IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JUDITH IRENE ZAVALA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84082-COA

ORDER OF AFFIRMANCE

Judith Irene Zavala appeals from a judgment of conviction, entered pursuant to a jury verdict, of second-degree murder. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Zavala argues that the district court erred by failing to fully instruct the jury on her theory of defense—voluntary manslaughter. Specifically, she argues the district court should have instructed the jury that it was the State's burden to prove beyond a reasonable doubt that she did not act in the heat of passion upon sudden provocation. Zavala did not request such an instruction below; therefore, Zavala is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). To demonstrate plain error, an appellant must show there was an error, the error was plain or clear, and the error affected appellant's substantial rights. *Id.* at 50, 412 P.3d at 48.

When a voluntary-manslaughter defense is raised in a homicide case, "a district court should provide *upon request* accurate and complete instructions setting forth the State's burden to prove the absence of heat of

passion upon sufficient provocation . . . ." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005) (emphasis added). A failure to request an instruction precludes appellate review "unless the error is patently prejudicial and requires the court to act sua sponte to protect a defendant's right to a fair trial." *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996).

Zavala contends the jury instruction that the district court provided on the distinction between second-degree murder and voluntary manslaughter was improper. The instruction stated that the jury could only find Zavala guilty of second-degree murder if it determined "beyond a reasonable doubt that the circumstances were not such as to justify the existence or persistence of irresistible passion in a reasonable person." This instruction was a correct statement of the law, *see Byford v. State*, 116 Nev. 215, 236 n.4, 994 P.2d 700, 714 n.4 (2000), and Zavala does not allege that the instructions provided were otherwise improper. Therefore, Zavala has not demonstrated that any error impacted her right to a fair trial and, accordingly, that the district court was required to provide the omitted instruction sua sponte. We thus conclude Zavala fails to demonstrate error plain from the record or that the alleged error affected her substantial rights.

Next, Zavala argues that there was insufficient evidence to support her second-degree-murder conviction because there was not sufficient evidence of implied malice. When reviewing a challenge to the sufficiency of the evidence, 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); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

Murder is defined as the unlawful killing of a human being with malice aforethought, either express or implied. NRS 200.010(1). Second-degree murder is defined in opposition to first-degree murder, *see* NRS 200.030(2) ("Murder of the second degree is all other kinds of murder."), and it "requires a finding of implied malice without premeditation and deliberation," *Desai v. State*, 133 Nev. 339, 347, 398 P.3d 889, 895 (2017). "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). As applied to murder, malice "does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty." *Keys v. State*, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (internal quotation marks omitted).

At trial, a forensic pathologist testified that the victim was subjected to manual strangulation and that during the incident, unconsciousness may have happened quickly but death took some time. The jury was also presented with evidence that Zavala did not seek help

from a neighbor after the incident and that the police were not summoned until approximately four hours later. Zavala initially informed law enforcement officers and her family that the victim had an emotional outburst due to her autism, stopped breathing, and collapsed. Zavala subsequently admitted to strangling the victim. Family members also testified that they had never seen the victim be violent toward Zavala. The jury could have reasonably inferred from the evidence presented that Zavala acted with extreme recklessness regarding homicidal risk by strangling the victim and without considerable provocation. Accordingly, we conclude Zavala is not entitled to relief based on this claim.

Next, Zavala argues that the district court abused its discretion by prohibiting defense counsel from asking a question during voir dire on the ground that the question constituted improper "golden rule" argument. A golden rule argument asks "jurors to place themselves in the position of one of the parties," and such arguments "are improper because they infect the jury's objectivity." *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008); *see also Anderson v. Babbe*, 933 N.W.2d 813, 821 (Neb. 2019) (stating "[p]arties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence").

NRS 175.031 provides that "[t]he court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." "Both the

scope and method of voir dire are within the district court's discretion, and we review for an abuse of discretion or a showing that the defendant was prejudiced." *Chaparro v. State*, 137 Nev., Adv. Op. 68, 497 P.3d 1187, 1193 (2021) (internal citations omitted).

During jury selection, defense counsel stated he was "going to relate something about me that hopefully can relate to the case," and proceeded to tell a story in which he yelled at his six-year-old daughter and regretted his actions. Defense counsel stated the purpose of the story was "to show that I make mistakes and I don't think that I can always react in a way that I ideally would want myself to act in a situation." Counsel then asked the prospective jurors "if they have an experience as a parent of taking care of someone else where in a sense, your love for that person is matched in that moment by the frustration you may be feeling about something?" The State objected, and the district court held that defense counsel's personal story and question constituted improper golden rule argument.

The venire was aware that Zavala was charged with strangling another person of the same last name, and defense counsel stated that his personal story related to Zavala's case and asked the jurors if they had had a similar experience. In context, counsel's question could reasonably be understood as asking the prospective jurors to place themselves in Zavala's position. Moreover, Zavala does not explain how the alleged error prejudiced her as counsel questioned prospective jurors regarding their views of family and persons with special needs. Therefore, we cannot

conclude the district court abused its discretion by limiting the scope of defense counsel's examination during voir dire.

Finally, Zavala argues that the cumulative effect of the errors violated her constitutional right to a fair trial. For the reasons previously discussed, Zavala fails to demonstrate any errors to cumulate. Therefore, we conclude Zavala is not entitled to relief. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk