

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS LEE MARLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51752
FILED

MAY 05 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of three gross misdemeanor counts of abuse, neglect or endangerment of a child under NRS 200.508. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

Upon relocating to Nevada, appellant and his three minor sons moved into appellant's mother's ranch house. In addition to the family, an assortment of animals lived on the property, including a group of pigs. After appellant's mother moved to the Pacific Northwest to attend to an ailing relative, appellant learned that the power company intended to shut off the ranch's electricity due to a sizeable unpaid bill. Appellant and his sons then moved in with a friend while appellant struggled to have the electricity transferred to his name and power restored. In their absence, however, a mighty wind blew the door off the ranch house and the animals, apparently led by the pigs, wreaked havoc upon their home. The family later returned to the ranch after the electricity issue was resolved. When police discovered the conditions in which appellant and his sons were living, appellant

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charged with three counts of abuse, neglect or endangerment of a child.¹

On appeal, appellant raises four arguments. We conclude that each argument lacks merit and we therefore affirm the judgment of conviction.

Appellant first contends that the State violated his due process rights by amending the information and thereby failing to provide him with adequate notice of the theory upon which the State was proceeding. Under NRS 173.095(1), “[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.”

Here, the original information charged appellant with three counts of abuse or neglect of a child under NRS 200.508(1)(b)(1) for keeping “a home that was a danger to his minor child.” Although the information did not name the children, the parties discussed at the preliminary hearing that appellant’s three minor children, Ricky, Bobby, and Joey, were the subject of those counts. The State then amended the information prior to trial to include the names of the three minor children. The amended information also conformed the wording to that used in the statute, alleging that appellant kept “an unsafe home” that placed each of his minor children “in a situation that was a

¹The animal damage appears to have merely worsened their already messy home. Among other things, the evidence showed the house had trash all over the floor, dirty dishes in the sink, rotten food throughout, no heating, exposed electrical wires, no beds, pornography and drug paraphernalia in plain view, and dead pigs in the backyard.

threat to his mental and physical welfare.” This new language replaced the wording in the original information that charged appellant with keeping “a home that was a danger to his minor child.” Thus, the State did not charge a new crime. Rather, it merely amended the information to include the names of the minor children and conformed the information language to that used in NRS 200.508. Since the State amended the information prior to trial and did not charge new crimes or counts, we conclude that appellant was not prejudiced and his due process rights were not violated.

Second, appellant alleges that the State engaged in prejudicial prosecutorial misconduct that warrants reversal. “To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due process.” Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). Furthermore, we will not overturn a district court’s denial of a motion for mistrial absent abuse of discretion. Johnson v. State, 118 Nev. 787, 796, 59 P.3d 450, 456 (2002).

During its opening statement, the State revealed that the police initially came to appellant’s residence in response to a domestic battery call involving appellant and his girlfriend. The State then proceeded to describe the girlfriend’s injuries in detail, stating “[s]he had a split lip, she had blood on her face, she had red marks on her shoulder and neck.” The State further embellished on the domestic battery, referring to comments the girlfriend made to a detective that appellant “had beaten her up in the presence of his three sons.” Although appellant did not object to these statements at the time they

were made, he did move for a mistrial at the conclusion of the opening statement. The district court then denied the motion and instructed the jury to disregard the statements.

The State contends that the domestic battery was part of the *res gestae* of the crime being charged. We disagree. If events surrounding the charged crime cannot be described without referring to other criminal acts, those other criminal acts are part of the *res gestae* of the charged crime. State v. Shade, 111 Nev. 887, 893-94, 900 P.2d 327, 330-31 (1995). Here, appellant was charged with neglect for keeping an unsafe home that threatened the physical and mental welfare of his three minor children. Thus, the pertinent issues were the condition of the residence and whether appellant's minor children lived at that residence. Witnesses could testify about those issues without referring to the domestic abuse allegations. The initial reason the police came to the residence, the description of the injuries, and the allegation that the incident occurred in front of the minor children are irrelevant to this charge. Since the crime charged is *neglect* by keeping an unsafe home, we further disagree with the State that the children's witnessing of the battery would be relevant to the crime charged.

Accordingly, we conclude that the State's remarks were improper, but we do not find them to reach a level of prosecutorial misconduct that warrants reversal. Here, the district court refused to declare a mistrial because appellant failed to bring a motion in limine even though he apparently knew the State intended to offer the evidence. The district court further based its reasoning on appellant's failure to make a contemporaneous objection to the statements. In response to the statements, the district court offered a clear instruction

to the jury to disregard the domestic battery remarks and to not consider them during deliberation. The State adhered to this admonishment.² In light of the jury instruction and the prosecutor's refrain from further comment on the domestic battery, we conclude that the district court's denial of the motion for mistrial was not an abuse of discretion.

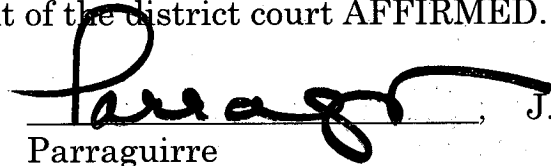
Appellant further argues that the State engaged in prejudicial prosecutorial misconduct when it asked appellant on cross-examination if the argument with his girlfriend started because appellant wanted to buy methamphetamine. On direct examination, however, appellant opened the door to this line of questioning when he stated that he and his girlfriend had argued about going into town to buy gas. Since the State had evidence indicating that appellant may have lied while testifying, the State had the right to challenge appellant's credibility. Moreover, the appellant's potential drug use was relevant because the admitted evidence showed that the children were exposed to drug paraphernalia in the house. When appellant denied that the argument was about a proposed methamphetamine transaction, the State accepted that answer and did not attempt to offer extrinsic evidence to contradict appellant's testimony. For the foregoing reasons, the question did not infect the proceedings with unfairness, and we therefore conclude that the question did not constitute prosecutorial misconduct.

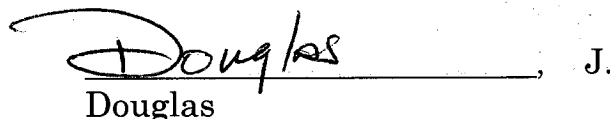
²The State later referenced the domestic battery, but only after appellant raised the issue on direct and cross-examinations.

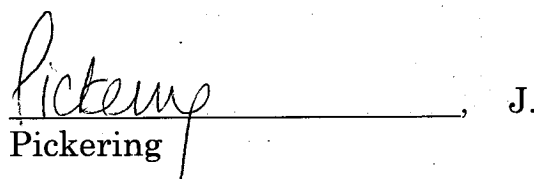
Third, we disagree with appellant's contention that the State did not produce sufficient evidence to support the conviction. A jury verdict is based on sufficient evidence if any rational trier of fact could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Here, the State provided extensive photographic evidence of the condition of the residence in addition to the testimony of numerous eyewitnesses. Although there was conflicting evidence regarding whether the minor children lived at the residence in question, the credibility of that evidence was for the jury to weigh. We therefore conclude that any rational trier of fact could find appellant guilty beyond a reasonable doubt based upon this evidence.

Finally, since appellant does not develop his assertion that NRS 200.508 is unconstitutionally vague, we decline to address the merits of that argument. 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 by this court.") Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Sixth Judicial District Court Dept. 2, District Judge
Humboldt-Pershing County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk