

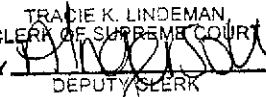
IN THE SUPREME COURT OF THE STATE OF NEVADA

ZACHARY NICHOLAS KELSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62570

FILED

FEB 27 2014

TRACIE K. LINDEMAN,
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of second-degree murder. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Sufficiency of the evidence

Appellant Zachary Nicholas Kelsey contends that insufficient evidence supports his conviction. He argues that the State failed to prove that he acted with malice and the consequences of his act naturally tended to take human life. We review the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The jury heard testimony that 40 to 60 young people gathered at the Stead race track for a bonfire party. Tyler DePriest brought Jared Hyde to the party in his Dodge Durango. Towards midnight, a fight broke out between two girls. Taylor Pardick tried to break-up the fight but he was confronted by Jake Graves after he warned one of the girls that he was not afraid to hit her. Pardick did not want to fight with Graves, but several people egged the fight on.

Robert Schnueringer and Andrue Jefferson were among those encouraging the fight. They identified themselves as belonging to a group called "Twisted Minds" or "TM," and they both shouted "TM" and urged Pardick to "rep for TM" by fighting Graves. When Pardick refused to fight, Jefferson reached around Graves and struck Pardick several times to get the fight started. Eric Boatman tried to intercede on Pardick's behalf, but ultimately Graves struck both of them and knocked them to the ground.

After these fights, Hyde headed towards the Durango. He walked alone and said out loud, "This is bullshit. You just knocked out my best friend." Zachary Kelsey, whose friends included Graves and Schnueringer, overheard Hyde and confronted him. Although Hyde's hands were held high, like he did not want to fight, Kelsey struck him twice in the head. Kelsey then grabbed Hyde as he fell and kneed him in the head twice. Zach Clough and Michael Opperman seized and restrained Kelsey, but Kelsey continued to yell at Hyde. Evidence was also presented that Kelsey later boasted that the last person he hit had died and that he used brass knuckles on Hyde.

When Hyde picked himself up, he had blood running from his mouth, his shirt was torn, and he looked distraught. He said to DePriest, "Let's go, let's get out of here. I just got rocked," and he continued to move towards the Durango. While Kelsey continued to yell at him, Hyde approached the passenger side of the Durango where he was confronted by Schnueringer and Jefferson. They asked him if he was "still talking smack" and he replied, "No, I'm not, I'm not." Hyde was scared, about to cry, and did not want to be there. He did not have his arms up and he was not defending himself when Schnueringer punched him in the head.

Schnueringer delivered a forceful, knockout punch that caused Hyde's knees to buckle and his body to fall to the ground. Jefferson got in front of Hyde's face, exclaimed, "You got knocked the fuck out," and then delivered a similar punch to Hyde's head. Schnueringer and Jefferson kicked Hyde as he lay on the ground, and Jefferson celebrated by jumping around and saying, "I slept him, I slept him." When Clifton Fuller checked his friend for a pulse, he felt something at first and then it went away.

Hyde was not breathing when he arrived at the hospital and efforts to resuscitate him failed. The medical examiner, Dr. Ellen Clark, conducted a forensic autopsy of the body. She determined that the manner of death was homicide and the cause of death was subarachnoid hemorrhage due to blunt force trauma. She found five separate areas of bleeding beneath the scalp surface and testified that these injuries were the result of blunt force trauma and they were consistent with being punched or kicked in the head numerous times. She also testified that the first blow to Hyde's head could have been the fatal blow, she could not identify one fatal impact site, and, in her opinion, the multiple injuries to different parts of Hyde's brain were cumulative. Dr. Clark had consulted with Dr. Bennet Omalu during the autopsy. Dr. Omalu is an expert on brain trauma and he testified that each and every one of the blows delivered to Hyde's head contributed to his death due to the phenomenon of repetitive traumatic brain injury.

We conclude that a rational juror could reasonably infer from this evidence that Kelsey acted with malice when he attacked Hyde and caused his death. *See* NRS 200.020; NRS 200.030(2); *Earl v. State*, 111 Nev. 1304, 1314, 904 P.2d 1029, 1035 (1995) (second-degree murder based

on implied malice does not require an intentional killing but rather a killing under circumstances that show an abandoned and malignant heart). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Evidentiary decisions

Kelsey contends that the district court erred by admitting demonstrative and gang-affiliation evidence. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Kelsey contends that the district court erred by admitting the State's demonstrative evidence because (1) the State's graph depicting the locations of the people at the party contained the defendants' mug shots and the victim's graduation or prom photographs and thereby placed the defendants in an unfair light and eroded the presumption of innocence; (2) the State's aerial photograph of the scene of the party was taken eight months after the party and featured a Christian cross at the site where the victim collapsed and, therefore, it did not accurately depict the area at the time of the bonfire party and violated the First Amendment by making it appear that God was on the prosecution's side; and (3) the State's chart depicting events unfairly used the term "attack" to characterize the defendants' contacts or conflicts with the victim. The district court conducted a hearing on Kelsey's pretrial challenges to this evidence and determined that the parties had stipulated to the use of the mug shots and victim's photographs, the aerial photograph's depiction of the cleaned-up bonfire area and the cross did not portray the defendants in a bad light,

and the State could use the term "attack" to describe its theory of the case. We conclude that the district court did not abuse its discretion by admitting this evidence and the evidence did not erode Kelsey's constitutional right to a fair trial.

Kelsey further contends that the district court erred by admitting gang-affiliation evidence. He argues that because the State did not seek a gang enhancement pursuant to NRS 193.168, he was left without notice that "he would be facing the equivalent of gang-related charges," and he was deprived of the opportunity to present an adequate defense. The district court conducted a hearing on the defendants' motion to exclude the TM evidence. The State informed the district court that it was prepared to present evidence at a hearing conducted pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), argued that the evidence of how people were aligned and whether they were making statements about TM was inextricably intertwined with the facts and circumstances of the case, and asserted that it did not intend to establish that TM was a criminal gang.¹ The defendants' acknowledged that the State was not trying to prove a bad act and conceded that the evidence the State sought to admit was *res gestae*. The district court concluded that the evidence was *res gestae* and a *Petrocelli* hearing was unnecessary, and it denied the motion. We conclude that the district court did not abuse its discretion by admitting this evidence and that Kelsey was adequately informed that he would have to defend against a charge of open murder. See NRS 48.035(3) (*res gestae* doctrine); see generally *Butler v. State*, 120

¹The record indicates that after the homicide in this case, the Washoe County Sheriff's Office classified TM as a gang.

Nev. 879, 889, 102 P.3d 71, 78-79 (2004) (discussing the admission of gang-affiliation evidence).

Constitutionality of NRS 200.070(1)

Kelsey contends that the involuntary manslaughter statute is unconstitutional because the language that it uses to refer back to the possibility of second-degree murder is virtually identical to the “natural and probable consequences” doctrine struck down by *Sharma v. State*, 118 Nev. 648, 654, 56 P.3d 868, 872 (2002).² “The constitutionality of a statute is a question of law that we review de novo. Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity.” *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) (footnotes omitted). In *Sharma*, we reevaluated the wisdom of the natural and probable consequences doctrine and “concluded that its general application in Nevada to *specific intent crimes* is unsound . . . [because] it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime.” 118 Nev. at 654, 56 P.3d at 872 (emphasis added). We did not hold that the natural and probable consequences doctrine was unconstitutional, and Kelsey has not demonstrated that NRS 200.070 violates his constitutional guarantees of due process. See *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every


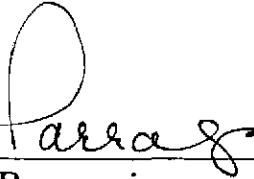

²NRS 200.070(1) provides in relevant part that, “where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being . . . the offense is murder.”

fact necessary to constitute the crime with which he is charged.”); see generally *Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (specific intent is not necessary to support a second-degree murder conviction). Accordingly, we conclude that Kelsey has not made a clear showing that the statute is invalid.

Second-degree felony murder

Kelsey appears to contend that the State failed to present sufficient evidence to support his conviction based on a felony-murder theory of criminal liability. However, our review of Kelsey’s indictment, the jury instructions, and the closing argument reveals that the State did not allege or pursue a felony-murder theory of criminal liability. Moreover, as discussed above, we have determined that the State presented sufficient evidence to support Kelsey’s second-degree murder conviction based on its direct-acts theory of criminal liability. See *Anderson v. State*, 121 Nev. 511, 515, 118 P.3d 184, 186 (2005) (“A unanimous general verdict of guilt will support a conviction so long as there is substantial evidence in support of one of the alternate theories of culpability.”). Accordingly, we conclude that this contention is without merit.

Having concluded that Kelsey is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.

	 _____, J. Pickering	
 _____, J. Parraguirre		 _____, J. Saitta

cc: Chief Judge, The Second Judicial District Court
Second Judicial District Court Dept. 10
Scott W. Edwards
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk