IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIMOTHY RUSH WIDEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68282

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, appellant Timothy Wideman claims the district court erred by rejecting his proposed jury instruction on reasonable doubt. "This court reviews a district court's decision to issue or not to issue a particular jury instruction for abuse of discretion." *Ouanbengboune v. State*, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). We conclude the district court did not abuse its discretion by rejecting this instruction because NRS 175.211 defines reasonable doubt and prohibits the court from instructing a jury on any other definition of reasonable doubt.

Second, Wideman claims the district court erred by rejecting his proposed two-reasonable-interpretations instruction. We conclude the district court did not abuse its discretion by rejecting this instruction because the Nevada Supreme Court has previously held it is not error for a court to reject a proposed two-reasonable-interpretations instruction when, as here, the jury has been properly instructed on reasonable doubt. *See Hooper v. State*, 95 Nev. 924, 927, 604 P.2d 115, 117 (1979).

Third, Wideman claims the district court erred by rejecting his proposed use-of-a-deadly-weapon instruction. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." *Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and alteration omitted). Wideman's theory of the case was he did not consciously use the knife to batter the victim. As some evidence supported Wideman's theory, we conclude the district court erred by rejecting his proposed instruction.[1] However, we are convinced beyond a reasonable doubt that the error was harmless under the facts and circumstances of this case. *See Crawford v. State*, 121 Nev. 744, 756, 121 P.3d 582, 590 (2005).

Fourth, Wideman claims the prosecutor committed misconduct by improperly injecting her beliefs as to reasonable doubt into her rebuttal argument. We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Here, the district court sustained Wideman's objections to the prosecutor's reasonable-doubt arguments and stated, "[t]he jury is instructed that the reasonable doubt instruction is what you've been given. It's very clear. Just read it." Based on this record, we conclude Wideman was not prejudiced by the prosecutor's comments and reversal is not warranted. *See id.* at 1193-94,

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[1]Wideman's proposed instruction provided, "[i]n order to find that a deadly weapon was used in the commission of a battery, you must find that the instrumentality was used in conscious furtherance of a criminal objective."

196 P.3d at 479 (no prejudice results from prosecutorial misconduct where the defense's objection has been sustained).

Fifth, Wideman claims the prosecutor committed misconduct by improperly vouching for the victim during her rebuttal argument. A prosecutor vouches for a witness when he "places the prestige of the government behind the witness by providing personal assurances of the witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks and alteration omitted). We have reviewed the prosecutor's comments in context and conclude they are merely comments on the victim's testimony and do not constitute improper witness vouching. *See State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence[ ] and . . . to state fully his views as to what the evidence shows.").

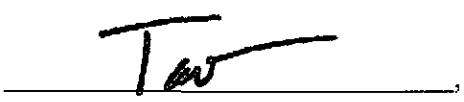
Sixth, Wideman claims the prosecutor committed misconduct by improperly injecting her personal beliefs into her rebuttal argument. Wideman did not object to the prosecutor's comments that she does not "love to show [jurors] injuries and cuts on people" and he has not demonstrated plain error because there was no error: the prosecutor's comments were a fair response to Wideman's closing argument. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (reviewing unpreserved claims of prosecutorial misconduct for plain error); *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000) (holding no error where prosecutor's remarks are fair response to defense arguments).

Seventh, Wideman contends that cumulative error deprived him of a fair trial. We conclude there was one error, the error was harmless, and Wideman was not deprived of a fair trial. *See United States*

v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

Having concluded Wideman is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Bush Law Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk