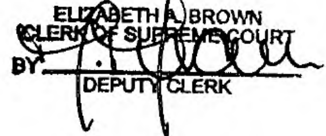
IN THE SUPREME COURT OF THE STATE OF NEVADA

CONTRAYER ZONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83972



DEC 19 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.[1]

Appellant Contrayer Zone suspected that the victim supplied his girlfriend, Maria Pacheco, with drugs, and that the two had an ongoing romantic relationship. On June 10, 2016, Zone's codefendant, Michael Rusk, picked up Zone and they went to the victim's apartment complex to see if Pacheco was there. After the victim arrived at the apartment complex, Zone exited Rusk's vehicle and shot the victim to death. Zone raises five issues on appeal, none of which warrant relief.

Severance

Zone argues that the district court erred in denying his motion to sever his trial from Rusk's trial because he and Rusk presented antagonistic defenses. We disagree. A district court has discretion to sever a trial and its decision will not be reversed on appeal unless the appellant

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[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

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shows that the court abused its discretion. *See Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). "[M]isjoinder requires reversal only if it has a substantial and injurious effect on the verdict." *Id.* at 647, 56 P.3d at 379. "While there are situations in which inconsistent defenses may support a motion for severance, the doctrine is a very limited one." *Jones v. State*, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995).

Here, Zone and Rusk did not present mutually exclusive defenses. *See Marshall*, 118 Nev. at 646, 56 P.3d at 378 (explaining that "[d]efenses are mutually exclusive when the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant" (internal quotation marks omitted) (second alteration in original)). At trial, Zone conceded that he killed the victim but argued the killing did not constitute deliberate and premeditated murder because it was a crime of passion. Rusk testified that he and Zone did not plan to harm the victim, that he drove Zone to the victim's apartment complex to see if Pacheco was there, and that he did not participate in killing the victim. Although Rusk minimized his role, he did not inculpate Zone beyond Zone's concession during opening statements that he killed the victim. Thus, even crediting Zone's assertion that Rusk presented an antagonistic defense, Zone has not shown that the joint trial had a substantial and injurious effect on the verdict. *See id.* at 648, 56 P.3d at 379 (explaining that "antagonistic defenses are a relevant consideration but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial"). Accordingly, we conclude that the district court did not abuse its discretion in denying Zone's motion to sever.

Admission of evidence

Zone argues that the district court erred in admitting certain 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).

First, Zone contends that the district court erroneously admitted text messages extracted from Pacheco's cell phone. We have held when a party objects to the admission of text messages, "the proponent must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission." *Rodriguez v. State*, 128 Nev. 155, 162, 273 P.3d 845, 849 (2012) (internal citation omitted). Although the text messages were seemingly relevant, the State did not authenticate them as being authored by Zone. The State offered evidence that Zone occasionally used Pacheco's cell phone but failed to demonstrate that Zone authored the text messages sent from Pacheco's phone to the victim on the morning of the killing. *See id.* at 161, 273 P.3d at 849 (noting that "cellular telephones are not always exclusively used by the person to whom the phone number is assigned" (quoting *Commonwealth v. Koch*, 39 A.3d 996, 1004-05 (Pa. Super. Ct. 2011))). Therefore, the district court erred in admitting the text messages sent to the victim from Pacheco's cell phone. However, we conclude that the error was harmless given the overwhelming evidence supporting the jury's verdict, including Zone's concession that he killed the victim. *See Mclellan*, 124 Nev. at 270, 182 P.3d at 111 (explaining that an error is harmless, and not grounds for reversal, unless "the error had substantial and injurious effect or influence in determining the jury's verdict") (internal quotations

omitted)). Accordingly, we conclude that Zone is not entitled to relief on this ground.

Second, Zone argues that the district court erred in admitting the victim's hearsay statement about not wanting to be involved with Pacheco any further. While hearsay is generally inadmissible, NRS 51.065(1), "[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule," NRS 51.105(1). However, in this case, the victim's state of mind was irrelevant to whether Zone felt sufficient provocation to support a manslaughter verdict. *See* NRS 48.015 (providing that relevant evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"); NRS 200.040 (defining manslaughter). Thus, the district court erred in admitting the victim's hearsay statement, but we conclude the error was harmless. *See Weber v. State*, 121 Nev. 554, 579, 119 P.3d 107, 124 (2005) (reviewing the erroneous admission of hearsay testimony for harmless error). Because the State presented substantial evidence to support the verdict of first-degree murder—including that Zone wore a mask and laid in wait for the victim to arrive—we conclude that Zone is not entitled to relief on this ground.

Jury instructions

Zone challenges the instructions informing the jury about implied malice and the duty to provide equal and exact justice. Zone concedes that this court has repeatedly rejected challenges to the given instructions. *See Byford v. State*, 116 Nev. 215, 232, 995 P.2d 700, 712 (2000) (upholding the malice instruction where the jury is properly instructed on the presumption of innocence); *Leonard v. State*, 114 Nev.

1196, 1208, 969 P.2d 288, 296 (1998) (concluding that the use of allegedly archaic statutory language in the malice instruction did not deprive defendant of a fair trial); *id.* at 1209, 969 P.2d at 296 (providing that where the jury has been instructed that the defendant is presumed innocent and that the State bears the burden of proving guilt beyond a reasonable doubt, the equal-and-exact-justice instruction does not undermine the presumption of innocence or lessen the burden of proof). Thus, Zone has not demonstrated that the district court abused its discretion in settling jury instructions. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.").

Cumulative error

Finally, Zone argues that cumulative error warrants reversal. Having found two errors (admission of the text messages and the victim's hearsay statement), which were individually harmless, we consider "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Here, the crimes are grave, but the issue of Zone's guilt is not close and the nature of the errors does not warrant relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_______________, C.J.
Stiglich

_______________, J.
Lee

_______________, J.
Bell

cc: Hon. Jacqueline M. Bluth, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk