IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW MARTIN COTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85120

FILED
DEC 27 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 first-degree murder with the use of a deadly weapon of a victim 60 years of age or older and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Andrew Cote was charged after he reported to the police that he fatally shot his seventy-year-old neighbor Mildred Olivia and his neighbor's friend Timothy Hanson. Cote's backyard abutted Olivia's. On the night of the shooting at approximately 10 p.m., Hanson was in Olivia's backyard while Cote's then-nine-year-old daughter was in Cote's backyard. Hanson yelled over the fence at Cote's daughter to "go get your daddy. Get your daddy out here." Cote also heard Hanson say, "Come on out, pastor," and "Let's see how tough you is." Cote retrieved a shotgun and went into his backyard. Olivia joined Hanson in her backyard. Cote testified that he grabbed his gun to encourage them to stand down. The last statement Hanson made to Cote was "you got a gun, huh?"

Cote testified that he saw Hanson coming over the wall between the properties. From his backyard, Cote shot Hanson in the head. Cote then shot Olivia in the head. When Hanson began to move, Cote shot

Hanson again in the head, assuming he was reaching for a gun in his pocket. Cote reported the shooting to the police minutes later.

At trial, Cote argued that he acted in self-defense or committed the lesser offense of voluntary manslaughter. The jury returned a guilty verdict for both counts of first-degree murder.

Sufficient evidence supported Cote's murder convictions

Cote argues that the State presented insufficient evidence of first-degree murder because it did not prove a lack of self-defense, malice aforethought, or premeditation beyond a reasonable doubt. He argues the jury did not adequately consider facts related to his self-defense claim that affected what a reasonable person would have perceived; namely, the years-long torment and threats from Olivia, his child being yelled at, that it was dark, and Hanson coming over the wall. He argues there was no malice aforethought because his intent was merely reactive and defensive. And he contends there was no premeditation because his split-second reaction to shoot upon seeing Hanson climbing the wall was made without time to engage in rational deliberation.[1]

When considering a challenge to the sufficiency of the evidence supporting a criminal conviction, we must determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). A person who kills in self-defense is justified if (1) he was

[1]Insofar as Cote raised arguments not specifically addressed in this order, we have considered them and conclude that they either do not warrant relief or need not be reached given our disposition.

"confronted by the appearance of imminent danger" that caused "an honest belief and fear" of death or great bodily injury; (2) he acted solely on these appearances, fear, and beliefs; and (3) a reasonable person in a similar situation would have believed that he or she would have been in similar danger. *Runion v. State*, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000). Malice aforethought is "the intentional doing of a wrongful act without legal cause or excuse or . . . adequate provocation." *Crawford v. State*, 121 Nev. 744, 752, 121 P.3d 582, 587 (2005) (internal quotation marks and emphasis omitted). "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." *Moser v. State*, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975), *modified on other grounds by Collman v. State*, 116 Nev. 687, 717 n.13, 7 P.3d 426, 445 n.13 (2000). Premeditation, as required for first-degree murder, "is a design, a determination to kill, distinctly formed in the mind by the time of the killing." *Valdez v. State*, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008) (quotation marks omitted). Murder can be deemed deliberate and premeditated "although the intent to commit such a homicide is formed at the very moment the fatal shot is fired." *Payne v. State*, 81 Nev. 503, 509, 406 P.2d 922, 926 (1965) (internal quotation marks and alteration marks omitted). It is for the jury to determine the weight and credibility given to conflicting evidence. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

The facts that Cote contends the jury did not account for related to his self-defense claim were all raised at trial. Specifically, Cote testified about his years-long tumultuous relationship with Olivia. He testified that she threatened to shoot his wife and made other comments that he interpreted as threats. He explained that he obtained protective and stay-away orders against Olivia and began using video to document her actions.

Cote also testified that before the shooting he had seen Hanson visiting Olivia's house, and Hanson had yelled from outside at Cote's residence on one prior occasion. On the day of the shooting, Cote and Olivia had a dispute over Olivia spraying Cote and his daughter with water, which Cote claimed violated his protective order. Police responded to the scene but did not make a report or take any other action.

Cote also testified about his perception of events leading up to the shooting, including the utter horror he experienced when he realized his young daughter was outside being yelled at by Hanson, that he went outside to protect his daughter and to make Hanson and Olivia stand down, his feelings of extreme fear that he was being lured outside, his uncertainty whether Hanson or Olivia had weapons, and his belief that his perceptions that night were affected by Olivia's earlier threats. Further, Cote testified about the circumstances of the shooting, including that he heard yelling from inside his house, grabbed his shotgun, and proceeded outside. He explained that he saw Hanson coming over the wall between the properties, there was not much light, and he could not see Hanson's hands. Cote testified that he then saw Olivia "coming at" him and that he could not see her hands to confirm whether she had a weapon.

The State presented evidence including video of the shooting that was recorded by Cote's and Olivia's surveillance systems and of Cote's police interview. In his police interview, Cote made statements that he had never seen Olivia or Hanson with firearms before and about his intentions for going outside that night. Cote stated, "I didn't intend on going out there to really talk with [Hanson], you know, to have a reasonable conversation." As to Olivia, Cote testified that he "didn't come out planning on killing her, but [he] knew that when [he] took the shot, that the shot would end her

life." Jurors watched video evidence of the shootings that captured the short time between Cote exiting his house and shooting Hanson and Olivia. The jurors also visited the crime scene themselves one afternoon during trial. In addition, a forensic pathologist medical examiner testified that Olivia and Hanson had drugs in their systems at death but that their deaths were caused by shotgun wounds to the head and the manner of their deaths was homicide. Based on their wounds, the examiner concluded that Cote was approximately three feet from Hanson when he fired the first shot, less than three feet from Olivia when he fired the second shot, and between three and ten feet from Hanson when he fired the third shot.

During the trial, the jury weighed the conflicting evidence and rejected Cote's self-defense claim. Specifically, the jury heard that the danger Cote confronted was Hanson yelling at Cote's daughter for him to come outside, that Cote did not know whether Hanson or Olivia had weapons, and about past negative interactions Cote had with Olivia and Hanson. The evidence was sufficient for a rational juror to find that the danger that Cote confronted was not imminent, that Cote killed Olivia and Hanson based on factors other than fear or imminent danger, and that a reasonable person in a similar situation would not have believed they were in similar danger. Thus, the evidence was sufficient to support the jury's determination on self-defense. Additionally, the jury heard Cote's statements that he did not intend to have a reasonable conversation by going outside and that he knew he would kill Olivia if he shot her. The jury was also presented with evidence that Cote shot Hanson and Olivia in the head with a shotgun at close range. Thus, a rational trier of fact could have found Cote intentionally used the shotgun in a dangerous and deadly manner, without an excuse or adequate provocation. Accordingly, sufficient

evidence supported the jury's determination for malice aforethought. Further, although Cote testified that he went outside with his gun to encourage Hanson and Olivia to stand down, a reasonable juror could have discredited this testimony in light of how quickly Cote fired the shots in the video and his other statements that he did not intend to have a conversation and knew taking the shot would kill. Taken together, the evidence of Cote exiting his house with his shotgun and soon after shooting both Hanson and Olivia in the head, combined with his statements about his thought processes, was sufficient for a jury to find that Cote had a determination or design to kill by the time of the killing. Thus, the evidence was sufficient to support the jury's determination as to premeditation. Accordingly, we conclude sufficient evidence supported Cote's murder convictions. *See* NRS 200.010, 200.030, 200.030.1, 193.165, 193.167.

Cote has not shown that the district court abused its discretion by granting the jury view

Cote argues the district court abused its discretion by granting the jury view because the photographs and video more accurately depicted the scene and circumstances, including darkness, as they existed on the night of the shooting.

A district court's decision to grant a jury view is reviewed for an abuse of discretion. *Spillers v. State*, 84 Nev. 23, 28-29, 436 P.2d 18, 21 (1968), *overruled in part on other grounds by Bean v. State*, 86 Nev. 80, 465 P.2d 133 (1970). A district court abuses its discretion if its decision is "arbitrary or capricious or if it exceeds the bounds of law or reason," *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (internal quotation marks omitted), or if "no reasonable judge could reach a similar conclusion under the same circumstances," *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). The "only function" of a jury view

"is to assist the jury in comprehending the evidence before it." *Spillers*, 84 Nev. at 28-29, 436 P.2d at 21.

In its order, the district court granted the motion for a jury view after "having heard the arguments of counsel and good cause appearing therefor." Cote did not provide this court with a transcript of the hearing on the motion or with any basis to conclude the ruling was arbitrary, capricious, unlawful, or unreasonable. *See* NRAP 30(b)(3); *Thomas v. State*, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) (noting that it was improper for counsel to fail to "provide this court with an adequate record"); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Presuming the omitted transcript supports the district court's decision, it was permissible for the court to decide that viewing the backyards would assist the jury in comprehending the evidence. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (presuming that missing portions of the record "support the district court's decision, notwithstanding an appellant's bare allegations to the contrary"), *rev'd on other grounds*, 504 U.S. 127 (1992). Accordingly, Cote has not shown that the district court abused its discretion when it granted the jury view.

One of the State's comments constituted prosecutorial misconduct, but the error is harmless

Cote next argues prosecutorial misconduct on several grounds. Prosecutorial misconduct claims are assessed under a two-step analysis. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. We first determine whether the prosecutor's conduct was improper. *Id.* If so, we determine whether the improper conduct requires reversal. *Id.* When an appellant objects to alleged prosecutorial misconduct at trial, this court applies harmless error review to determine whether reversal is warranted. *See id.* at 1190, 196

P.3d at 477. The applicable standard of harmless error review depends on whether the error is of constitutional dimension. *Id.* at 1189-90, 196 P.3d at 476-77. If an appellant did not object, we may review for plain error. *Id.* at 1190, 196 P.3d at 477.

The State's reference to Hanson's race during rebuttal closing argument was impermissible but harmless

In its rebuttal closing argument, the State referred to Hanson's race while arguing one of the cameras projected light into the backyards during the shooting. Specifically, the State commented, "Despite the photographic evidence he won't admit that there's a light there. Why? Because he wants it to be dark. Why? Oh, there's a scary African-American male in my backyard yelling at me, so I shot him." Cote objected that the comment addressed facts not in evidence. The district court overruled the objection, responding that the evidence included photographic evidence. The State did not present evidence that Cote shot Hanson because of Hanson's race, and Cote did not testify that his fear was produced by being faced with a Black man, specifically in the dark.

Cote argues the State's comment about Hanson's race was improper because it injected an irrelevant and prejudicial theory of racial motive that served to inflame the passions of the jury. Cote argues that the racial comment was constitutional error because it injected race into the trial. He does not argue it was constitutional error because it was an impermissible comment on a choice to exercise a constitutional right or because it combined with other errors to deny him a fair trial. *See Valdez*, 124 Nev. at 1189, 196 P.3d at 477.

A prosecutor may "assert inferences from the evidence and argue conclusions on disputed issues." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). However, "[a] prosecutor may not blatantly

attempt to inflame a jury." *Valdez*, 124 Nev. at 1191, 196 P.3d at 478 (internal quotation marks omitted). Other jurisdictions have determined it is an error of constitutional dimension to inject "ethnicity into the trial [in such a way that] clearly invite[s] the jury to put the [defendant's] racial and cultural background into the balance in determining their guilt." *United States v. Vue*, 13 F.3d 1206, 1211, 1213 (8th Cir. 1994) (finding that the admission of testimony about the likelihood that persons of Hmong descent would be involved in opium smuggling implicated the defendant's constitutional rights to due process and equal protection).

Here, the comment served only to inflame the jury's emotion by suggesting that Cote shot Hanson due to racism. The comment remains improper even if its intention was only to emphasize the implausibility of Cote's self-defense claim. The State's comment about Hanson's race, however, did not invite the jury to use generalizations about members of Cote's racial group to determine whether he was guilty. Thus, we apply the nonconstitutional harmless error standard.

The test for an error that is not of constitutional dimension is whether the error "substantially affect[ed] the jury's verdict." *Valdez*, 124 Nev. at 1189, 196 P.3d at 476. To determine whether an error had a substantial and injurious effect or influence on the jury's verdict, the prosecutor's comments should be evaluated in the broader context of the trial. *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000). If "evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." *Id.*

The State's evidence that Cote committed first-degree murders was strong. Cote did not contest that he killed Hanson and Olivia, and surveillance video captured portions of the shooting, including the short

time between Cote exiting his house and shooting Hanson and Olivia. Cote stated in his recorded police interview that he had never seen Olivia or Hanson with a firearm and that he did not intend to have a conversation with Hanson when he proceeded outside that night with his shotgun. Cote also testified that he knew Olivia would die if he shot her. Further, the State presented evidence that Cote shot Hanson and Olivia at close range, and that Cote shot Hanson a second time when he began to move. Thus, in light of the strength of the State's evidence, we conclude the State's comment about Hanson's race likely did not have a substantial and injurious effect on the verdict and thus was harmless.

The State's reference to Cote's profession as a pastor during rebuttal closing argument was permissible

Cote also contends the State's comment during rebuttal closing argument that "[j]ust because he's a pastor, he doesn't get a pass" misled the jury by mischaracterizing or denigrating the defense's theory as something patently absurd.

Cote did not object. At trial, Cote testified about his profession as a pastor, Olivia tearing up religious literature and placing it on his front porch, an occasion where he tried to "share the love of God" with Olivia to improve their relationship, and Hanson yelling from the backyard immediately before the shooting, "Come on out, pastor." Thus, the State's argument can be characterized fairly as comments on the evidence. Accordingly, we determine the State's comment did not amount to prosecutorial misconduct.

The State's use of the term "murder" during witness questioning was permissible

Cote next argues the State's references to "murder" subverted the presumption of innocence by implying that murder had already been proven.

In *Watters v. State*, we concluded it was improper for the prosecutor to display, during opening argument, the defendant's booking photo with the word "GUILTY" superimposed over the image because it undermined the presumption of innocence. 129 Nev. 886, 891-92, 313 P.3d 243, 247-48 (2013). We determined that visually declaring a defendant guilty was more prejudicial than doing so orally. *Id.* at 891, 313 P.3d at 248. In a subsequent decision, we concluded that displaying a defendant's photograph with the word "guilty" superimposed over it was not error when the visual was displayed briefly during closing argument. *Artiga-Morales v. State*, 130 Nev. 795, 799, 335 P.3d 179, 182 (2014).

Cote identifies two instances when the State referenced murder.[2] Specifically, the State asked a detective "how long after the murder [he] went to collect the phone" and responded to Cote when asking whether he "called 911 after this incident" that the incident referred to "[t]he murders, the murders." The State also used the term when asking Cote's former attorney whether the hearing the former attorney mentioned was the latest between Cote and Olivia "[b]esides the murder." Cote did not object.

The State's comments were made during witness questioning, which is more akin to a comment made in opening argument than closing argument because the jury had not yet heard all the evidence. However,

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[2]Cote also identifies two references to "murder" that are inapposite to analyzing prosecutorial misconduct because witnesses made the references in response to questions from defense counsel.

the State's three references to murder were infrequent, fleeting comments. Each question appears to have been asked to elicit information about the timeline of events. On balance, we conclude the State's three references to murder during questioning did not amount to an improper declaration of Cote's guilt and were thus permissible. Further, because Cote did not object to these references at trial, even if they were improper, they would not constitute plain error. Cote has not shown how these three references to murder caused him actual prejudice in light of the overwhelming evidence that supported his convictions.[3]

The State's use of the terms "victim" and "victims" during witness questioning was permissible

Cote argues the State's use of the terms "victims" and "victim" amounted to legal conclusions that the jury had not yet made.

The term "victim" is commonly defined as "one that is acted on and usually adversely affected by a force or agent" or "one that is injured, destroyed, or sacrificed under any of various conditions." *Victim*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/victim (last visited Sept. 13, 2023).

Cote identifies several instances when the State referred to "victim" or "victims" during questioning and asked a question that resulted in a witness referencing the terms several times. In particular, the State mentioned "victim" or "victims" when asking witnesses questions about

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[3]We caution that murder is a legal determination for the jury and that use of the term "murder" in questioning should be avoided. Although we conclude the use of the term here did not amount to prosecutorial misconduct, we note there may be circumstances where the use of the word in questioning could constitute prejudicial error. *See People v. Price*, 821 P.2d 610, 703 (Cal. 1991) (determining that it is "improper for a prosecutor to use the term 'murder' in questioning a witness about an unadjudicated killing").

locations such as Olivia's residence, questions about Olivia's and Cote's cameras, and to interpret photographs. Witnesses used the terms to describe Olivia's residence, where physical evidence was found, and what was depicted in photographs. Cote did not object, and he also used the term once in questioning.

It was uncontested that Cote killed Hanson and Olivia when he shot them and that both decedents were therefore the victims of a killing. Thus, the State's references to "victim" and "victims" reflected common usage of the terms rather than legal conclusions. Thus, we conclude the State's references to "victim" or "victims" were not prosecutorial misconduct.

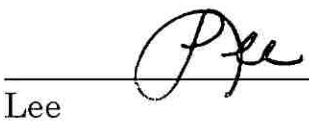
Cumulative error does not warrant reversal

Cote argues cumulative error warrants reversal and remand for new trial because the quantity of the error was sufficiently extensive, the character of the error was grave, and the issue of guilt was close. When there is a sole error, there is nothing to cumulate. *Lipsitz v. State*, 135 Nev. 131, 140 n.2, 442 P.3d 138, 145 n.2 (2019). The single error was the State's comment about Hanson's race. Therefore, Cote has not shown cumulative error.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon



_____, J.
Lee

_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Law Office of Amanda Pellizzari, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk