IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAROM THOMAS BOYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76856-COA

ORDER OF AFFIRMANCE

Jarom Thomas Boyes appeals from a judgment of conviction, pursuant to a jury verdict, of involuntary manslaughter. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Melissa Boyes died after an argument with her husband, Jarom Boyes.[1] The couple started arguing at a bar and continued after they went home. Jarom first told police that he was in a different room, heard a gunshot, and then found Melissa wounded. Jarom later told police, as well as a friend the next day, that he walked into the bedroom and saw Melissa holding a gun and, in an attempt to save her life, he "grabbed the firearm . . . and turned it on her before it discharged." Melissa died from a gunshot wound to her chest.

Boyes was charged with first degree murder with the use of a deadly weapon. After closing arguments, the jury was instructed on (1) first degree murder, (2) second degree murder, (3) voluntary manslaughter, and (4) involuntary manslaughter. The district court also instructed the jury on two unlawful acts that would satisfy the involuntary manslaughter statute

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

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(1) neglecting a duty imposed by law in willful or wanton disregard of the safety of others, and (2) aiming a firearm at a human being.

The jury convicted Boyes of involuntary manslaughter and he appeals, arguing that his conviction should be reversed because the district court erred by (1) instructing the jury on involuntary manslaughter because the State failed to plead or argue the facts necessary to support a conviction at trial (i.e., that Boyes was criminally negligent in pointing a gun at his wife or wrestling with her while she had a gun, which led to her death); and (2) answering a jury question concerning willfulness because it caused the jury to decide that Boyes was criminally negligent, which led to his conviction. We disagree.

Standard of review

Boyes and the State first disagree as to whether Boyes preserved his objection to the involuntary manslaughter instructions for appellate review. If an objection below is made on a different basis than the claim on appeal, plain error review applies. *Jeremias v. State*, 134 Nev. 46, 55, 412 P.3d 43, 52 (2018), *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018). We conclude that the legal basis for Boyes' trial court objection is different from his assertions on appeal and, therefore, we will review Boyes' claims for plain error.

The authority cited by Boyes at trial to support an objection to the involuntary manslaughter instructions was *Sheriff, Clark Cty. v. Morris*, 99 Nev. 109, 659 P.2d 852 (1983), and the district court concluded that this case only applies to second degree felony-murder (i.e., NRS 200.070's latter half).[2] Boyes' specific argument at trial was that, pursuant

[2]The latter half of NRS 200.070(1) states that, "where the involuntary killing occurs in the commission of an unlawful act, which, in its

to *Morris*, the State was required to show "an immediate and causal relationship between the conduct [i.e., the unlawful act] and the death [of Melissa]" to support an involuntary manslaughter instruction. *See Morris*, 99 Nev. at 118, 659 P. 2d at 859. The district court overruled the objection.

On appeal, however, Boyes cites *Bielling v. Sheriff, Clark Cty.*, 89 Nev. 112, 113, 508 P.2d 546, 546 (1973), to argue that his conviction should be reversed because the State's information did not allege involuntary manslaughter, nor did the State argue it at trial. Boyes specifically argues that the State was required to plead the specific acts of "criminal negligence" that were used to establish the unlawful acts to satisfy the involuntary manslaughter instruction. Thus, the argument asserted by Boyes at trial is inconsistent with his argument on appeal and, therefore, we review for plain error. Under plain error review, the "appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. "[A] plain error affects a

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consequences, naturally tends to destroy the life of a human being . . . *the offense is murder*." (Emphasis added.) The latter half of NRS 200.070(1) has been interpreted as Nevada's second degree felony-murder rule. *See, e.g., Ramirez v. State*, 126 Nev. 203, 206, 235 P.3d 619, 621 (2010) ("Nevada's involuntary manslaughter statute, NRS 200.070, when read in conjunction with Nevada's murder statute, NRS 200.030(2), permit[s] the offense of second degree murder under the felony-murder rule."). The *Ramirez* court explained that the second degree felony-murder rule should only be applied to situations where there is "an immediate and direct causal relationship between the actions of the defendant, if proved, and the [victim's] demise." *Id.* at 206, 235 P.3d at 622 (alteration in original). Thus, the district court properly interpreted the legal application of *Morris* as pertaining to second degree felony-murder.

defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.[3]

It was not plain error to instruct the jury on involuntary manslaughter

Boyes argues that his conviction should be reversed because the State's information did not allege involuntary manslaughter—nor did the State argue it at trial—and that the State was required to plead the specific acts of "criminal negligence" that were used to establish the unlawful acts to support an involuntary manslaughter instruction. The district court found that there was an evidentiary record to support an inference of involuntary manslaughter and, therefore, instructed the jury in that regard. We conclude that the district court did not commit plain error.

"[T]he well-settled rule [is] that one may be found guilty of a lesser offense necessarily included in the offense charged. *The offense of involuntary manslaughter is necessarily included in a charge of murder.*" *Sepulveda v. State*, 86 Nev. 898, 899, 478 P.2d 172, 173 (1970) (emphasis added) (citation omitted); *accord United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) ("It is well established that involuntary manslaughter is a lesser-included offense of murder."); *see also Parsons v. State*, 74 Nev. 302, 307-09, 329 P.2d 1070, 1073-74 (1958) (holding that the district court was

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[3]We generally review the district court's "settling of jury instructions" for an abuse of discretion. *See, e.g., Menendez-Cordero v. State*, 135 Nev., Adv. Op. 29, 445 P.3d 1235, 1243 (2019) ("[T]he district court has broad discretion in settling jury instructions" and "we review such matters for abuse of discretion or judicial error."). We conclude that—even if we were to review the issue under an abuse of discretion standard—the district court did not abuse its discretion in instructing the jury on involuntary manslaughter, as well as the unlawful acts, because the district court's decision did not "exceed[ ] the bounds of law or reason." *Id.*

"amply justified" to instruct the jury on involuntary manslaughter during a prosecution for murder because the jury had the requisite evidence to conclude that the defendant had committed involuntary manslaughter).

To instruct the jury on a lesser-included offense, however, there must be an evidentiary basis to support a conviction. *See, e.g., Collins v. State*, 133 Nev. 717, 728, 405 P.3d 657, 667 (2017) ("The judicially imposed condition that there be at least some evidentiary basis for the lesser-included instruction . . . prevent[s] lesser-included instructions from being misused as invitations to juries to return compromise verdicts without evidentiary support." (internal quotations omitted)). Thus, if an evidentiary basis supports an involuntary manslaughter instruction, the State is not barred from seeking one. *See id.*; *Thedford v. Sheriff, Clark Cty.*, 86 Nev. 741, 745, 476 P.2d 25, 28 (1970) ("An open murder complaint charges *murder in the first degree and all necessarily included offenses*." (emphasis added) (quoting *Miner v. Lamb*, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970))); *cf. Graham v. State*, 116 Nev. 23, 31, 992 P.2d 255, 259-60 (2000) (holding that the defendant, charged with first degree murder for child abuse, could not request an involuntary manslaughter instruction because there was no evidence of an unlawful act, pursuant to NRS 200.070, to support the instruction (i.e., an unlawful act, independent of NRS 200.030(1), pertaining to the death of the child)).

Involuntary manslaughter "is the killing of a human being, without any intent to do so, *in the commission of an unlawful act*." NRS 200.070(1) (emphasis added); *see also King v. State*, 105 Nev. 373, 376, 784 P.2d 942, 943 (1989) ("In order to find appellants guilty of involuntary manslaughter, . . . the evidence must establish that each appellant committed acts resulting in [the victim's] death . . . ."). Here, the district

court explained that it based the unlawful acts instructions to support the involuntary manslaughter instruction on (1) neglect of a duty in willful or wanton disregard of the safety of others, pursuant to NRS 202.595, because of Boyes' attempt to wrestle someone who was holding a firearm, and (2) aiming a deadly weapon at a human being, pursuant to NRS 202.290, because Boyes pointed a gun at Melissa. This analysis, therefore, turns to whether each one of the unlawful act instructions—which necessarily supported the involuntary manslaughter instruction—were plain error based upon the evidentiary record.

The district court instructed the jury on NRS 202.290[4] as one unlawful act used to satisfy NRS 200.070. Boyes does not argue that this instruction was improper. The State, however, notes that the jury could have based the involuntary manslaughter verdict on Boyes "[a]iming a [f]irearm" at Melissa. We conclude that a rational juror could have found that Boyes aimed the gun at Melissa in violation of NRS 202.290 because Boyes "grabbed the firearm" that Melissa "was holding and turned it on her before it discharged." *See, e.g., Thompson v. State*, 125 Nev. 807, 816, 221 P.3d 708, 714-15 (2009) ("In reviewing . . . a jury's verdict, this court determines 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." (emphasis added) (internal quotations omitted)).

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[4]NRS 202.290(1) provides, in relevant part, "a person who willfully . . . [a]ims any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being . . . is guilty of a gross misdemeanor."

Having determined that the evidentiary record allowed the trier of fact to convict Boyes of involuntary manslaughter for the unlawful act of aiming a gun at Melissa in violation of NRS 202.290—and because Boyes did not offer argument to show that the NRS 202.290 instruction was improper—we conclude that Boyes has failed to demonstrate that the district court committed plain error.

We also conclude, however, that Boyes' argument in regard to the jury instruction pursuant to NRS 202.595[5] requires our attention as it is an independent ground for affirmance; the district court did not commit plain error. Boyes argues that the unlawful act instruction pursuant to NRS 202.595 was improper because the district court "did not specify the act of criminal negligence upon which the charge could go forward." Boyes cites two cases in support of his argument: (1) *Bielling*, 89 Nev. at 113, 508 P.2d at 546 ("[T]o properly charge appellant with the offense of involuntary manslaughter, the information must specify the acts of criminal negligence upon which the state is relying to try to obtain a conviction."); and (2) *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (explaining that jury instructions must be unambiguous). Boyes also argues that instructing the jury in this regard was improper because, "under no theory of responsibility in this specific case could the failure to render effective lifesaving aid form the justification for an involuntary manslaughter verdict." We conclude that the district court did not commit plain error by instructing the jury pursuant to NRS 202.595.

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[5]NRS 202.595 provides: "a person who performs any act or neglects any duty imposed by law in willful or wanton disregard of the safety of persons . . . shall be punished:" (1) if the act does not result in substantial bodily harm or death, for a gross misdemeanor, or (2) if the act or neglect does result in substantial bodily harm or death, for a category C felony.

The Nevada Supreme Court has infrequently addressed NRS 202.595. In *Lakeman v. State*, Docket No. 64609, at *4 (Order of Affirmance, June 22, 2016), it was stated that, "NRS 202.595 requires 'willful or wanton disregard,'" for the safety of others. "Wanton" was defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." *Wanton, Black's Law Dictionary* (10th ed. 2014). The definition of "willful" is "[v]oluntary and intentional . . . [a] voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, *or at least inexcusable carelessness* . . . ." *Willful, Black's Law Dictionary* (11th ed. 2019) (emphasis added).

Here, the district court explained that it was basing the NRS 202.595 instruction on Boyes' attempt to "wrestle[ ] someone who is holding a firearm." Boyes argues generally that the district court based this instruction on his failure to render lifesaving aid to Melissa. Boyes, therefore, misrepresents the record and has not demonstrated plain error. Also, a trier of fact could have reasonably concluded that Boyes was inexcusably careless when he wrestled with Melissa to retrieve the gun, and thus, acted willfully under NRS 202.595. *See id.*

Boyes' citations to caselaw also do not support his argument. *Bielling* involved a habeas petition after a conviction for vehicular manslaughter. 89 Nev. at 113, 508 P.2d at 546 (citing NRS 193.190).[6] In *Bielling*, the State had not pleaded the requisite elements of criminal negligence in its information to establish a vehicular manslaughter charge (the information there, unlike here, did not allege murder). *Id.* The *Bielling*

[6]NRS 193.190 states that "[i]n every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence."

court thus granted the petitioner's pretrial habeas petition after finding that the State's information only alleged ordinary negligence rather than criminal negligence. *Id.*

Here, unlike *Bielling*, the State alleged first degree murder in its information, and thus, it was not error for the court to give an instruction on a lesser-included offense supported by the evidentiary record (i.e., involuntary manslaughter). In addition, Boyes offers no authority to suggest that NRS 202.595, which requires willful or wanton conduct, is equivalent to criminal negligence. In the second case that Boyes relies upon, *Vallery*, 118 Nev. at 372, 46 P.3d at 77, the court stated that "jury instructions should be clear and unambiguous." Boyes, however, does not explain how the instructions in this case were ambiguous or legally deficient. Thus, Boyes has not demonstrated plain error in this regard. Therefore, we conclude that this unlawful act instruction pursuant to NRS 202.595 was not improper.

Boyes has failed to provide an adequate appellate record to review his contentions in regard to the district court's answer to the jury question

Boyes contends that the district court erred by answering a jury question on willfulness as it applied to involuntary manslaughter. Boyes claims that the district court's clarification was improper based upon the facts of the case.

During deliberations, the jury sent the following written question to the district court: "would it be considered willfullness [sic] if a person did not try life saving measures immediately or if a person purposely did not try to stop an injured person from bleeding?" The district court allegedly provided the following answer:

> Simply failing to render aid to an injured person, alone, does not constitute willfulness under the jury instructions.

> Stated another way, if the jury believed that Defendant was not responsible for the injury pursuant to theories of responsibility within the jury instructions, but believed Defendant purposefully did not render aid or stop [the] bleeding, the sole failure to do so is not willfulness.
>
> If the Court's response does not address your question, please clarify your question and resubmit it to the Court.[7]

We do not have an independent record of the district court's answer to the jury question (presuming that the district court held a hearing). In the appendix Boyes filed in this court on appeal, the only record of the district court's answer to the jury question on willfulness was Boyes' post-judgment motion for a new trial pursuant to NRS 176.515. On appeal, Boyes only cites to the portion of the record consisting of his post-judgment motion for a new trial, and the record omits any pre-judgment discussion of the jury question or the district court's answer. The State's fast track response, likewise, cites the hearing on Boyes' post-judgment motion for a new trial. In sum, we have no independent record of the district court's pre-judgment answer to the jury question, and thus, we cannot verify that this quotation was an accurate reflection of the district court proceeding when precision is

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[7]It is crucial to note that this quotation comes from Boyes' post-judgment motion for a new trial, and not from a trial court transcript or a copy of the court's written answer.

essential. Therefore, we choose not to address this issue on its merits.[8] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Linda Marie Bell, Chief Judge, Eighth Judicial District
Law Office of Gabriel L. Grasso, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[8]We also note that Boyes cites no additional authority to support the legal merits of this argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed [on appeal]."); *see also* NRAP 3C(e)(1)(B)(vi) ("*The fast track statement shall include . . . [l]egal argument, including authorities, pertaining to the alleged error*(s) of the district court." (emphasis added)). We further note that Boyes' fast track statement did not provide citations to the record for this argument. *See* NRAP 3C(e)(1)(C) ("Every assertion in the fast track statement regarding matters in a . . . transcript or other document shall cite to the page and volume number, if any, of the appendix that supports the assertion."). Thus, we also choose not to address this issue because it was not cogently argued with supporting authority and record citations.