IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DIANE JEAN DAVIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78950-COA
DIANE JEAN DAVIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 79767-COA

FILED
OCT 21 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Diane Jean Davis appeals from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree arson and from a district court order denying a motion for a new trial. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Davis set fire to her home with herself and fourteen dogs inside in 2013.[1] Police arrived on scene and ordered Davis to exit her home. She exited with a dog in one hand and a gun in the other. She then tried to reenter her home and an officer tased her, causing her to fall and hit her head.

After police took Davis into custody, she made two recorded statements during which she confessed to setting the fire: one to Detective Eric Murphy and one to Fire Chief Scott Lewis. Before questioning, Detective Murphy informed Davis who he was and properly *Mirandized* her. Detective Murphy noted that Davis appeared to respond rationally, comprehended what he said, made eye contact, and he heard her clearly. In

[1]We do not recount the facts except as necessary for our disposition.

20-38615

both interviews, Davis admitted that she pushed her dryer in front of the back door and then lit clothes on fire on top of it to stop people from coming inside her home. On the way to the hospital, Davis made a third confession when she spoke with Paramedic and Firefighter Allen McFall and told McFall that she lit clothes on fire in her house to stop anyone from coming in.

The State charged Davis with first-degree arson and thirteen counts of overdriving/torturing/injuring/abandoning an animal. Prior to trial, Davis moved to suppress all three of her statements, arguing that her waiver under *Miranda* was not voluntary, knowing, or intelligent because "she had fallen off a porch, been tased and was suffering from smoke inhalation," and she had "physical and mental health issues." The State moved to admit a separate statement from Davis, through the testimony of Rea Krenzer, about planning to kill her dogs and burn her house down.

The district court denied Davis's motion to suppress, finding that she gave her waiver knowingly, voluntarily, and intelligently and all post-arrest statements she made could be admitted. The district court granted the State's motion to admit Krenzer's testimony because it found the statements did not constitute prior bad acts. The jury found Davis guilty of arson but not guilty of animal abuse.

After the trial, Davis moved for a new trial on the ground of newly discovered evidence. The newly discovered evidence consisted of photos of the house taken after the fire but before the trial. She argued she could not obtain the photos before trial and that the photos were material to show the State's theory of the location of the origin of the fire was incorrect. Davis argued that she exercised reasonable due diligence to find the photos but was only able to locate them after the trial. In addition, she argued the new photos were not cumulative and would have led to a different outcome

at trial. Further, Davis argued her motion was not to impeach testimony from trial. Lastly, the photos would be the best evidence in the case.

Following an evidentiary hearing, the district court denied Davis's motion for a new trial, finding: the photos were not newly discovered evidence because they existed in 2013 and Davis knew of their existence; Davis failed to act with due diligence in obtaining the photos or having new photos taken; and the photos would be cumulative because Davis presented evidence at trial about her theory of the fire not starting on the dryer.

On appeal, Davis advances five arguments: (1) the district court erred in denying her motion for a new trial; (2) the district court erred in denying her motion to suppress her statements; (3) the district court erred by allowing the State to introduce portions of Krenzer's testimony; (4) the State engaged in prosecutorial misconduct by allowing Krenzer to testify to falsehoods; and (5) the cumulative effect of the errors below violate her due process right to a fair trial and requires the reversal of her conviction.

Motion for New Trial

Davis argues the district court abused its discretion in denying her motion for a new trial because there was newly discovered evidence.

"The granting of a new trial in criminal cases on the ground of newly discovered evidence is largely discretionary with the trial court, and that court's determination will not be reversed on appeal unless abuse of discretion is clearly shown." *Lightford v. State*, 91 Nev. 482, 483, 538 P.2d 585, 586 (1975).

Under NRS 176.515, a district court may grant a new trial on the ground of newly discovered evidence. To receive a new trial because of newly discovered evidence, the evidence must: (1) be newly discovered; (2) be material to the defense; (3) not be discoverable before trial, even with the exercise of reasonable diligence; (4) not be cumulative; (5) indicate that a

different result is probable on retrial; (6) not be simply an attempt to contradict or discredit a former witness; and (7) that these facts be shown by the best evidence the case admits. *McLemore v. State*, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978).

Here, the district court did not abuse its discretion in denying Davis's motion for a new trial primarily because the evidence was not newly discovered. Davis admitted she knew a photographer took photos in 2013 and the trial was not until 2018, which demonstrates that the existence of the photos was not new to Davis. Moreover, because she knew the photos existed, she could have obtained them by exercising proper diligence prior to trial. Additionally, the district court's findings as to the other factors were not clearly wrong. Therefore, we conclude the district court did not err by denying Davis's motion for a new trial.

Suppression of Statements

Davis argues the district court erred in denying her motion to suppress her statements because they are unreliable due to contamination error, inconsistent with the evidence, and given after an officer tased her, she fell off her porch, and suffered smoke inhalation. Davis also argues her statements were not voluntary or knowing because her "will was overcome by both physical and mental torture [such] that the State deprived her of the very concept of justice." (internal quotation marks omitted).

The question of whether a confession is voluntary presents a mixed question of law and fact. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). The district court's purely historical factual findings are given deference and thus reviewed for clear error, but the district court's legal determination, whether the statement was voluntary, is reviewed de novo. *Id.*

We first address whether Davis gave her statements voluntarily. "In order to satisfy due process requirements, a confession must be made freely and voluntarily, without compulsion or inducement." *Dewey v. State*, 123 Nev. 483, 492, 169 P.3d 1149, 1154 (2007) (internal quotation marks omitted). "Voluntariness [is] determined by reviewing the totality of the circumstances, including such factors as the defendant's age, education, and intelligence; his knowledge of his rights; the length of his detention; the nature of the questioning; and the physical conditions under which the interrogation was conducted." *Gonzales v. State*, 131 Nev. 481, 488, 354 P.3d 654, 658 (Ct. App. 2015). "A confession is involuntary if it was coerced by physical intimidation or psychological pressure." *Id.* (internal quotation marks omitted). Further, *Miranda* warnings create procedural safeguards "to secure and protect the Fifth Amendment privilege against compulsory self-incrimination during the inherently coercive atmosphere of an in-custody interrogation."[2] *Stewart v. State*, 133 Nev. 142, 146, 393 P.3d 685, 688 (2017) (citing *Dewey v. State*, 123 Nev. 483, 488, 169 P.3d 1149, 1152 (2007)).

We conclude under the totality of the circumstances that Davis made her statements freely and voluntarily. While Davis was in custody, Detective Murphy informed her of her *Miranda* rights before she confessed to burning down her house with her dogs inside. Further, while Davis was suffering from smoke inhalation, tased, and had hit her head, those injuries are insufficient by themselves to make her statement involuntary because they were not shown to have affected her ability to understand what she was doing. *See Chambers v. State*, 113 Nev. 974, 980-82, 944 P.2d 805, 809-10 (1997) (holding the defendant's statements were voluntary even though

---

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

police questioned him for four hours, he had a stab wound on his arm, and he was intoxicated).

Davis also argues that her statements are unreliable because they are the product of contamination error. Davis asserts a police officer asked her at the scene why she lit her house on fire, thereby contaminating her confessions. However, a statement can be voluntary even if an officer lies to a suspect, and here the officer merely asked a leading question without any lie. *See Sheriff, Washoe Cty. v. Bessey,* 112 Nev. 322, 325, 914 P.2d 618, 619 (1996) (holding "an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary").

We now address whether there was substantial evidence to support the district court's factual findings. "[F]actual determinations . . . are given deference on appeal if they are supported by substantial evidence and are not clearly erroneous." *Goudge v. State,* 128 Nev. 548, 554, 287 P.3d 301, 304 (2012). "Substantial evidence is 'evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Thompson v. State,* 125 Nev. 807, 816, 221 P.3d 708, 715 (2009) (quoting *Brust v. State,* 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992)).

Here, the district court found both of Davis's interviews with Detective Murphy and Chief Lewis to be coherent and appropriate in context. Further, it found neither Detective Murphy nor Chief Lewis used threats or deceptive tactics during the interviews before Davis confessed to lighting her house on fire. The district court also found that Davis made a subsequent confession to Allen McFall in the ambulance on the way to the hospital the following day, during which McFall did not question Davis, nor use any threats or deceptive tactics to induce her to talk. Also during the conversation, Davis was coherent and appropriate in context. The district

court additionally determined Davis does not suffer from a lack of education or intelligence. While the district court noted that Davis submitted a psychological evaluation showing "major depressive disorder, schizoid personality disorder, brief psychotic disorder, and somatic system disorder," the district court nonetheless noted that the evaluation found Davis "would likely experience little difficulty in comprehending and meeting the intellectual demands of her day to day and occupational functioning, and that she was within the average range of intellectual functioning." Substantial evidence supports all of these findings, and accordingly the district court did not err in admitting Davis's statements.

Rea Krenzer's Testimony

Davis asserts the district court erred in admitting Krenzer's testimony that, before setting the fire, Davis said that she planned to kill herself and set her house on fire. Davis argues that the testimony should be considered unreliable because Krenzer had no direct knowledge of the offense and was not present during the incident. She further argues that the evidence is more prejudicial than probative because it is not relevant to show intent, and motive is irrelevant for a general intent crime like arson.

"[A] district court's decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Davis argues that Krenzer's testimony describes a "prior bad act" under NRS 48.045(2). However, Davis's statement to Krenzer is no such thing. Davis committed no separate crime when she admitted that she planned to commit a crime. All Davis did was to admit that she planned to commit a crime before it happened; NRS 48.045(2) does not apply to the making of such statements because such statements are evidence proving the charged crime itself rather than evidence proving some other crime,

wrong or act that exists independently of the charged crime. Here, Davis's statement to Krenzer constitutes direct evidence of her state of mind during the commission of the crime, not indirect evidence proving some other act that only circuitously and circumstantially suggests guilt.

Here, the district court did not abuse its discretion in admitting Krenzer's testimony because the statements clearly demonstrated Davis's plan as well as her state of mind. The district court also did not abuse its discretion in concluding that the probative value of the statements was not substantially outweighed by the danger of unfair prejudice or that the statements would not confuse the issues or mislead the jury. *See* NRS 48.035(1). Accordingly, the district court did not abuse its discretion in admitting Krenzer's testimony.

Prosecutorial Misconduct

Davis argues that Krenzer testified to falsehoods and that the State knew of this when Krenzer was testifying and thereby committed prosecutorial misconduct.

As Davis failed to object to this issue below, she has forfeited this claim on appeal and is therefore entitled only to plain-error review. *See LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (utilizing plain-error review in a case involving unobjected-to habitual criminal adjudication). "Before this 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." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). We examine claims of prosecutorial misconduct by first determining whether the prosecutor's behavior was improper, and if so, does the improper conduct warrant reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476

(2008). As such, if a prosecutorial misconduct claim was not preserved, we determine whether there was prosecutorial misconduct, whether the misconduct was plain from the record, and whether the misconduct affected the defendant's substantial rights. *Id.* at 1191, 196 P.3d at 478.

During trial, Krenzer testified she saw smoldering carcasses in cages after the fire. Davis did not object to Krenzer's testimony at trial. Later during trial, there was conflicting evidence that the dogs were not smoldering or in cages. This variance in testimony does not establish either that Krenzer's testimony was false or that the State knew Krenzer's testimony to be false. Moreover, even if it could be said that some error occurred, the error did not have any effect on Davis's substantial rights because the jury found Davis not guilty on all thirteen counts of animal abuse.

Cumulative Error

Lastly, Davis argues that cumulative error warrants reversal. As we discern no error, there is nothing to cumulate. *Burnside v. State*, 113 Nev. 371, 408, 352 P.3d 627, 652 (2015).

Accordingly, we

ORDER the judgment of conviction and order of the district court AFFIRMED.

____________________, C.J.
Gibbons

____________________, J.
Tao

____________________, J.
Bulla

cc: Hon. Robert W. Lane, District Judge
The Law Office of Kristina Wildeveld & Associates
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk