IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY DALE MCCASKILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41407

ORDER AFFIRMING AND REMANDING FOR CORRECTION OF JUDGMENT OF CONVICTION

This is a direct appeal from a judgment of conviction of one count of second-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On April 13, 2003, appellant Jeremy McCaskill was convicted, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon for the death of Joseph Galdarisi. The district court sentenced McCaskill to serve consecutive terms of life in prison with the possibility of parole in 120 months. McCaskill raises three issues on appeal.

First, McCaskill contends that insufficient evidence supported his conviction for second-degree murder with the use of a deadly weapon. Instead, McCaskill contends that the jury should have found that he lawfully acted in self-defense when he stabbed and killed Galdarisi.

This court reviews a challenge to evidence supporting a conviction for "'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.'"[1] Issues concerning the weight and credibility of conflicting witness testimony, including the testimony of the defendant himself, are within the sound province of the jury and will not be disturbed on appeal so long as the verdict was supported by substantial evidence.[2]

Murder is defined as "the unlawful killing of a human being, with malice aforethought."[3] Those acts of murder which do not constitute murder in the first degree are murder in the second degree.[4] The malice necessary to support a second-degree murder conviction is implied "'when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.'"[5] Malice aforethought may be inferred when the defendant intentionally uses a deadly weapon to commit the killing.[6]

Here, undisputed evidence was presented to the jury that McCaskill stabbed Galdarisi twice with a knife during an altercation that

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[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

[2]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

[3]NRS 200.010.

[4]See NRS 200.030(1), (2).

[5]Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (quoting NRS 200.020).

[6]Id. (citing Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975)).

began as an argument and turned into a fistfight between the two men. One of these two stab wounds pierced Galdarisi's heart, causing his death.

McCaskill testified in his own defense at trial and admitted that he stabbed Galdarisi. McCaskill, however, claimed that he stabbed Galdarisi in self-defense. NRS 200.200 provides that a lawful killing in self-defense occurs when

> 1. [t]he danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and
>
> 2. [t]he person killed was the assailant, or . . . the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.[7]

The defendant's fear of death or bodily harm must be reasonable.[8]

Although there was testimony that Galdarisi was in a rage and aggressive once the fight began, there was also testimony that McCaskill was equally in a rage and aggressive during the fight and that he was the initial aggressor provoking the altercation. The evidence before the jury suggested that both men voluntarily engaged in the fight. McCaskill, however, was the only man who entered the fight with a weapon—a knife.

McCaskill claimed that he stabbed Galdarisi out of fear; however, other witness testimony was that McCaskill "snapped" when an empty soda can was thrown minutes before Galdarisi was fatally stabbed.

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[7]See NRS 200.120; NRS 200.160; NRS 200.190.

[8]See NRS 200.130; see also Runion v. State, 116 Nev. 1041, 1045-54, 13 P.3d 52, 55-60 (2000); Culverson v. State, 106 Nev. 484, 487-89, 797 P.2d 238, 239-41 (1990).

There was no evidence that McCaskill ever attempted to physically retreat from the fight, despite multiple opportunities to do so. There was no evidence that Galdarisi ever possessed or threatened McCaskill with any weapons. McCaskill even admitted that Galdarisi did not threaten him with any weapons that night. Nor was there any evidence that McCaskill was seriously injured by Galdarisi. Rather, McCaskill suffered what appeared to be only minor bruises and a cut on his thumb during the fight, which may have well been the result of McCaskill's use of his own knife.

Additionally, McCaskill's actions after stabbing Galdarisi, although not dispositive proof of guilt in themselves, were inconsistent with someone who had acted in self-defense. After stabbing him, McCaskill left Galdarisi lying on the ground by a car and bleeding and made no attempt to contact the police or seek medical help. McCaskill disposed of the knife and later changed his bloody clothes, attempting to dispose of them as well. Witnesses testified that McCaskill bragged about both the fight and stabbing Galdarisi. McCaskill also attempted to convince three people to lie to the police on his behalf, and initially lied to the police himself about the incident.

Given McCaskill's initial aggression toward Galdarisi, the absence of serious physical injury to McCaskill or evidence that Galdarisi was armed, and McCaskill's behavior after the stabbing, a reasonable jury could have found McCaskill's claim that he acted in self-defense to be unreasonable and unjustified under the law. Based on the evidence above, a reasonable jury also could have found beyond a reasonable doubt that McCaskill acted with the implied malice necessary to support his conviction for second-degree murder with the use of a deadly weapon. We conclude that sufficient evidence supported McCaskill's conviction.

Second, McCaskill contends that the reasonable doubt instruction provided to the jury improperly reduced the State's burden of proof and violated McCaskill's due process rights. McCaskill does not dispute that the instruction was in accordance with NRS 175.211, but he contends that the "more weighty affairs of life" portion of that instruction is unconstitutional. This court has previously, and repeatedly, considered and rejected constitutional challenges to NRS 175.211,[9] and has held that there is no reasonable likelihood that a jury applied this particular portion of the instruction in an unconstitutional manner when it was also instructed on the defendant's presumption of innocence and the State's burden of proof.[10] Here the jury was so instructed, and we decline McCaskill's invitation to revisit our prior holdings.

Third, McCaskill contends that the district court erred by refusing to give the following jury instruction proposed by the defense:

> If evidence in this case is susceptible of two reasonable interpretations, one of which would point to the defendant's guilt and the other would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to his guilt.

This court has previously reviewed this instruction and held that it is not error for a district court to refuse it "where the jury has been properly

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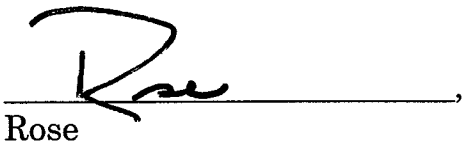
[9]See, e.g., Buchanan, 119 Nev. at 221, 69 P.3d at 708; Noonan v. State, 115 Nev. 184, 189-90, 980 P.2d 637, 640 (1999).

[10]See Middleton v. State, 114 Nev. 1089, 1111-12, 968 P.2d 296, 311 (1998); Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995).

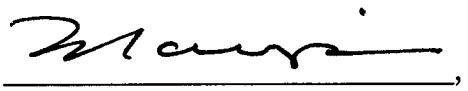
instructed on the standard of reasonable doubt."[11] As discussed above, the jury in this case received a proper reasonable doubt instruction. We conclude that it was not error for the district court to refuse McCaskill's proposed instruction.

Finally, our review of the record reveals that McCaskill's judgment of conviction erroneously states that his conviction was the result of a guilty plea, not a jury trial. This error must be corrected. Accordingly, we

ORDER the judgment of the district court AFFIRMED, but we REMAND with instructions to correct the judgment of conviction.



_____, J.
Rose



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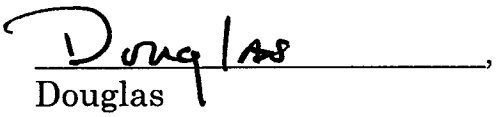

_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[11]See Mason, 118 Nev. at 559, 51 P.3d at 524.