over objection, the district court admitted the testimony as statements by co-conspirators during the course of the conspiracy and as excited utterances.

Generally, an out-of-court statement offered to prove the truth of the matter asserted is inadmissible as hearsay.³¹ At the time of Boice's trial, the governing case on admissibility of testimonial out-of-court statements under the Confrontation Clause was Ohio v. Roberts.³² In Roberts, the United States Supreme Court held that admitting hearsay statements into evidence denies the defendant's right to confront witnesses unless the statements possess indicia of reliability.³³ Under Roberts, hearsay evidence is sufficiently reliable if it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."³⁴

³⁰Ducksworth v. State, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998) (emphasis added).

³¹NRS 51.035.

³²448 U.S. 56 (1980).

³³Id. at 66.

³⁴Id.

Subsequent to Boice's trial, however, the United States Supreme Court decided Crawford v. Washington, which held that the Confrontation Clause bars testimonial out-of-court statements of witnesses, unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine them.³⁵

We need not decide whether the district court's decision to admit contradicts the Crawford holding because we conclude that even if the district court erred, the error was harmless. For example, Avila and Moyle testified that after the altercation, Evans was thanking and hugging everyone. Evans' behavior at Voltaire Canyon has no bearing on Boice's state of mind before or during the altercation. The district court also admitted statements that someone said they used a metal rod to swing at a guy's head, that there was a sense of avenging at the canyon, that Clint Malone was "poking" Resendiz, and that people were "pumped up." Moyle testified that Jaron Malone stated that he was the last guy in the room and he hit Resendiz with his fist, knocking him off the bed. Moyle also stated that Frederick Fred and Dutchy explained how they were trying to "go after" the guys inside the motel room.

The record contains ample testimony to sustain Boice's conviction, even without the statements. Evidence at trial established that the group anticipated a fight because they were upset about Evans' injuries and fed up with the Tokers. Moyle stated that "people were getting angry and riled up about what happened." Upon arrival at the motel, some of the Native Americans were taking off their shirts in preparation for a fight and were hitting themselves on the chest.

³⁵ ___ U.S. ___, 124 S.Ct. 1354, 1374 (2004).

Testimony also showed that Boice moved to the front of the group when they approached the motel room. In light of this, we conclude that the district court's error in allowing the Voltaire Canyon statements was harmless beyond a reasonable doubt, and we decline to disturb the district court's ruling.³⁶

The deadly weapon enhancement

Boice contends that Judge Griffin's decision to reinstate the enhancement ran contrary to res judicata and law of the case principles, violated the Double Jeopardy and Ex Post Facto clauses, and constituted cruel and unusual punishment. We conclude Boice's arguments are inapposite; we will address each argument in turn.

Res judicata and law of the case

The doctrine of res judicata precludes parties from relitigating an issue the court has already determined.³⁷ The collateral estoppel doctrine states that "if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties."³⁸ Under "law of the case" canons, where an appellate court states a principle or rule of law in deciding a case, that rule becomes the law of the case and is controlling

³⁶Tabish v. State, 119 Nev. ___, ___, 72 P.3d 584, 595-96 (2003).

³⁷Executive Mgmt. v. Ticor Title Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998)).

³⁸Id. at 835, 963 P.2d at 473 (quoting University of Nevada v. Tarkanian, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994)).

both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same.³⁹

Insofar as res judicata principles apply in the criminal context, the deadly weapon enhancement was not an issue of fact or law we determined on appeal. First, our opinion did not reference the deadly weapon enhancement; we merely determined that the predicate felony of burglary with intent to commit battery did not merge with the felony murder.⁴⁰ Second, while NRS 177.015 permits a party to appeal an order granting a motion to dismiss one or more counts in a criminal information,⁴¹ a district court's order granting a motion to strike an amended information is not appealable.⁴² Under NRS 193.165(2), the use of a deadly weapon is not a separate offense, but "an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." Consequently, the prosecution had no right to appeal the enhancement ruling independently. For the same reasons, the law of the case doctrine does not apply.

Absent the application of res judicata and law of the case, the issue becomes whether Judge Griffin had the authority to void Judge Fondi's order and reinstate the deadly weapon enhancement.

District courts have equal and coextensive jurisdiction; therefore, one district court lacks jurisdiction to review another district

³⁹Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

⁴⁰State v. Contreras, 118 Nev. 332, 337, 46 P.3d 661, 664 (2002).

⁴¹State v. Koseck, 112 Nev. 244, 245, 911 P.2d 1196, 1197 (1996).

⁴²State v. Dist. Ct., 116 Nev. 374, 379-80, 997 P.2d 126, 130 (2000).

court's acts.⁴³ However, we have previously discussed the power of a successor judge as to proceedings before a former judge in Moore v. City of Las Vegas⁴⁴ and Rohlfing v. District Court.⁴⁵ In Moore, between the filings of a first and a second motion for rehearing on a motion for summary judgment, the first judge to whom the case was originally assigned lost his bid for reelection. Pursuant to District Court Rule 27, when a judge denied an application or a petition, a party could not make the same application or petition to another judge without the first judge's consent. We determined that his successor had discretion to decide whether to grant the second motion for a rehearing, although the first judge had denied the prior rehearing motion.⁴⁶ We reasoned that the unavailability of the first judge removed the "judge shopping" considerations District Court Rule 27 sought to prevent.⁴⁷ We conclude that Moore is analogous to the case at bar because it dealt with the right of a direct successor to reconsider the former judge's ruling. As in Moore, Judge Griffin is Judge Fondi's direct successor and the prosecution filed a motion to reconsider the prior ruling.

In Rohlfing, Judge Guinan, the judge originally assigned to the case, granted the prosecution's motion for a mistrial.⁴⁸ The

⁴³State Engineer v. Sustacha, 108 Nev. 223, 225, 826 P.2d 959, 960 (1992).

⁴⁴92 Nev. 402, 551 P.2d 244 (1976).

⁴⁵106 Nev. 902, 803 P.2d 659 (1990).

⁴⁶Moore, 92 Nev. at 404-05, 551 P.2d at 245-46.

⁴⁷Id. at 405, 551 P.2d at 246.

⁴⁸Rohlfing, 106 Nev. at 903-04, 803 P.2d at 660.

prosecution filed an application to reset the case for retrial; Rohlring moved to dismiss. Because the Second Judicial District Court had a rotating criminal calendar, Judge McGee heard and granted the motion to dismiss. Subsequently, Judge Guinan entered an order voiding Judge McGee's order granting Rohlring's motion to dismiss and purporting to deny the motion to dismiss. Rohlring then filed a motion to vacate Judge Guinan's order, which came before Judge Adams, Judge Guinan's successor in office. Judge Adams denied Rohlring's motion to vacate. On appeal, we held that "Judge Guinan exceeded his jurisdiction when he declared void Judge McGee's order dismissing the state's case against Rohlring."⁴⁹ We conclude that Rohlring is distinguishable because Judge McGee heard the case pursuant to the rotating criminal calendar. Unlike Rohlring, Judge Griffin was Judge Fondi's direct successor. As a direct successor, Judge Griffin had discretion to vacate the prior order and Cordova v. State⁵⁰ provides sufficient justification for Judge Griffin's decision.

In Cordova, the defendant was charged with second degree murder with the use of a deadly weapon for shooting through the front door of an apartment and killing the victim.⁵¹ The district court instructed the jury on second degree felony murder with the predicate felony of shooting into an occupied dwelling. After the jury returned a guilty verdict, the district court sentenced the defendant to two consecutive terms of life imprisonment with the possibility of parole. The

⁴⁹Id. at 904, 907, 803 P.2d at 660-61, 63.

⁵⁰116 Nev. 664, 6 P.3d 481 (2000).

⁵¹Id. at 665, 6 P.3d at 482.

defendant appealed, claiming that the use of a deadly weapon was a necessary element of the crime he committed. We held that the offense of second-degree murder, "considered in the abstract," did not include the use of a firearm as an essential element and thus the deadly weapon enhancement was appropriate.⁵²

In the case at bar, the prosecution charged Boice as a principal to second degree murder with the use of a deadly weapon. While the jury found Boice guilty as a principal to second degree felony murder with the use of a deadly weapon, the judgment of conviction adjudicated Boice guilty as a principal to second degree murder with the use of a deadly weapon. Similar to Cordova, the jury convicted Boice based on an underlying felony involving the use of a deadly weapon. As in Cordova, the use of a deadly weapon is not a necessary element of the offense of second degree murder "considered in the abstract." The use of a deadly weapon served to enhance Boice's sentence.

Boice's attempt to distinguish Cordova is inapposite. Boice argues that Cordova is inapplicable because his second degree murder conviction rested on the underlying battery with the use of a deadly weapon and thus the conviction already included the deadly weapon enhancement. Boice, however, fails to note that the underlying felony in Cordova, shooting into an occupied dwelling, also necessarily involved the use of a deadly weapon. Based on Cordova, Judge Griffin properly set aside Judge Fondi's order.

⁵²Id. at 668, 6 P.3d at 484.

Double Jeopardy and judicial ex post facto prohibition

Boice argues that Judge Griffin's decision to reinstate the deadly weapon enhancement violated the Fifth Amendment Double Jeopardy clause and the judicial ex post facto prohibition. We conclude that Boice's arguments lack merit.

"Both the Nevada and the United States constitutions prohibit placing a person in jeopardy more than once for the same offense."⁵³ A single act violating two statutory provisions constitutes a single offense for double jeopardy purposes if the elements of one offense entirely include the elements of the second offense.⁵⁴ "Jeopardy attaches when an accused is at trial before a sworn jury."⁵⁵

Boice asserts that the deadly weapon enhancement violated the Double Jeopardy clause because the use of the deadly weapon was a necessary element of the underlying offense of battery with the use of a deadly weapon. Boice's argument, however, ignores a fundamental Double Jeopardy principle, *i.e.*, that jeopardy does not attach before the jury panel is sworn. In the instant case, jeopardy did not attach because Judge Fondi never impaneled a jury. The only jury selection process in this case occurred after Judge Fondi's retirement.

Turning to Boice's ex post facto argument, Boice maintains that reinstating the enhancement violated the judicial ex post facto prohibition because the offense occurred in 1998 and we decided Cordova in 2000. The "judicial ex post facto" prohibition precludes judicial

⁵³Hanley v. State, 83 Nev. 461, 465, 434 P.2d 440, 442 (1967).

⁵⁴Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002).

⁵⁵Hanley, 83 Nev. at 465, 434 P.2d at 442.

retroactive increases in punishment.⁵⁶ We discussed the issue in Stevens v. Warden.⁵⁷ In Stevens, we held that a retroactive application of a judicial decision affecting good time credit calculations would violate ex post facto principles where the judicial decision was unforeseeable and it would increase the amount of time Stevens had to spend in prison.⁵⁸ However, Stevens is distinguishable because the district court had already sentenced Stevens and the subsequent judicial decision affected an already existing sentence.⁵⁹ Unlike Stevens, at the time Judge Griffin reinstated the deadly weapon enhancement, the jury had convicted Boice, but he had received no sentence. Consequently, Judge Griffin did not increase Boice's already existing punishment, and his decision did not violate the ex post facto doctrine.

Cruel and unusual punishment

Boice argues that his sentence is unreasonably disproportionate to the sentences other co-defendants received and such a selective punishment violated his equal protection rights under the Fourteenth Amendment, constituting cruel and unusual punishment. We find Boice's arguments unpersuasive.

While a prosecutor has wide discretion whether to prosecute, this discretion is subject to constitutional limitations.⁶⁰ Equal protection

⁵⁶Stevens v. Warden, 114 Nev. 1217, 1221, 969 P.2d 945, 948 (1998).

⁵⁷114 Nev. 1217, 969 P.2d 945.

⁵⁸Id. at 1221-23, 969 P.2d at 948-49.

⁵⁹Id. at 1218-19, 969 P.2d at 946.

⁶⁰U.S. v. Armstrong, 517 U.S. 456, 464 (1996).

principles mandate that the decision whether to prosecute may not rest on "an unjustifiable standard such as race, religion, or other arbitrary classification."⁶¹ A defendant must demonstrate that the enforcement of a criminal statute is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."⁶²

Following Boice's principal to second degree felony murder with the use of a deadly weapon conviction, the district court sentenced Boice to twenty to fifty years in prison. After the completion of Boice's trial, the rest of the defendants pleaded guilty to various charges. The harshest sentence the district court imposed was Dutchy's twenty-six to sixty-five months imprisonment term; the majority of other defendants received probation. While Boice's counsel acknowledges that the record does not reflect this, counsel maintains that Boice never received a plea offer similar to the offers the other defendants received. Because of the varying sentences and the alleged lack of an acceptable plea bargain, Boice argues that the prosecution singled him out for disparate treatment and violated his equal protection rights. We find Boice's contentions unavailing.

There is no evidence that the prosecution based its decision to prosecute Boice on race, religion, gender or any other arbitrary classification. All defendants were Native Americans. Boice has failed to show that he belongs to a class which the prosecution singled out for a

⁶¹Id. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

⁶²Id. at 464-65 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

disparate treatment. Boice's claims rest on the mere fact that he received a much harsher penalty than the rest of the group, although their involvement in the altercation was arguably the same. Boice fails to show a legal justification for reversing the sentence on equal protection grounds.

Boice's "cruel and unusual punishment" argument is equally inapposite. He maintains that his sentence is unreasonably disparate to the penalties the district court imposed on his co-defendants and thus it constitutes cruel and unusual punishment. The Eighth Amendment prohibition against cruel and unusual punishment applies to extreme sentences that are grossly disproportionate to the crime.⁶³ Pursuant to NRS 200.030(5), a defendant convicted of second degree murder can receive a prison sentence

- (a) [f]or life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
- (b) [f]or a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

The district court's twenty to fifty years imprisonment sentence⁶⁴ for Boice's conviction as a principal to second degree murder falls within the statutory punishment guidelines. Because Boice's sentence is not grossly disproportionate to the crime he committed, his punishment was not cruel and unusual. Although Boice emphasizes the disparity between his sentence and the sentences of the other defendants, this disparity does not support his argument on "cruel and unusual"

⁶³Ewing v. California, 538 U.S. 11, 23 (2003).

⁶⁴The conviction reflects the deadly weapon enhancement.

grounds. The relevant inquiry is whether the punishment is proportionate to the crime, not to the sentences of other co-defendants.

Principal to battery conviction

Boice argues that there was insufficient evidence to support his principal to battery with the use of a deadly weapon conviction for the injuries Lainez sustained. We disagree.

Battery is "any willful and unlawful use of force or violence upon the person of another."⁶⁵ To uphold a battery conviction, we must determine "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."⁶⁶

Boice argues that we should reverse his battery with the use of a deadly weapon conviction because there was no evidence Boice ever struck Lainez. This argument lacks merit. While no evidence showed that Boice was personally involved in hitting Lainez, there was sufficient evidence to sustain his conviction as a principal for his overall participation in producing Lainez' injuries.

Cross-examination and bad acts evidence

Boice argues that the district court violated his Sixth Amendment confrontation rights in restricting certain cross-examination of witnesses and introduction of bad acts evidence. We conclude that Boice's arguments are inapposite.

⁶⁵NRS 200.481(1)(a).

⁶⁶Jackson v. Virginia, 443 U.S. 307, 319 (1979) (quoted in Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1019 (2000)).

District courts have discretion to curtail cross-examination.⁶⁷ Absent an abuse of discretion, we will not overturn a district court's decision to exclude evidence.⁶⁸ Even if the district court erred, we will not disturb the district court's ruling if the error was harmless beyond a reasonable doubt.⁶⁹

Under NRS 48.045(1), character evidence is normally inadmissible to show that a person acted in conformity with that character. One of the exceptions to NRS 48.045(1), however, allows a defendant to present evidence of a victim's character which shows "that the victim was the likely aggressor."⁷⁰ In such instances, the defendant need not prove knowledge of the victim's character,⁷¹ but may offer evidence only in the form of reputation or opinion testimony.⁷² While the district court may admit evidence of a victim's specific acts, such evidence can only serve the purpose of establishing what the defendant believed about the victim's character.⁷³ Where the defendant raises self-defense, this evidence is relevant to show whether the defendant reasonably believed that use of force in self-defense was necessary.⁷⁴ In such cases,

⁶⁷Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001).

⁶⁸Daniel v. State, 119 Nev. ___, ___, 78 P.3d 890, 900-01 (2003).

⁶⁹Ducksworth v. State, 113 Nev. 780, 795, 942 P.2d 157, 167 (1997).

⁷⁰Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

⁷¹Id.

⁷²NRS 48.055(1).

⁷³Daniel, 119 Nev. at ___, 78 P.3d at 902.

⁷⁴Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986).

the defendant must prove that he had knowledge of the alleged specific instances of misconduct.⁷⁵

Despite all these limitations, NRS 48.045(2) permits the admission of evidence of "other crimes, wrongs or acts" for purposes other than character, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Prior specific acts are also admissible for impeachment if they resulted in a felony conviction.⁷⁶ Absent a felony conviction, a party may inquire into specific acts if they relate to truthfulness, but the cross-examiner may not introduce extrinsic evidence to prove the alleged acts.⁷⁷

Boice points to eleven instances where the district court allegedly erred. We will briefly address each instance. First, Boice alleges that the district court erred in restricting defense counsel's inquiry into Lainez' methamphetamine consumption to five days prior to the 1998 incident. We conclude that the district court's ruling was correct. By attempting to demonstrate an alleged "Toker gang activity," Boice's counsel merely aimed to show bad character by implying that Lainez was a loyal member of a group that society would condemn. Boice's "defect in perception" argument is also inapposite because the jury heard evidence of Lainez' marijuana consumption on the night in question. Evidence of drug intake outside the five-day time frame the district court allowed would be less relevant and highly prejudicial. Regarding Lainez' understanding of

⁷⁵Id.

⁷⁶NRS 50.095(1).

⁷⁷NRS 50.085(3).

his plea agreement, the district court did permit Boice's counsel to ask whether Lainez obtained a beneficial charge reduction.

Second, Boice argues that the district court improperly granted Lainez immunity to testify. This argument is inapposite because the district court granted immunity to Lainez at the prosecution's request.

Third, Boice asserts that the district court erroneously precluded his evidence that Boice had received from Dutchy regarding two alleged occasions in the year 2000 where Lainez spat on Dutchy and challenged him to fight. Because this occurred subsequent to 1998, the district court did not abuse its discretion in excluding this evidence.

Fourth, Boice argues that the district court should have permitted cross-examination as to Lainez' pending prosecution for gun possession. The district court's decision was correct because this occurred after the 1998 incident.

Fifth, Boice asserts that the district court erred in precluding cross-examination about Simpson's misdemeanor battery conviction. The district court rightfully excluded the evidence because NRS 50.095(1) expressly prohibits the introduction of this misdemeanor conviction.

Sixth, Boice claims that the district court erroneously precluded introduction of Resendiz' domestic violence conviction. We conclude Boice's contentions lack merit. In Daniel v. State and Petty v. State, we held that evidence of the victims' prior violent conduct was admissible where the defendants demonstrated knowledge of this conduct.⁷⁸ Unlike Daniel and Petty, there was no evidence that Boice

⁷⁸Daniel v. State, 119 Nev. ___, ___, 78 P.3d 890, 902 (2003); Petty v. State, 116 Nev. 321, 326-27, 997 P.2d 800, 803 (2000).

knew of Resendiz' domestic violence conviction. Absent such knowledge, the conviction had no probative value and the district court properly excluded it.

Seventh, Boice argues that the district court incorrectly limited cross-examination about Resendiz' prior attack on a Carson City deputy sheriff. We hold that the district court did not err in excluding the evidence because there was no indication that Boice knew of this incident. In such cases, the defense can prove the victim's character for violence only through reputation or opinion.

Eighth, Boice claims that the district court erred in precluding inquiry into whether Muppet was expelled from high school for carrying a firearm. We find this argument inapposite. Under then existing NRS 62.193(1) and NRS 62.295,⁷⁹ a juvenile adjudication was generally not a criminal proceeding and did not result in a conviction. The defense did not dispute the fact that Muppet had received a juvenile adjudication, and thus his firearm possession "conviction" cannot serve for impeachment purposes.

Ninth, Boice argues that the district court should have allowed his counsel's questions regarding alleged threats against Contreras that Muppet made to Contreras' father. The police arrested Muppet as a result of the threat, but there was no evidence of a conviction. The district court's ruling was correct because the arrest was inadmissible for two reasons: (1) there was no conviction, and thus the specific bad acts constitute impermissible character evidence; and (2) even if there was a

⁷⁹Subsequent to trial, the Legislature repealed both statutes, but enacted NRS 62D.010 and NRS 62E.010, which stand for the same proposition.

conviction, juvenile convictions may not serve for impeachment purposes.

Tenth, Boice asserts that the district court should have permitted examination as to whether a witness knew about Resendiz firing a gun at another Native American about two weeks before the incident. The district court properly excluded the evidence because the defense made no showing that Boice knew about this act and Boice testified that he did not identify Resendiz on the night in question.

Finally, Boice maintains that the district court erred in precluding evidence that Resendiz was to conduct a drive-by shooting in the Reno area. The district court correctly excluded the evidence because the defense presented no proof that Boice knew of Resendiz' character, and thus specific acts were inadmissible. The district court's actions were squarely on point with NRS 48.045 and our holding in Daniel.

Fair trial

Boice argues that the district court's inappropriate remarks toward his trial counsel deprived him of a fair trial. We find Boice's arguments unpersuasive.

"Judges must be mindful of the influence they wield. The words of a trial judge may mold the opinion of the jurors to the extent that a party may be prejudiced."⁸⁰ A district court's numerous expressions of impatience with defense counsel throughout trial in the jury's presence may warrant a reversal where the district court's behavior undermines the jury's opinion of counsel and negatively impacts the defense's case.⁸¹

⁸⁰Randolph v. State, 117 Nev. 970, 984-85, 36 P.3d 424, 433 (2001).

⁸¹Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339-40 (1998).

In Oade v. State, the district court repeatedly levied fines against or issued warnings to defense counsel, expressed impatience with counsel in front of the jury on numerous occasions, volunteered opinion on certain evidence, commented on issues unrelated to the case at bar, and continuously emphasized the need to maintain courtroom decorum.⁸² We held that the district court's inappropriate behavior in the jury's presence prejudiced the defendant's right to a fair trial and reversed the defendant's conviction.⁸³ In Randolph v. State, the district court abruptly interrupted defense counsel's admonition request on one occasion. On another occasion, after defense counsel objected to the prosecution's description of certain evidence, the court stated that it was up to the jury to decide and asked for no more interruptions. In response to defense counsel's question whether the district court was limiting him, the court answered, "I'm limiting you at this time, Mr. Brown. So, please do not provoke the court any further."⁸⁴ We concluded that the district court's expressions of impatience with defense counsel in front of the jury did not warrant a reversal because they were only two and were not extreme.⁸⁵

In the instant case, the relationship between the district court and defense counsel appeared confrontational throughout trial. The district court continuously precluded counsel's inquiry into specific bad acts. Because defense counsel continued to inquire into specific acts, the

⁸²Id. at 623-24, 960 P.2d at 339.

⁸³Id. at 624, 960 P.2d at 339-40.

⁸⁴Randolph, 117 Nev. at 984, 36 P.3d at 433.

⁸⁵Id. at 985, 36 P.3d at 434.

district judge held a meeting outside the jury's presence. The judge instructed counsel to ask permission before talking about prior bad acts. The court stated: "[D]on't just shoot off from the top of the hip, or we'll stop it. Because if you do it very many more times, you won't be allowed to ask questions." With the jury present, defense counsel inquired into Resendiz' alleged gun possession, and the district court admonished, "[S]pecific acts can't be inquired into, sir." Defense counsel then attempted to dispute the ruling and the district court replied, "That's denied, sir. One more time, and we'll have a little talk about what you are doing here today, sir." Defense counsel retorted, "That's for another court." The district court then responded that counsel was either going to try the case in accordance with the rules of evidence or he was not going to try it.

As a result of this argument, the district court called another meeting outside the jury's presence. The court told counsel that he was not "going to pull this trick again." The district court stated that counsel persisted in disregarding the court's instructions on specific acts, although the court told him "about five times" he could not do that. Although counsel apologized for the "another court" comment, the district judge stated that if counsel continued his behavior, the judge would not put up with it. Later that same day, the district court had another specific acts dispute with defense counsel outside the jury's presence. Although the court again precluded counsel's inquiry into specific acts, the court remarked, "And that's a fair – that's a fair attempt to ask a question, so I'm not concerned about that. That's a fair question." On yet another occasion outside the presence of the jury, the district court limited defense

counsel's inquiry into Lainez' methamphetamine consumption and Lainez' alleged confrontation with Dutchy at a restaurant.

We conclude that the district court's conduct did not deprive the defendant of a fair trial. Unlike Oade, where the district judge repeatedly reproached counsel in front of the jury, in this case the demonstrations of tension between counsel and the district court in the jury's presence were limited and not seriously damaging.

As far as the arguments between the district court and counsel outside the jury's presence, the district court had a good reason for admonishing counsel. Boice's counsel repeatedly inquired into specific acts in violation of evidence rules and the district judge's prior instructions. Counsel was also disrespectful toward the district judge in the jury's presence. While counsel argues that the district court's actions chilled his ability to zealously represent his client, counsel's own behavior created the antagonistic atmosphere. The district court's actions did not violate Boice's right to a fair trial.

NRS 174.061

Boice argues that admitting the testimony of Roberts and Lainez violated NRS 174.061 because neither witness testified that their agreement with the prosecution would be void if they testified falsely. We find this argument unavailing.

NRS 174.061(1) mandates that

[if] a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty . . . to a lesser charge . . . , the agreement . . . must be in writing and include a statement that the agreement is void if the defendant's testimony is false.

Boice's claim rests on the fact that neither Lainez nor Roberts testified that their "agreements" with the prosecution were void if they testified truthfully. A review of the record reveals that NRS 174.061 does not apply to either of these witnesses. Lainez is one of the victims in this case, he is not a defendant. Boice's assertion regarding Roberts is also inapposite because Roberts was also never a defendant in the instant case. While Roberts was one of the Native Americans who went to the Roundhouse Inn, the prosecution decided not to press charges against Roberts due to his marginal participation in the incident.

Evidence admission

Boice argues that the district court improperly admitted a metal construction stake, a piece of channel iron, a whiskey bottle, broken vodka bottle glass, and a socket wrench into evidence. We disagree and even if the district court did err, the error was harmless.

Absent an abuse of discretion, we will not overturn a district court's decision to admit evidence.⁸⁶ Even if the district court erred, we will not disturb the district court's ruling if the error was harmless beyond a reasonable doubt.⁸⁷

Witness testimony at trial provided sufficient grounds for admitting the metal construction stake, the piece of channel iron, and the socket wrench. To begin, the forensic pathologist testified that a heavy metal bar could have caused Resendiz' death. A woman, who resided in the Roundhouse Inn on the night in question, observed the Native Americans approach the motel. After the group entered the motel room,

⁸⁶Daniel, 119 Nev. at ___, 78 P.3d at 900-01.

⁸⁷Ducksworth v. State, 113 Nev. 780, 795, 942 P.2d 157, 167 (1997).

she testified that she could "hear them beating on people" and it sounded like metal was hitting something. Another woman, who lived behind the Roundhouse Inn when the incident occurred, stated that she heard a male voice saying, "Let's go get them" and after that she heard a lead pipe fall out of a car. As the pipe rolled onto the street, someone said, "Shh" and picked it up. The woman testified that the people involved in beating Resendiz had metal poles. Although Boice testified to the contrary, the woman also stated that she saw Boice holding something like a metal fence post. Contreras testified that Clint Malone had a long rusted bar. While there was no direct connection between Boice and these items, the items were sufficiently pertinent to the prosecution's theory of the case. Because the jury convicted Boice as a principal, evidence of weapons anyone else in the group may have carried is relevant.

We do not determine whether the district court improperly admitted the whiskey bottle and the broken vodka bottle glass because even if the court did, the error was harmless.

Self-defense instruction

Boice contends that the district court gave erroneous self-defense instructions to the jury. We conclude this argument lacks merit.

"Justifiable homicide is the killing of a human being in necessary self-defense."⁸⁸ A person may be justified in committing a homicide if the person reasonably believes that he is in imminent danger of death or serious bodily injury.⁸⁹ A bare fear is insufficient homicide

⁸⁸NRS 200.120.

⁸⁹NRS 200.160(1); Runion v. State, 116 Nev. 1041, 1047, 13 P.3d 52, 56 (2000).

justification; "[i]t must appear that the circumstances were sufficient to excite the fears of a reasonable person."⁹⁰ The party asserting self-defense need only show apprehension of apparent, not actual, danger.⁹¹

Boice claims that the district court erred in failing to instruct the jury that it should have examined Boice's state of mind at the time that he struck Resendiz. Boice asserts that the jury instructions did not contain language that "the reasonableness of a person's belief must be considered under the circumstances that existed when the belief was formed." Finally, Boice argues that the district court wrongfully advised the jury that there was no right to self-defense if the death occurs during a felony murder. We will address Boice's first and second contentions simultaneously.

In pertinent parts, the district court's self-defense instructions read as follows:

The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:

1. That there is imminent danger that the other person will either kill him or cause him great bodily injury; and
2. That it is necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.

⁹⁰NRS 200.130.

⁹¹Runion, 116 Nev. at 1047, 13 P.3d at 56.

To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position. . . . [T]he danger must be apparent, present, immediate and instantly dealt with, or must so appear at th [sic] time to the slayer as a reasonable person.

(Emphasis added.)

The instructions also stated:

If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in a like danger . . . , the person's right to self-defense is the same whether the danger is real or merely apparent.

(Emphasis added.)

A simple reading of the jury instructions reveals that Boice's argument is inapposite. The underlined jury instructions portions show that the district court did advise the jury to consider Boice's state of mind and the reasonableness of his beliefs under the circumstances.

Boice's third contention involves the district court's allegedly erroneous decision to instruct the jury on the unavailability of self-defense in felony murder situations. Boice asserts that the instruction was erroneous because the jury acquitted him of the predicate felony of burglary, but convicted him of second degree felony murder for the burglary felony.

As stated earlier, this contention is factually incorrect. The prosecution charged Boice as a principal to second degree murder with the use of a deadly weapon for murdering Resendiz "during the perpetration of the crime of battery with a deadly weapon." (Emphasis added.) As far as

the unavailability of self-defense in felony murder situations, the district court's actions were proper. When a death occurs during the commission of a felony, the felon is per se the first aggressor. "The right of self-defense is not available to an original aggressor."⁹²

Flight instruction

Boice argues that the district court erred in giving a flight instruction to the jury because there was no evidence of flight. We agree, but conclude it is harmless error. There was overwhelming evidence to support Boice's conviction, even without the flight instruction.

Jury selection

Boice argues that the jury selection process was inappropriate and violated his constitutional rights. We find this argument inapposite.

The process of selecting jurors for trial involves the examination of individual jurors to determine the need for exercising challenges for cause or peremptory challenges.⁹³ Typically, challenges are exercisable in this order: (1) challenges to the array, (2) challenges for cause, and (3) peremptory challenges.⁹⁴ "It has been said that in criminal cases especially, the order in which the challenges shall be exercised is mandatory."⁹⁵

Boice asserts that the district court deprived him of his constitutional rights because the court allegedly forced Boice to exercise

⁹²Id. at 1051, 13 P.3d at 59.

⁹³47 Am.Jur.2d Jury § 227, at 905 (2003).

⁹⁴Id.

⁹⁵Id.

his peremptory challenges before he exercised his challenges for cause. A review of the record indicates otherwise. The district court exhausted the possible jury pool before completing the jury panel. After the parties had exercised their challenges for cause and their peremptory challenges pertaining to the then present jury pool, the district court determined that it still needed two more regular jurors and two alternates. Consequently, the district judge had to summon new potential jurors. To remedy the situation, the district court granted both sides an additional peremptory challenge for the remaining voir dire.

We conclude that the district court's actions were proper. NRS 6.080 specifically provides a procedure for selecting additional jurors when the district court exhausts the jury pool. Thus, the legislature must have contemplated situations like the one at bar. It is difficult to imagine how the district court would exhaust the jury pool without entertaining the parties' jury challenges. The district court apparently recognized the need to remedy the unusual jury selection process and that is why it granted the additional peremptory challenge. The district court's actions were fair because both sides received an additional challenge and one challenge does not appear disproportionate to the number of jurors the district court needed to complete the panel. The district court's decision was correct.

Cumulative error


Boice argues that the cumulative effect of the district court's alleged trial errors warrants a reversal. We disagree. While the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually,⁹⁶ this does

⁹⁶Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).


not apply to the case at bar. We conclude that the district court's decisions do not warrant a reversal.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹⁷


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Michael R. Griffin, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Carson City District Attorney
Carson City Clerk

⁹⁷We deny as moot the motion for bail pending appeal.