IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SAM VAH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74938-COA

ORDER OF AFFIRMANCE

Sam Vah appeals from a judgment of conviction, pursuant to a jury verdict, of sexual assault and failure to appear after admission to bail or release without bail. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Vah lived in Las Vegas with his roommate, Samuel Sewe. Sewe was in a long distance romantic relationship with E., and in 2012, she and her friend Kristin Hallsdorsdottir came to Las Vegas for a vacation. During the women's visit to Las Vegas, they stayed at Vah's and Sewe's apartment and went out drinking together on several nights.

On the night of the incident, the group went to the Ghost Bar. When the group returned to the apartment in the early morning hours, Sewe and Hallsdorsdottir left to get some food while Vah and E. remained at the apartment. E. alleged that during the approximate 20 minutes that Sewe and Hallsdorsdottir were gone, she was "blacked out" asleep and awoke to find a man on top of her performing sexual intercourse with her. E. did not realize it was Vah at first and thought it was Sewe. E. told him to stop, and then when the act continued, she realized it was not Sewe, but Vah, and she pushed him off her. When Sewe and Hallsdorsdottir returned to the apartment, E. told Sewe that she awoke to find Vah having sex with her. E.

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told Hallsdorsdottir that Vah was trying to have sex with her. Sewe then called the police.

The State charged Vah with sexual assault. He failed to appear on the second day of the trial and the jury was excused. Vah was additionally charged with failure to appear and the two charges were consolidated for a second trial.

The jury found Vah guilty on both charges at the second trial. On appeal, Vah challenges only the sexual assault conviction, arguing (1) the admission of his inculpatory statements to the police violated the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and the Nevada Constitution because they were involuntary, (2) the State violated the Fifth and Fourteenth Amendments of the United States Constitution and the Nevada Constitution by committing repeated acts of prosecutorial misconduct during trial, (3) the State failed to prove the sexual assault charge beyond a reasonable doubt, and (4) cumulative error warrants reversal.[1] We disagree.

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[1]Vah also argues that (1) the district court violated his Fifth, Sixth, and Fourteenth Amendment rights by denying a trial continuance, (2) the district court provided an improper and prejudicial jury instruction on victim testimony, and (3) the district court abused its discretion in denying his motion for a new trial. For the following reasons, we conclude that these arguments are unpersuasive. First, Vah did not file a motion for a continuance, an affidavit outlining the proposed testimony of a possible new expert witness, or a report from the supposed expert witness. We therefore affirm the district court's denial of Vah's motion to continue. *See Sparks v. State*, 96 Nev. 26, 28, 604 P.2d 802, 804 (1980) ("Failure to file a motion and supporting affidavits has often been a basis for affirming a denial of a motion to continue . . . ."). Second, the Nevada Supreme Court approved the no-corroboration jury instruction in *Gaxiola v. State*, 121 Nev. 638, 649-50 119 P.3d 1225, 1233 (2005), and we decline Vah's request to reconsider it. Under the doctrine of vertical stare decisis, we have no choice but to follow the precedent established in *Gaxiola*, no matter how persuasive Vah's argument

Admission of statements and apology letters

Vah contends that the district court erred by denying his motion to suppress inculpatory statements made to police officers. Vah argues that due to his physical condition and coercive police tactics, his statements to the police were not voluntary.[2] Specifically, Vah claims (1) Detective Jaeger inaccurately told him that sexual assault carries a minimum of 20 years in prison, (2) Detective Jaeger told him that he would be better off if Detective Jaeger was on his side, (3) Detectives Jaeger and Russell repeatedly told him

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might be. *See, e.g., State v. Nichols*, 600 N.W.2d 484, 487 (Neb. Ct. App. 1999) ("Vertical stare decisis compels inferior courts to follow strictly the decisions rendered by courts of higher rank within the same judicial system."). Lastly, Vah's claim that the district court abused its discretion by denying the motion for a new trial based upon newly discovered evidence fails by Vah's admission in his opening brief that he learned *during trial preparation* "that an expert witness could have buttressed the defense case." *See Burton v. State*, 84 Nev. 191, 196, 437 P.2d 861, 864 (1968) (stating that to satisfy the requirements of former NRS 176.515, "there must be a factual showing that the newly discovered evidence could not have been obtained through due diligence prior to trial, and that it would have the probable effect of a different verdict on retrial").

[2]Vah also contends that the State failed to prove by a preponderance of the evidence that he voluntarily, knowingly, and intelligently waived his *Miranda* rights during the first interview. Vah did not argue this as a specific claim for relief below. Rather it was presented in the context of whether Vah's statements were voluntary and it is again presented primarily in that fashion on appeal. Additionally, Vah does not challenge the administration of the *Miranda* warnings given to him before the second interview, at which time he made his first incriminating statements. While the transcript of the first interview contains gaps as to Vah's full response to the initial questions from the detective regarding his rights, it does suggest as a whole that he voluntarily, knowingly, and intelligently waived his rights. Importantly, Detective Jaeger testified at the suppression hearing that at the outset of the first interview, Vah indicated he understood his *Miranda* rights and wished to speak with him.

that they did not believe his story, (4) Detective Jaeger asked him how he could prove his innocence, (5) Detective Russell told him that the jurors would be informed that he failed the polygraph test, (6) Detective Russell gave him only two options after he purportedly failed the polygraph test—either sex with E. was consensual or it was rape, and (7) because he is from Liberia, he is completely unfamiliar with the American justice system.[3]

A district court's resolution of a motion to suppress presents a mixed question of law and fact. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). The district court's findings of historical facts are reviewed for clear error but the legal consequences of those factual findings are reviewed de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008).

"A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement." *Passama v. State*, 103 Nev. 212, 213,735 P.2d 321, 322 (1987). We examine the totality of the circumstances to determine whether the defendant's will was overborne when he confessed. *Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181-82 (2006). The Nevada Supreme Court has held that trial courts should consider police deception in evaluating the voluntariness of a confession. *Sheriff v.*

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[3]Vah also claims that (1) Detective Jaeger told him he could go home if he confessed, (2) Detective Jaeger promised he could go home after writing E. an apology letter but made him redo the letter until Detective Jaeger was satisfied, and (3) because he did not eat anything and was in pain during the second interview, his partial confession was not voluntary. Vah did not address these claims in his motion to suppress or at the hearing on his motion. Vah supports these claims only by citing to his trial testimony. Therefore, these claims are not properly raised in the context of a challenge to the district court's denial of Vah's motion to suppress, and we decline to consider them. *See Davis*, 107 Nev. at 606, 817 P.2d at 1173. We note that the jury was provided an instruction on voluntariness.

Bessey, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996). Police deception does not automatically render a confession involuntary. *Id.* Police subterfuge is permissible if "the methods used are not of a type reasonably likely to procure an untrue statement." *Id.* at 325, 914 P.2d at 620. "[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means . . . ." *Miller v. Fenton*, 474 U.S. 104, 116 (1985); *see also Passama*, 103 Nev. at 214, 735 P.2d at 323 ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive . . . that they must be condemned under the Due Process Clause of the Fourteenth Amendment."). However, "interrogation techniques such as offering false sympathy, blaming the victim, minimizing the seriousness of the charge, using a good-cop/bad-cop routine, or suggesting that there is sufficient evidence when there is not" are permissible techniques so long as they do not "produce inherently unreliable statements or revolt our sense of justice." *Bessey*, 112 Nev. at 328, 914 P.2d at 622.

We conclude that the district court did not err by finding that under the totality of the circumstances, Vah's will was not overborne when he made his admissions. As the district court noted, the deception and inaccurate statements made by the detectives were concerning, but it was limited, and not enough, when "looking at everything," to find an otherwise voluntary statement to be involuntary, and "the State's met their burden to show the confession he made was voluntary." Nevertheless, the techniques that the detectives used, such as inaccurately describing the penalty, minimizing the facts, suggesting there was sufficient evidence and Vah would have to prove to the detective that he was innocent, and falsely stating that

the jury would be told he failed the polygraph test, were not likely to produce a false confession when viewed under the totality of the circumstances. Therefore, we conclude that the district court did not err in finding that Vah's statements were voluntary even if the interrogation methods were not ideal and did not err by denying Vah's motion to suppress.

Prosecutorial misconduct

Vah argues that the prosecution committed misconduct by (1) repeatedly asking him during cross-examination whether other witnesses were lying, (2) shifting the burden of proof in its closing argument rebuttal, and (3) improperly vouching for its witnesses' veracity also during rebuttal.

Because Vah did not object below, he has waived all but plain error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) ("[A]ll unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension."). "[T]he decision whether to correct a forfeited error is discretionary." *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018), *cert. denied* ___ U.S. ___, 139 S.Ct. 415, 202 L.Ed.2d 320 (2018). "Before [the] court will correct a forfeited error, an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* at 50, 412 P.3d at 48. "[A] plain error affects the defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

Asking Vah whether other witnesses were lying

During cross-examination, the State sequentially asked Vah whether E., Hallsdorsdottir, Sewe, and Detective Jaeger each lied while testifying. In *Daniel v. State*, the Nevada Supreme Court adopted "a rule prohibiting prosecutors from asking a defendant whether other witnesses

have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." 119 Nev. 498, 519, 78 P.3d 890, 904 (2003). "[S]uch questions can constitute in effect a misleading argument to the jury that the only alternatives are that the defendant or the witnesses are liars." *Id.* (quoting *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990). Because Vah did not challenge the truthfulness of the witnesses during his direct examination testimony, the State's questioning of Vah during cross-examination as to whether the other witnesses were lying was improper and can be seen from a casual inspection of the record. When reviewing the State's misconduct in view of the trial as a whole, however, Vah has not shown that the State's questions during cross-examination alone affected his substantial rights. Thus, we conclude that no relief is warranted.

Burden shifting during closing rebuttal

Vah argues that the State improperly shifted the burden of proof in its closing argument rebuttal when it told the jury that it would have to believe that every State witness lied in order to find Vah not guilty. The State returned to its theme of witness credibility and truthfulness by arguing:

> The defendant would have you believe in this case that [E.] is out to get him, that [Hallsdorsdottir] made up a really strange and pointless fact that the[ ] defendant is a gentleman because when he tried to hit on her and she said no, that that was a lie. Why she would make that up, how that has anything to do – that would hurt the defendant, no idea, but that [E.] is out to get him, that [Hallsdorsdottir] is lying, that Detective Jaeger is lying, that the transcriptionist who prepared this transcript edited the transcript and is lying as well, that Detective Russell is lying, that's what you would have to believe to find the defendant not guilty in this case. That's not actual doubt.

Nevertheless, the State was responding to arguments made in Vah's closing argument regarding the credibility of witnesses. Therefore, no alleged error is clear from a casual inspection of the record. Moreover, even if we concluded that the prosecutor's statement was improper, Vah has failed to demonstrate that the statement affected his substantial rights. Therefore, we conclude that no relief is warranted, because plain error has not been shown.

Vouching

Vah asserts that the prosecution vouched for its witnesses during its closing rebuttal argument. The State counters that it did not vouch for Sewe, but responded to Vah's arguments by asserting during rebuttal that the testimony supported Sewe's credibility, as Sewe honestly disclosed an unsavory fact.

"The prosecution may not vouch for a witness; such vouching occurs when the prosecution 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) (alteration in original) (quoting *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992) (internal quotation marks omitted)). However, the supreme court has recognized that where an "outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying." *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). "Analysis of the harm caused by vouching depends in part on the closeness of the case." *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (quoting *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996)).

The prosecutor's statements during the State's closing rebuttal ("[T]hat guy's being honest with you," and "[n]obody who testified for the State's case had any issue with relaying what happened in an honest – –") seemed to strike the district court as implying the State's personal assurances of its witnesses' veracity. *See Browning*, 120 Nev. at 359, 91 P.3d at 48. Further, the district court also seemed to believe that, by arguing "If they're not being honest, if they're going to hide something, ask yourselves wouldn't they – wouldn't they try to hide the fact," the prosecutor similarly implied a personal assurance regarding the State's witnesses' veracity. *See id.*

In response, the district court attempted to cure any possible misconduct sua sponte by immediately admonishing the prosecutor. When the prosecutor again appeared to vouch, the district court stopped the prosecutor in mid-sentence and called counsel to the bench. Additionally, the district court later instructed the members of the jury that they would determine the credibility and believability of the witnesses. Therefore, we conclude that even if the prosecutor's remarks were improper, the remarks alone did not affect Vah's substantial rights because they were limited, made in the context of responding to Vah's credibility argument, and quickly stopped by the district court in the view of the jury.

Sufficiency of the evidence

Vah argues that the State produced insufficient evidence to prove the sexual assault charge because (1) other witnesses contradicted E.'s testimony, (2) E.'s testimony was inherently unreliable because she admitted that she "blacked out," and (3) no physical evidence supported E.'s claim of sexual assault.

In reviewing a challenge to the sufficiency of the evidence, we consider "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction may be upheld even where the State's primary evidence is the victim's testimony because it is the jury's province to determine what weight and credibility to give to the evidence. *See Hutchins v. State*, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994), *holding modified on other grounds by Mendoza*, 122 Nev. 267, 130 P.3d 176.

Here, E., Hallsdorsdottir, Sewe, Detective Jaeger, the nurse who conducted the sexual assault examination of E., and Vah testified at the trial. The State also produced Vah's admissions to the police and the six apology letters. While witness testimony conflicted and the State produced no physical evidence corroborating E.'s claim of sexual assault, the jury was able to hear testimony from both E. and Vah, along with others, and weigh their credibility.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). The jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict. *See McNair*, 108 Nev. at 56, 825 P.2d at 573. Based on the record before us, we conclude that the evidence was sufficient to support Vah's conviction.

Cumulative error

Lastly, Vah argues that cumulative error requires reversal of the sexual assault conviction. Cumulative error applies where individual harmless errors, viewed collectively, nevertheless violate the defendant's right to a fair trial and warrant reversal. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). In reviewing claims of cumulative error, we consider "(1) whether the issue of guilt is close, (2) the quantity and character

of the error, and (3) the gravity of the crime charged." *Id.* (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

We conclude that cumulative error does not warrant reversal. The issue of guilt was not close because the State produced substantial evidence to support the jury's verdict, including the victim's testimony, corroborating witnesses, and Vah's admissions. The alleged errors were neither pervasive nor consequential in light of the evidence against Vah, and we have concluded that there was only one clear error in the form of prosecutorial misconduct. *Cf. id.*, 124 Nev. at 1197-98, 196 P.3d at 482 (concluding that there was cumulative error where "[t]he prosecutorial misconduct occurred throughout the trial" and another error "resulted in serious jury misconduct"). Lastly, although the crime charged, sexual assault, is a serious charge that carries a sentence of ten years to life in prison, that factor alone is not enough to outweigh the first two factors. We therefore conclude that cumulative error did not violate Vah's right to a fair trial. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk