IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MARK FENTON, A/K/A JOHN MARK CANNELORA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59694

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery resulting in substantial bodily harm on a person 60 years of age or older, burglary, robbery of a person 60 years of age or older, and grand larceny of a motor vehicle. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.[1]

Confrontation/hearsay

Appellant John Fenton contends that the district court erred by allowing Sgt. Jason Pepper of the Elko Police Department to testify that the victim identified the perpetrator as "a white male" because it violated his constitutional right to confrontation. See U.S. Const. amend.

[1]Although we filed the appendix submitted by Fenton, it fails to comply with the Nevada Rules of Appellate Procedure. The 17-volume joint appendix submitted by Fenton does not include an alphabetical index. See NRAP 3C(e)(2)(C); NRAP 30(c)(2) ("If the appendix is comprised of more than one volume, one alphabetical index for all documents shall be prepared and shall be placed in each volume of the appendix."). Counsel for Fenton is cautioned that the failure to comply with the appendix requirements in the future may result in the documents being returned to be correctly prepared and in the imposition of sanctions, NRAP 3C(n).

VI; Crawford v. Washington, 541 U.S. 36, 53-59 (2004) (holding that admission of testimonial hearsay statement violates Confrontation Clause unless declarant is unavailable to testify and defendant had prior opportunity to cross-examine declarant). Fenton claims that although the victim testified at trial and was subject to cross-examination, the victim's undisputed loss of memory due to the injury suffered as a result of the instant battery rendered him unavailable for Confrontation Clause purposes because he "did not have the ability to 'defend or explain' the statement he gave to Sgt. Pepper describing his attacker." See Crawford, 541 U.S. at 59 n.9 ("The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."); see also Goforth v. State, 70 So. 3d 174, 185-87 (Miss. 2011) (right to confrontation violated when defendant did not have constitutionally adequate opportunity to cross-examine testifying declarant about prior testimonial statement due to undisputed loss of memory). The district court denied Fenton's motion in limine seeking to preclude admission of Sgt. Pepper's statement. We disagree with Fenton's contention.

"We generally review a district court's evidentiary rulings for an abuse of discretion. However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal citations and quotation marks omitted). Here, the district court determined that allowing Sgt. Pepper to testify about the victim's statement did not violate the Confrontation Clause because "the Defense will have sufficient opportunity and ammunition to cross examine the

witness."[2] See United States v. Owens, 484 U.S. 554, 558-560 (1988); Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006); see also Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) ("When a witness gives 'testimony that is marred by forgetfulness, confusion, or evasion . . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.'" (omission in original) (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985))). And the victim did, in fact, testify at trial and was subject to cross-examination by Fenton. The district court also determined that the victim's statement to Sgt. Pepper was not hearsay and admissible as a prior inconsistent statement. See Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) ("[W]hen a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement [and admissible] pursuant to NRS 51.035(2)(a). The previous statement is not hearsay and may be admitted both substantively and for impeachment." (emphasis added)). We conclude that the district court did not abuse its discretion or commit judicial error by allowing Sgt. Pepper's testimony.

Motion for a new trial/Brady violation

Fenton contends that the district court erred by denying his motion for a new trial based on an alleged Brady violation. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (announcing a trial right to discovery of exculpatory and impeachment evidence material to the defense). Fenton claims that because he made a specific, oral request, the district court

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[2]The Honorable Andrew J. Puccinelli, District Judge, presided over and ruled on this and several other pretrial motions filed by the parties.

applied the wrong standard—the "reasonable probability" test rather than the appropriate "reasonable possibility" test—in determining that the State did not violate Brady by not providing him with evidence pertaining to an incident he was involved in prior to trial while incarcerated in the Elko County Jail. See State v. Bennett, 119 Nev. 589, 600, 81 P.3d 1, 8 (2003). We disagree with Fenton's contention.

Determining whether the State adequately disclosed information pursuant to Brady involves questions of both fact and law which we review de novo. See id. at 599, 81 P.3d at 7-8. Here, the district court conducted a hearing and determined that the evidence was not material to Fenton's defense and, under either the "reasonable probability" or "reasonable possibility" tests, would not have "affected the judgment of the jury or the outcome of the trial." We agree and conclude that the district court did not err by rejecting Fenton's claim or abuse its discretion by denying his motion for a new trial. See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001) (the district court's decision to deny a motion for a new trial is reviewed for an abuse of discretion).[3]

Jury instructions

First, Fenton contends that the district court erred by rejecting his proposed adverse inference instruction regarding law enforcement's failure to gather material evidence, specifically, forensic evidence from the crime scene and from a potential suspect.[4] Fenton

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[3]To the extent it was raised in this appeal, we also reject Fenton's claim that the district court erred by denying his motion to reconsider his motion for a new trial.

[4]Fenton proposed the following instruction: "[I]f you believe that material evidence was not gathered or destroyed, you must presume that the evidence would have been favorable to the Defense."

claims that he is entitled to the instruction because the investigating officers' conduct amounted to gross negligence. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) ("[I]n the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State."). We disagree.

"This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion." Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). In denying Fenton's pretrial motion to dismiss, Judge Puccinelli found that "there is not sufficient evidence before the Court to show whether the evidence was material" and that "there is no evidence before the Court showing that there is a reasonable probability that the washed away blood evidence would be helpful to the defense." The district court concluded that the "negligence attributed to the State in this case is, if anything, mere negligence," and, pursuant to Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998), Fenton was only entitled to "examine the prosecution's witnesses about the investigative deficiencies." During the settling of jury instructions, Judge Memeo agreed with Judge Puccinelli's ruling and rejected Fenton's proposed instruction. Fenton fails to demonstrate that the evidence not gathered was exculpatory, material, or that the investigating officers were grossly negligent. See Randolph, 117 Nev. at 987, 36 P.3d at 435; Daniels, 114 Nev. at 267-68, 956 P.2d at 115. Therefore, we conclude that the district court did not abuse its discretion by rejecting Fenton's proposed instruction.

Second, Fenton contends that the district court committed plain error by failing to sua sponte provide the jury with an instruction regarding the merger of battery and robbery because the counts were redundant. See NRS 178.602 ("Plain errors or defects affecting

substantial rights may be noticed although they were not brought to the attention of the court."); Salazar v. State 119 Nev. 224, 227-28, 70 P.3d 749, 751-52 (2003). We disagree. Battery does not merge with robbery because each "requires proof of a fact that the other does not." Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006); compare NRS 200.380(1) with NRS 200.481(1)(a). Moreover, we recently disapproved of Salazar and the "redundancy" line of cases "to the extent that they endorse a fact-based 'same conduct' test for determining the permissibility of cumulative punishment." Jackson v. State, 128 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 55, December 6, 2012) at 17; see also Blockburger v. United States, 284 U.S. 299, 304 (1932); Barton v. State, 117 Nev. 686, 694-95, 30 P.3d 1103, 1108 (2001). Therefore, we conclude that the district court did not commit plain error by failing to sua sponte instruct the jury on the merger of the two counts.

Third, Fenton contends that the district court erred by rejecting his proposed instruction on afterthought robbery. Fenton claims that he was entitled to the instruction pursuant to Nay v. State, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007), where we concluded that the district court erred by failing to instruct the jury on afterthought robbery because "[r]obbery does not support felony murder where the evidence shows that the accused kills a person and only later forms the intent to rob that person." Fenton proposed the following instruction: "[I]f you find that the taking occurred when the victim was unconscious and the taking was an afterthought to the use of force, then you must find the Defendant not guilty of robbery." The State argued that, among other things, the proposed instruction was a misstatement of the law. We agree with the State. Pursuant to the robbery statute, NRS 200.380, "it is irrelevant when the intent to steal the property is formed" and it is not necessary

that "the force or violence be committed with the specific intent to commit robbery." Chappell v. State, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998); see also Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542-43 (1976). Therefore, we conclude that the district court did not abuse its discretion by rejecting Fenton's proposed instruction. Ouanbengboune, 125 Nev. at 774, 220 P.3d at 1129.

Custodial interrogation/recorded statement

Fenton contends that the district court erred by admitting at trial his recorded interview with law enforcement because his level of intoxication and deception used by the interrogating officers rendered his statement involuntary. See generally Miranda v. Arizona, 384 U.S. 436 (1966). We disagree. "[V]oluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). "[T]he voluntariness analysis involves a subjective element as it logically depends on the accused's characteristics." Id. at 193, 111 P.3d at 696; Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987) (listing factors relevant to voluntariness determination); see also Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181-82 (2006) (Miranda waiver is voluntary "'if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement'" (quoting U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998))).

The district court conducted a hearing on Fenton's motion to suppress and determined that his Miranda waiver was voluntary based on the totality of the circumstances. The district court specifically found, among other things, that (1) Fenton's "level of intoxication did not affect [his] ability to understand the meaning of his statements," (2) he interacted appropriately with the officers, and (3) there was "no evidence

of either coercion or deception that rises to the level of overpowering [his] will." We agree and conclude that the district court did not err by admitting Fenton's recorded statement.

Impeachment/extrinsic evidence

Fenton contends that the district court erred by prohibiting him from cross-examining a witness about his failure to appear at his sentencing hearing in an unrelated case. Fenton claims that pursuant to NRS 50.085(3), he was entitled to impeach the witness with this evidence because it was relevant to truthfulness and admissible to show consciousness of guilt. "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). Here, the district court conducted a hearing on Fenton's motion in limine to admit extrinsic evidence and found that evidence or testimony pertaining to the witness' failure to appear at his sentencing hearing in the unrelated case was not relevant to his credibility in the instant case. We conclude that Fenton fails to demonstrate that the district court abused its discretion by limiting his cross-examination of the witness in question in this manner. See generally Lobato v. State, 120 Nev. 512, 518-19, 96 P.3d 765, 770 (2004) (discussing impeachment by extrinsic evidence).

Judicial misconduct

Fenton contends that the district court committed misconduct by dissuading counsel from proffering a mental health defense. Fenton, however, did not object to the alleged judicial misconduct, see Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998) ("Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court."), and he

fails to demonstrate plain error affecting his substantial rights, see NRS 178.602.

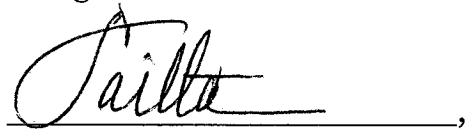
Cumulative error

Fenton contends that cumulative error denied him his right to a fair trial. Because Fenton fails to demonstrate any error, we reject his contention. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006). Accordingly, we

ORDER the judgment of conviction AFFIRMED.[5]

_____, J.
Gibbons

_____, J.
Douglas



_____, J.
Saitta

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[5]In a footnote and without any argument, Fenton claims that the evidence was insufficient to support the burglary and grand larceny convictions. He states, "Due to space limitations, Fenton submits that argument based upon the facts recited in this brief." We stated in Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987), that "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Nevertheless, our review of the record reveals that Fenton's contention is without merit. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008); see also NRS 205.060(1); former NRS 205.228(1).

cc: Hon. Nancy L. Porter, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk