IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72056

ORDER OF AFFIRMANCE

Jorge Mendoza appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of conspiracy to commit robbery, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, two counts of attempted robbery with use of a deadly weapon, murder with use of a deadly weapon, and attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Mendoza's charges arose from his involvement in a home burglary and fatal shooting. At trial, the State presented substantial evidence, including testimony from two coconspirators and evidence of Mendoza's cellular telephone location records before, during, and after the crime. The jury convicted Mendoza following a 19-day trial.[1]

On appeal, Mendoza argues the district court reversibly erred by (1) denying a motion to exclude coconspirator Summer Larsen as a witness due to the State's untimely notice, (2) admitting Mendoza's cellular telephone records, (3) disclosing coconspirator Robert Figueroa's unredacted plea agreement, and (4) refusing to instruct the jury on self-

[1]We do not recount the facts except as necessary to our disposition.

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defense. He further argues that cumulative error warrants reversal. We disagree.

With respect to Mendoza's arguments regarding Summer Larsen[2] and the cellular telephone records,[3] Mendoza did not object below and we conclude he does not demonstrate plain error on appeal in light of the overwhelming evidence against him. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (holding the "failure to object precludes appellate review of the matter unless it rises to the level of plain error" (internal quotations omitted)).

Third, Mendoza argues that the district court improperly admitted accomplice Robert Figueroa's plea agreement without redacting its truthfulness provision. Under NRS 175.282(1), the court must allow the jury to inspect a plea agreement of a testifying former codefendant and should excise the truthfulness provision from the document provided to the jury "unless [that provision is] admitted in response to attacks on the witness's credibility attributed to the plea agreement." *Sessions v. State*, 111 Nev. 328, 334, 890 P.2d 792, 796 (1995). Because here Mendoza's codefendant attacked Figueroa's credibility, we conclude that the district court did not err by admitting Figueroa's unredacted plea agreement.

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[2]We note the district court likely abused its discretion by admitting Larsen's testimony, as NRS 174.234(1)(a)(2) requires the State to file and serve written notice at least five days before trial of all witnesses it intends to call. But, even had Mendoza objected below, the error was harmless under these facts. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

[3]The record belies Mendoza's argument that the State failed to timely disclose the cellular phone records or the timely notice the expert. *See* NRS 174.234 and NRS 174.235 (setting forth the applicable requirements).

Mendoza also claims that the district court abused its discretion by declining to instruct the jury on his proffered self-defense instruction. Mendoza argues that a self-defense instruction was warranted because the underlying felonies were fully completed and there was a time lapse before the killing occurred. Mendoza claims that he had fled the scene when the victims began shooting at him, and he only returned fire in self-defense because he was in fear for his life.

"We review a district court's denial of proposed jury instructions for abuse of discretion or judicial error." *Davis v. State*, 130 Nev. 136, 141, 321 P.3d 867, 871 (2014). "Generally, the defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Nevertheless, the right of self-defense is generally unavailable to a defendant charged with felony murder. *See People v. Tabios*, 78 Cal. Rptr. 2d 753, 756-57 (Ct. App. 1998), *disapproved of on other grounds by People v. Chun*, 203 P.3d 425 (Cal. 2009); *State v. Amado*, 756 A.2d 274, 282-84 (Conn. 2000) (concluding that a defendant found guilty of felony murder cannot claim self-defense). And a defendant is guilty of felony murder even after the felony is complete "if the killing and the felony are part of one continuous transaction." *Sanchez-Dominguez v. State*, 130 Nev. 85, 94, 318 P.3d 1068, 1074 (2014).

We are unpersuaded by Mendoza's argument that he was entitled to claim self-defense because Mendoza's own trial testimony demonstrates that the felonies and the killing were one continuous transaction. Thus, the district court correctly ruled that Mendoza was not entitled to an instruction that he acted in self-defense. *See Tabios*, 78 Cal. Rptr. 2d at 757 (holding that in a prosecution for felony murder, "the

defendant is not permitted to offer any proof at all that he acted without malice"). Testifying on his own behalf, Mendoza expressly conceded to the following facts: he agreed with his coconspirators to break into a drug dealer's home with the intent to steal marijuana from inside of the home; he participated in the conspiracy by approaching the victim's home armed with a rifle, and he and his coconspirators kicked in the victim's front door where they were met with gunfire; as he tried to run away, he was shot in the femur and fell down into the grass in the front yard of the home; attempting to flee from the scene and unable to walk, he moved into the street; and, when he heard more gunfire and saw two armed figures shooting at him from the doorway, he fired toward the house, hitting someone. On cross-examination, Mendoza further conceded that when he fired towards the house, he knew the shot he fired killed the victim.

Mendoza admitted to committing conspiracy to commit robbery, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, attempted robbery with use of a deadly weapon, and attempted murder with use of a deadly weapon during his testimony before the jury, and that these felonies and the killing occurred as one continuous transaction. *See Sanchez-Dominguez*, 130 Nev. at 93-94, 318 P.3d at 1074. Therefore, Mendoza's testimony that he committed the underlying felonies charged supplies the requisite malice for felony murder under these specific facts. *See Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007) (noting that "[w]ith respect to felony murder, malice is implied by the intent to commit the underlying felony"). Thus, the district court did not abuse its discretion by denying Mendoza's request to instruct the jury on self-defense. *Cf. Amado*, 756 A.2d at 283 (recognizing that "[o]ne who commits or attempts a robbery armed with deadly force, and kills the

intended victim when the victim responds with force to the robbery attempt, may not avail himself of the defense of self-defense" (alteration in original) (quoting *United States v. Thomas*, 34 F.3d 44, 48 (2d Cir. 1994))).[4] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]We further hold that, in light of our conclusion that Mendoza fails to demonstrate any error, his argument that cumulative error requires the reversal of his conviction is without merit. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (rejecting appellant's argument of cumulative error where the "errors were insignificant or nonexistent").