IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SEQUOIA TAYHOE-SIERRA JOHNNY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69786

FILED

SEP 13 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery resulting in substantial bodily harm. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Appellant Sequoia Tayhoe-Sierra Johnny appeals his conviction, challenging the information and the district court's evidentiary rulings at trial. Specifically, Johnny contends: (1) the district court abused its discretion in granting the State's motion for leave to file an amended information upon affidavit, (2) the district court abused its discretion by sustaining the State's objection to his question to the venire about the meaning of stand your ground, (3) the district court erred by allowing a State's witness to testify, (4) the district court abused its discretion by allowing the State to question him on cross-examination about whether he could have left the residence during the altercation[1], (5)

[1]We have considered this argument and determined it is without merit as Johnny testified that he tried to leave the victim's apartment multiple times during the altercation. Therefore, we conclude the State's question was relevant as to whether he tried to leave or intended to leave the apartment during the altercation. *See* NRS 48.015.

the State committed prosecutorial misconduct during its closing argument, and (6) that cumulative error warrants reversal.[2]

First, Johnny argues the district court abused its discretion in granting the State leave to file an amended information upon affidavit because it erred in finding the justice court committed egregious error. Specifically, Johnny contends the State presented inadequate evidence at the preliminary hearing of prolonged physical pain to support a finding of probable cause on the charge of battery resulting in substantial bodily harm. We review a district court's grant of leave to file an information upon affidavit for an abuse of discretion, but we review the district court's determination of egregious error de novo. *Moultrie v. State*, 131 Nev. ___, ___, 364 P.3d 606, 609-10 (Ct. App. 2015).

A justice court commits egregious error when it erroneously dismisses a charge against a defendant and the error is plain. *Id.* at ___, 364 P.3d at 611. "[P]robable cause to bind a defendant over for trial may be based on slight, even marginal evidence because it does not involve a determination of guilt or innocence of an accused." *Sheriff, Washoe Cty. v. Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 285 (1996) (internal quotation marks omitted). The Nevada Supreme Court has defined "prolonged physical pain" as "physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." *Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 93 (2009).

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[2]We do not recount the facts of the case except as necessary to our disposition.

At the preliminary hearing, the victim testified that Johnny grabbed her, held her face down on the floor, and punched her in the back and on the head. The victim testified that during the altercation she heard and felt one of her bones break. Further, she testified, without objection, that she went to the hospital after the incident and a doctor told her she broke her rib. According to the victim, she also had multiple contusions on her head, brain hemorrhaging, a black eye, a fat lip, a three-inch long scratch, blood clots, multiple bruises, and internal bleeding for about three weeks. When asked about her pain, she testified that she was still in pain. Officer Bradley Parvin testified that he observed injuries to the victim.

Based on the victim's testimony, we conclude the State presented sufficient evidence during the preliminary hearing to establish probable cause that Johnny committed the offense of battery resulting in substantial bodily harm. Therefore, we conclude the district court did not err in finding that the justice court committed egregious error in declining to bind Johnny over on the charge; and as a result, we conclude the district court did not abuse its discretion in granting the State leave to file an amended information upon affidavit.[3]

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[3]Further, the record does not reveal any prejudice to Johnny as a result of the procedure employed. We recognize that the State did not charge the felony battery offense in the criminal complaint and that it provided no advance notice that it would seek an order to bind Johnny over on the offense. The State, however, did ask that Johnny be held to answer at the conclusion of the presentation of evidence and before the justice court rendered its decision to hold him to answer on the other charges.

Second, Johnny argues the district court abused its discretion by sustaining the State's objection to his question to the venire about the meaning of stand your ground. "The scope of voir dire is within the sound discretion of the district court, and on review such discretion is accorded considerable latitude." *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978) (internal citation and quotation marks omitted).

Initially, we reject Johnny's reliance on *Runion v. State*, 116 Nev. 1041, 13 P.3d 52 (2000), to argue that stand your ground laws apply in cases that do not involve deadly force. Since *Runion* does not discuss stand your ground laws or their applicability, but, rather, only mentions stand your ground within a suggested jury instruction for cases involving deadly force, it provides no basis for this court to conclude stand your ground laws apply in situations not involving a deadly weapon or deadly force. *See* 116 Nev. at 1050-51, 13 P.3d at 58-59. Moreover, in looking beyond *Runion* to other Nevada caselaw, stand your ground laws (also known as the "no duty to retreat" rule) have arisen only in the context of deadly force. *See Earl v. State*, 111 Nev. 1304, 1307, 904 P.2d 1029, 1031 (1995) ("This court has interpreted the 'no duty to retreat' rule to mean that the person must *reasonably* believe he is about to be attacked with deadly force."); *see also Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 240-41 (1990). Therefore, because defense counsel's question did not apply to the facts of the case and he invoked the name of an unrelated controversial criminal case from Florida, the record reveals that the district court did not preclude defense counsel from exploring self-defense with prospective jurors. Accordingly, we conclude the district court did not abuse its discretion by sustaining the State's objection.

Third, Johnny argues that the district court abused its discretion by allowing the victim's mother to testify in the State's case-in-chief because the State noticed the witness on the first day of trial and failed to provide a valid reason for the delay. "This court reviews a district court's decision whether to allow an unendorsed witness to testify for an abuse of discretion." *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). At least five days prior to trial or as soon as practicable, the State must submit to the defense the names and addresses of all witnesses it intends to call during its case-in-chief. *See* NRS 174.234(1)(a)(2), (3)(a). If the State in bad faith fails to properly notify the defense of its witnesses, the district court must prohibit the witness from testifying. *See* NRS 174.234(3)(a). If the district court finds the State did not act in bad faith, it may remedy a violation by such order as it deems just under the circumstances. NRS 174.295(2).

Here, the State advised the district court that it had mistakenly left the victim's mother off its witness list. Despite this mistake, Johnny did not dispute that he received Officer Ruben Ramirez's police report with the complaint, which mentioned the victim's mother. Johnny also declined the district court's offer to weigh the prosecutor's credibility by putting him under oath in determining whether the late disclosure was made in bad faith. As a result, the district court did not find that the prosecutor acted in bad faith. Nonetheless, the district court prohibited the State from mentioning the victim's mother in its opening statement and allowed Johnny access to interview the victim's mother. For these reasons, we conclude the district court did not abuse its discretion by allowing the victim's mother to testify. *See Mitchell*, 124 Nev. at 819, 192 P.3d at 729 (concluding the district court did not abuse its

discretion in allowing an unendorsed witness to testify because the defendant did not argue that the State acted in bad faith, the record did not indicate any bad faith, and the defendant failed to show any prejudice regarding his substantial rights). *See also Jones v. State*, 113 Nev. 454, 473, 937 P.2d 55, 67 (noting the defendant was not prejudiced by the State's failure to endorse an expert witness).

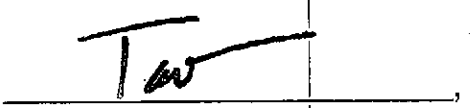
Fourth, Johnny argues the State committed prosecutorial misconduct during closing argument when it disparaged legitimate defense tactics by using the word "just." Johnny failed to object to the State's comments at trial. We apply a two-step test when considering claims of prosecutorial misconduct. First, we consider whether the conduct in question was improper. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Second, if the conduct was improper, we then consider whether the conduct merits reversal. *Id.* We will not reverse the conviction if the error is harmless. *Id.* However, harmless-error review does not apply when the defendant fails to object at trial. *Id.* at 1190, 196 P.3d at 477. If the defendant fails to object, we review for plain error, which requires the defendant demonstrate "'actual prejudice or a miscarriage of justice.'" *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

At the outset, we note that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, and the alleged improper remarks must be read in context." *Butler v. State*, 120 Nev. 879, 896, 102 P.3d 71, 83 (2004) (internal quotation marks omitted). Here, the use of the word "just" was a legitimate response to a defense argument, and Johnny has failed to demonstrate he was

prejudiced by the remark, even if disparaging. Therefore we conclude this argument is unpersuasive.[4]

Accordingly, we ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

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

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[4]Nevertheless, we caution prosecutors that disparaging remarks directed towards defense counsel "have absolutely no place in a courtroom, and clearly constitute misconduct." *Butler*, 120 Nev. at 898, 102 P.3d at 84.

[5]Since there are no errors to accumulate, we conclude that Johnny's argument that he was denied a fair trial because of cumulative error is without merit. *See Rose*, 123 Nev. at 212, 163 P.3d at 420 (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2000)).