

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN TURNER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 76465-COA

**FILED**

OCT 31 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Yocelyn  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Steven Turner appeals from a judgment of conviction for conspiracy to commit burglary, attempted burglary while in possession of a firearm or deadly weapon, two counts of attempted murder with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

Turner and an accomplice, Clemon Hudson, tried to burglarize a home but ended up in a gun battle with the police during which an officer was shot in the thigh and Turner was shot in the leg. Hudson was arrested at the scene. Turner fled but was apprehended later, and Turner and Hudson were charged in connection with the crimes.<sup>1</sup> When interrogated, both Turner and Hudson gave partial confessions implicating themselves and each other in the crime. Prior to trial, Turner moved to sever his trial from Hudson's trial based on their mutually incriminatory statements. The district court denied the motion but redacted each defendant's statement to eliminate any reference to each other. At trial, Turner challenged the expert testimony of forensic analyst Anya Lester for lack of notice and insufficient expertise about gunshot stippling, arguing that it was presented in bad faith.

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

Dr. Amy Urban also gave expert testimony about stippling, which Turner failed to object to. Lastly, Turner objected to the presence of uniformed officers in the courtroom during closing argument. Ultimately, the jury found Turner guilty of all counts.

On appeal, Turner argues that: (1) the district court erred in denying his pretrial motion to sever the trial; (2) the district court erred in continuing with the joint trial even after actual prejudice arose during trial; (3) the district court abused its discretion in allowing expert witnesses Lester and Dr. Urban to testify about stippling around Turner's gunshot wound consistent with his having been wounded in the police shootout; (4) the district court erred when it denied Turner's challenge to exclude uniformed officers in the courtroom during closing argument; and (5) the prosecutors committed various acts of misconduct during trial.

First, we consider whether the district court erred in denying Turner's pretrial motion to sever. We review a decision regarding severance for an abuse of discretion. *Ducksworth v. State*, 113 Nev. 780, 794, 942 P.2d 157, 166 (1997). "Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same . . . series of acts or transactions constituting an offense or offenses." NRS 173.135. When defendants "have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). However, a trial court may sever a joint trial if it appears that a defendant would be prejudiced by being tried with a codefendant. NRS 174.165. As a result, "[t]o establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." *Marshall v. State*, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002).

In a joint trial, a defendant's Sixth Amendment confrontation right is violated when a prosecutor's use of his co-defendant's exculpatory statement violates his right of cross-examination. *Bruton v. United States*, 391 U.S. 123, 126 (1968). However, a nontestifying co-defendant's incriminating statement does not violate the Confrontation Clause when it "is redacted to eliminate not only the defendant's name, but any reference to his or her existence" and the court issues a proper limiting instruction to the jury. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Once these steps are taken, the statement is no longer "incriminating on its face, and bec[o]me[s] so only when linked with evidence introduced later at trial" placing it outside the scope of *Bruton*. *Id.* at 208; *Bruton*, 391 U.S. at 135-37. Reversal is required when it is not clear beyond a reasonable doubt that the violation was harmless error. *Ducksworth*, 113 Nev. at 794-95, 942 P.2d at 166-67.

Here, both Turner and Hudson gave multiple statements incriminating each other in the crime, but the district court properly redacted both statements to eliminate the others name and replacing each redacted name with neutral pronouns to eliminate any reference to the others existence. The district court also gave a limiting instruction to the jury after each statement was admitted. Under *Richardson*, both the redactions and the limiting instruction were proper and sufficed to place the statements outside the scope of *Bruton*. Moreover, prior to trial, Turner stipulated that the redactions were proper and avoided any *Bruton* issue. Accordingly, the district court did not abuse its discretion in declining to sever the trial.

Second, we consider whether the district court erred in continuing with the joint trial after prejudice supposedly arose. Turner argues that the State relied on "largely circumstantial" evidence to convict him, and therefore Hudson's statement was almost the only evidence of his guilt. Turner further argues that the prosecutor used Hudson's statement

against him during closing argument in direct violation of the court's redactions and *Bruton*.

"[T]he district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Marshal v. State*, 118 Nev. 642, 646, 56 P.3d 376, 379 (2002) (quoting *Neill v. State*, 827 P.2d 884, 890 (Okla. Crim. App. 1992)). We review a claim of a violation of the Confrontation Clause de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

During trial, Turner failed to object to the State's use of Hudson's statement. Consequently, we review those matters only for plain error. *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 636-37 (2010). Under plain error review, the court specifically considers "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). An error is plain if it "is so unmistakable that it reveals itself by a casual inspection of the record," and the error must be "clear under current law." *Saletta v. State*, 127 Nev. 416, 421, 254 P.3d 111, 114 (2011) (internal quotation marks omitted). Moreover, it is the defendant's burden to show actual prejudice or a miscarriage of justice resulting from the error. *Green*, 119 Nev. at 545, 80 P.3d at 95.

"In determining whether admission of a co-defendant's statement violates *Bruton*, the central question is whether the jury likely obeyed the court's instruction to disregard the statement in assessing the defendant's guilt." *Ducksworth v. State*, 114 Nev. 951, 955, 966 P.2d 165, 167 (1998). For example, prejudice can result if a prosecutor attempts to "undermine the limiting instruction" by using a co-defendant's statement against the other co-defendant. *Id.* Prejudice can also result when mostly circumstantial evidence is used to convict a codefendant at trial. *See Lisle v.*

*State*, 113 Nev. 679, 692-93, 941 P.2d 459, 468-69 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

We conclude that Turner did not suffer prejudice during his joint trial, and thus no plain error occurred. First, Turner's assertion that the State relied solely on Hudson's statement and "largely circumstantial" evidence to convict him is not supported by the record. Though much of the State's direct evidence implicated Hudson, there was also considerable direct evidence of Turner's guilt. For example, Turner confessed to large portions of the crime, and suffered a gunshot wound that medical evidence connected to the shootout following the burglary. Thus, the State did not rely only, or even primarily, upon Hudson's statement to prove Turner's guilt.

Turner next argues the prosecutor improperly called upon the jury to use Hudson's statement against Turner in violation of the limiting instruction. However, a review of the record shows that the prosecutor expressly noted that Hudson's statement did not mention Turner by name but only mentioned that "the other guy" fired a gun first. In an aside, the prosecutor argued that the jury could conclude that Turner was the "other guy." Because the prosecutor never implied that Hudson specifically named Turner, the argument did not violate *Bruton*. Moreover, even if anything else in the prosecutor's statements could be construed as improper, any error would be harmless given the substantial evidence presented at trial against Turner including his own partial confession. *Stevens v. State*, 97 Nev. 443, 445, 634 P.2d 662, 664 (1981).

Lastly, Turner argues that the prosecutor improperly showed the jury a PowerPoint slide that included Turner's nickname. Although the slide did refer to one of the perpetrators by a nickname, the jury was never presented with any evidence that the nickname belonged to Turner and the

prosecutor did not argue that the nickname belonged to him. Thus, it is unlikely that this slide prejudiced Turner and had an effect on the jury verdict.

Third, we consider whether the district court abused its discretion in allowing experts Lester and Dr. Urban to testify about stippling. NRS 50.275 governs the admissibility of expert testimony and requirements for experts. “[A] district court’s decision to allow expert testimony [is reviewed] for abuse of discretion.” *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

To testify as an expert witness under 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of [his or her specialized] knowledge (the limited scope requirement).

*Hallmark*, 124 Nev. at 498, 189 P.3d at 650 (internal quotation marks omitted). Additionally, NRS 174.234(2) requires the prosecutor to disclose expert witnesses and provide a “brief statement” of the expert’s expected testimony and “substance of the testimony” at least 21 days before trial.

Here, Turner stipulated that Lester was a qualified expert in firearms and toolmarks. The district court reviewed Lester’s experience under the *Hallmark* factors and found that she was qualified to discuss stippling because: (1) she had specialized knowledge in the area of firearms and toolmarks, received some training on stippling, and observed stippling patterns for her work; (2) her testimony would assist the jury because evidence of stippling was in the record; and, (3) her testimony would be

limited to general definitions about stippling and her experiences in the distances she has seen stippling result from a gunshot. Thus, the district court did not abuse its discretion in allowing her testimony because the decision was supported by substantial evidence. Further, Lester's testimony was also proper under NRS 174.234(2) because Turner received notice that she would testify regarding firearm and toolmark comparisons. Because stippling is a subcategory of firearms analysis and specifically relates to gunshot residue, Lester's notice was sufficient to include testimony regarding stippling. Thus, the district court did not abuse its discretion in allowing her testimony.

Dr. Urban's testimony was also proper under NRS 174.234(2).<sup>2</sup> Although Dr. Urban was not noticed as an expert witness, she was Turner's emergency room doctor and treated his gunshot wound after the crime and therefore Turner knew she was likely to testify regarding her observations of his injury, including any stippling she observed. *See Mitchell v. State*, 124 Nev. 807, 819 & n.24, 192 P.3d 721, 729 & n.24 (2008) (providing that when a defendant has notice of an expert's potential testimony, even if the notice was not received through an expert disclosure, he cannot claim prejudice in the unnoticed expert testimony). Turner also stipulated to the admission of his medical records, some of which were prepared by Dr. Urban and which

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<sup>2</sup>Turner did not object to Dr. Urban's testimony. Turner argues that his lack of objection is the result of the State's false representation that Dr. Urban was noticed when she was not, a statement which he relied upon to his detriment. Although the record supports this assertion, the State's misrepresentation does not allow Turner to overcome his burden of objection and preserving issues for appeal. Because Turner failed to object to the admission of Dr. Urban's testimony, we review only for plain error. *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006).

specifically noted the presence of stippling around his gunshot wound.<sup>3</sup> Therefore, the district court did not abuse its discretion when it allowed Lester and Dr. Urban to testify about stippling.

Fourth, we consider whether the district court erred when it denied Turner's request to remove uniformed police officers from the courtroom during closing argument on the grounds that their presence may have intimidated the jury. When determining whether a courtroom arrangement is "inherently prejudicial," the proper inquiry is whether "an unacceptable risk is presented of impermissible factors coming into play." *Holbrook v. Flynn*, 475 U.S. at 560, 572 (1986) (internal quotation marks omitted).

Here, Turner objected to the officers' presence, but fails to present any evidence of actual or inherent prejudice that occurred as a result of the officers' presence during closing arguments. Turner does not establish the number of officers that were in the courtroom, where they sat in proximity to the jury, if they were present for other parts of the trial, or if officers ever actually entered the courtroom after he challenged their anticipated presence. Accordingly, he has failed to establish that his right to an impartial jury was prejudiced.

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<sup>3</sup>In addition to Turner's objections to Lester and Dr. Urban's testimony, he uses the instances described above and lay witness testimony to proffer a bad faith argument under NRS 174.234(3). *See Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) ("[I]f the prosecution in bad faith fails to satisfy these [NRS 173.234(2)] requirements, then the district court must not allow the expert witness to testify and must also bar the prosecution from introducing any evidence that the expert would have produced."). However, because neither the expert nor lay witness testimony was improper we conclude that any bad faith argument fails.





Next, Turner alleges that the State engaged in various acts of prosecutorial misconduct, such as improperly inflaming the passions of the jury, invoking prosecutorial authority to bolster their case, disparaging the defense, arguing facts not admitted into evidence, and misstating the law. However, our review of the record reveals that most of the statements cited by Turner did not constitute misconduct. Although in one instance the prosecutor exaggerated that Turner knew the victims did not have a gun when no evidence suggested this, and at another point suggested that Turner was guilty of other crimes with which he was never charged, on both occasions the district court promptly intervened and issued an immediate curative instruction to the jury which nullified any harm accruing from these statements. *Valdez v. State*, 124 Nev. 1172, 1192, 196 P.3d 465, 478 (2008). Moreover, any potential errors were harmless in view of the overwhelming evidence against Turner. *Id.* at 1188-89, 196 P.3d at 476.


Finally, we conclude that no cumulative error occurred that warrants reversal. *Mulder v. State*, 116 Nev. 1, 16-17, 992 P.2d 845, 854-55 (2000).

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Linda Marie Bell, Chief Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk