IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONY ALLEN PRESSLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80234-COA

FILED

DEC 01 2020

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

ORDER OF AFFIRMANCE

Tony Allen Pressler appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of eluding a police officer and one count of grand larceny of a motor vehicle with a value of $3,500.00 or more. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Kimberly Nye testified that between 9 to 10 p.m. she met with Pressler—her soon to be ex-boyfriend—to return his belongings.[1] She got into his white pick-up truck, and together they drove for a while as they argued about their relationship. Pressler drove past a hospital and turned off on the side of the road. While pulled over on the side of the road, Nye got out of the pick-up truck to run away "[b]ecause things got physical." She sprinted towards the hospital, hid in some bushes, and called her sister who immediately called 9-1-1 and told them where Nye was hiding. When officers arrived and neared the area with the bushes, the pick-up truck turned on its headlights and fled, prompting officers to pursue.

Officers pursued the pick-up truck onto a road that dead-ended into a private property. On the southwest end of the property, the officers followed the pick-up truck to a barn. As the officers approached the barn,

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

the pick-up truck came dangerously close to driving into one of the officers' cars in a head-on collision, but it abruptly veered off into a field. One of the officers fired three shots at the pick-up truck coming towards him. The officer who fired at the pick-up truck, Officer Joshua Taylor, identified Pressler as the driver, as the two knew each other from prior non-criminal encounters. Pressler later called David Grate, a private investigator, to dispute that Officer Taylor could identify Pressler under those dark conditions with the vehicle coming towards the officer. When Pressler's counsel asked if Officer Taylor could have identified the driver in the pick-up truck, Grate responded, "I don't know what Officer Taylor could or could not have seen."

No one was injured, and two hours later officers found the pick-up truck abandoned in a nearby field. Officers searched the pick-up truck and discovered Pressler and Nye's possessions, including two casino gaming cards with Pressler's name on them. Around the same time, a call came through dispatch about a stolen gold SUV in Spring Creek.

Deputy Aspyn Carroll searched for Pressler nearby in Spring Creek by contacting his known associates. She contacted Billy Flynn, a known associate, and Marlene Stewart, Nye's mother. Stewart explained to Deputy Carroll that Nye and Pressler slept in her driveway in Pressler's pick-up truck the week before the events occurred. Stewart had photographed Pressler's pick-up truck—the same pick-up truck he used to elude police—and showed the photos to Deputy Carroll.

After Deputy Carroll left Stewart's house, she noticed the stolen SUV towing Flynn's car down the road. She identified Pressler as the driver of the stolen SUV. When Pressler saw Deputy Carroll, he sped off, and a second pursuit began. Officer James Mathes joined the pursuit. At one

point, he drove parallel to the stolen SUV, and he also identified Pressler as the driver. Pressler escaped the police again.

Later, officers searched for Pressler at Flynn's home, where they found him hiding in a bedroom closet. The officers arrested Pressler and found keys to the stolen SUV in Pressler's pocket.

Prior to trial, the State filed an "Offer of Proof Concerning Other Crimes or Wrongs Committed by Defendant" to introduce at trial evidence of a domestic dispute between Nye and Pressler. After a hearing, the district court granted the motion and found that the evidence was necessary to provide a full and accurate account of the circumstances surrounding the commission of the crime and that a limiting instruction would dissolve the evidence's unfair prejudicial effect. During trial, the district court provided the jury with a limiting instruction each time a witness testified about the domestic incident. During the State's closing arguments, the State said, "[W]hat the evidence has shown conclusively is that [Nye] and [Pressler] were in a white truck, driving around out there. There was some kind of domestic incident or altercation that prompted [Nye] to flee. . . . Obviously, it was some kind of, you know, domestic incident was happening."

Additionally, during one officer's testimony, the State asked the officer if he searched the white pick-up truck for stolen property, to which the officer responded affirmatively. The district court gave a limiting instruction to the jury, instructing them that they were only to consider the evidence to understand why photos of the pick-up truck showed pillows piled up on the vehicle's passenger side. The district court explained that the jury was not to consider the evidence to show that Pressler had a bad character or had a disposition to commit crimes.

Pressler later objected to the testimony about the stolen items and moved for mistrial, arguing that it was unfairly prejudicial and there was no clear and convincing evidence to support it. The district court concluded that the evidence had probative value for showing that there could have been a passenger in the vehicle during the car chase, and that its probative value was not substantially outweighed by unfair prejudice. The district court also denied the motion for mistrial because the limiting instruction cured any prejudice that might have occurred.

Before the jury retired to deliberate, Pressler introduced a box of documents into evidence for the jury to review. During deliberations, the foreperson asked the district court whether the jury should consider paperwork printed off from March 1, 2019, in the defense-submitted evidence box labeled "PP", which included newspaper clippings describing other crimes that had recently occurred in town. Pressler's counsel admitted that she did not review the box's contents before submitting it to the jury. Pressler spoke directly to the district court, and explained that he had friends mail him newspaper clippings of all his arrests.

The next morning, the district court conducted a voir dire of every juror to determine the extent, if any, of the possible taint. After voir dire, the district court found that two of the jurors may have been tainted because they read headlines about some crimes committed at a bar and at a casino, even though they did not read about Pressler's connection to those crimes. The district court proposed replacing them and resubmitting the case to the jury, and both parties agreed with the district court's resolution.

The district court replaced the two jurors with alternates. It then resubmitted the case to the jury, instructing the jury, "This case is now resubmitted to the jury as presently constituted for a new

deliberation. . . . So this is a brand new deliberation, ladies and gentlemen. You have to start over, in other words, because this is considered, in the eyes of the law, a completely new jury."

After a recess, the district court reconvened because the jury filled out all but one verdict form. The district court was concerned and wanted to conduct another voir dire to see when the jury filled out the forms, but Pressler's counsel stated, "I am truly not sure what difference it makes since it's a new jury." Pressler himself seemed rattled by everyone's confusion, and he declared: "Mistrial. Move for a mistrial. I want a mistrial. This is too confusing for me. Nobody knows what to do." The district court denied the motion for mistrial. The district court then brought in the foreperson, who told the district court that the jury filled out the verdict forms before opening Defense Exhibit PP. The district court responded, "Okay. Well, the jury is going to be instructed and just reminded that this is a new jury deliberation and the prior deliberations are not to be discussed in any way? I think they understand that. We'll make it even more specific." The district court then provided new verdict forms to the jury before it resubmitted the case to them.

The jury convicted Pressler of two counts of eluding a police officer in a manner posing a danger to persons or property and one count of grand larceny of a motor vehicle with a value of $3,500 or more.

On appeal, Pressler makes five arguments. First, Pressler argues that the State committed prosecutorial misconduct that warrants reversal when the State referenced the alleged domestic incident. Second, Pressler claims that the district court should have sua sponte intervened when the State referenced the alleged domestic incident during closing arguments. Third, Pressler claims that the district court erred by not

properly impaneling a new jury. Fourth, Pressler argues that the district court erred in denying two motions for mistrial. Finally, Pressler argues that there was not sufficient evidence to convict him of eluding the police in the pick-up truck.[2]

Prosecutorial Misconduct

Pressler first argues that the prosecutor committed misconduct during closing arguments by suggesting that the evidence "conclusively" and "obviously" demonstrated that a domestic incident occurred between Nye and Pressler. Pressler then avers that the district court erred by not sua sponte declaring a mistrial when the State indicated during closing arguments that there was a domestic incident because it previously gave limiting instructions. Pressler failed to timely object to the argument, so our review is limited to "plain error." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). Generally, in reviewing claims of prosecutorial misconduct, we determine whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal under a harmless error analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This harmless error analysis only applies, however, if the defendant preserved the error by objecting to the misconduct at trial. *Id.* at 1190, 196 P.3d at 477. Failure to preserve the error requires that we apply plain error review. *Id.* Before we will correct a plain 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*, 134 Nev. at 50, 412 P.3d at 48. "[A] plain error affects a defendant's substantial

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[2]Pressler does not challenge his second count of eluding a police officer on appeal.

rights when it caused actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted).

Here, there is no error to be seen from a casual inspection of the record because the reference to the "domestic incident" was admitted as evidence, which Pressler does not contest on appeal. Further, Pressler has provided no authority showing that the district court had a sua sponte duty to intervene during closing argument to again give the limiting instruction. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); *see also Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1133 (2001) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)) (district court must provide limiting instruction both at the time the uncharged bad act evidence is admitted and in the district court's final charge to the jury). Finally, the State's closing argument could not have caused actual prejudice or a grossly unfair outcome because the jury heard multiple witnesses testify about the domestic incident during the trial, and the prosecutor's argument merely summarized the evidence presented by those witnesses.

Impaneling a New Jury

Pressler next argues that the district court erred in how it replaced two jurors who may have seen (but not read) newspaper articles describing other crimes that Pressler may have committed. However, the district court was not required to replace the jurors at all, because Pressler gave the newspaper articles to the jury to take into the jury room with them to review. Pressler cannot seek relief from error that he himself invited. *See, e.g., Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994)

("[A] party will not be heard to complain on appeal of errors which he himself induced."); *see also United States v. McCormac*, 309 F.3d 623, 626-27 (9th Cir. 2002) (concluding that a district court did not abuse its discretion when denying a mistrial because a defendant's own conduct caused the alleged jurors' impartiality and the court took reasonable steps to ensure the jurors served impartially); *see also United States v. Stewart*, 256 F.3d 231, 242 (4th Cir. 2001) (concluding that declaring a mistrial based on a defendant's misconduct would subvert the judicial process and allow a defendant to benefit from his own wrongdoing). Because the district court was not required to replace the jurors at all, but only did so in a generous effort to mitigate Pressler's own error, Pressler can hardly complain about how the district court chose to replace them.

In any event, the district court properly followed the procedure set forth in NRS 175.061(4)[3], which provides that "[i]f an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury." "[A] failure to instruct a jury to restart deliberations when an alternate juror replaces an original juror is an error of constitutional dimension because it impairs the right to a trial by an impartial jury." *Martinorellan v. State*, 131 Nev. 43, 47-48, 343 P.3d 590, 593 (2015). A constitutional error is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see also Valdez*, 124 Nev. at

[3]Both parties cite to NRS 16.080, but that statute is inapplicable because it is within Title 2 of the NRS which is entitled "Civil Practice." NRS 175.061 is the controlling statute because it is within Title 14 of the NRS which is entitled "Procedure In Criminal Cases."

1189, 196 P.3d at 476. However, when a district court instructs a jury, we presume the jury followed the instructions. *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001).

Here, the district court did not err because it was not required to replace the jurors at all, but when it did, it followed NRS 175.061(4) and instructed the jury to restart its deliberations. The district court gave new verdict forms to the jury and stressed several times that the jury was to restart its deliberations with the newly impaneled juror members. Nothing in the record suggests that the jury did not restart its deliberations, such as a shortened jury deliberation time. Accordingly, the district court did not err because it properly followed NRS 175.061(4) and no evidence suggests that the jurors did not restart their deliberations as the district court instructed.

Motions for Mistrial

Third, the district court did not abuse its discretion when it denied Pressler's motions for mistrial. A district court may grant a defendant's request for mistrial when some prejudice occurs that prevents a fair trial. *Jeffries v. State*, 133 Nev. 331, 333, 397 P.3d 21, 25 (2017). This court reviews a district court's decision to deny a mistrial for abuse of discretion. *Id.* "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Here, Pressler sought mistrial based upon two grounds, the admission of allegedly prejudicial evidence, and the alleged conduct of two alternate jurors who replaced two other jurors. Whether or not the full question and answer were proper, when the district court allowed an officer to testify about searching the pick-up truck for stolen goods, the district

court nonetheless did not abuse its discretion in denying Pressler's first motion for mistrial. The district court's limiting instructions to the jury made clear that testimony regarding the police search was admitted not to prove that any goods were stolen—and in fact there is no evidence that they were stolen and Pressler was never charged with stealing them—but only to explain why the police officer searched the truck in the manner that he did. The State never argued that Pressler stole the items, but the officer's reasoning helped to explain why he conducted a disruptive search of the truck that is not necessarily conducted every time someone evades the police during a chase. The district court properly weighed whether the evidence's probative value was substantially outweighed by its unfair prejudicial effect. *See* NRS 48.035(1). Further, the evidence served to rebut Pressler's attack upon Nye's credibility. Moreover, the district court sufficiently dissipated any unfair prejudicial value by offering a limiting instruction and Pressler has not demonstrated the contrary. Thus, the district court did not abuse its discretion in denying the motion for a mistrial.

Moreover, the district court did not abuse its discretion in denying Pressler's second motion for mistrial when the first jury filled out several verdict forms before two jurors were replaced. As noted, Pressler triggered this error himself by submitting newspaper articles referencing his prior crimes to the jury for review. It was the jury, and not Pressler, that wondered whether these articles should have been admitted by sending a note to the judge. In response to the jury's note, the district court took steps to remedy Pressler's own invited error by replacing two jurors, and when it did so, it conducted extensive voir dire of each juror, which revealed that none of the other jurors read the news articles. The district court

resubmitted the case to the newly impaneled jury, and there is nothing showing that the newly impaneled jury ever knew the content of the articles. Thus, the district court reasonably concluded that the news articles did not prejudice the jury, and if they did, the district court cured any potential defect by removing jurors who could have known about them. Pressler is not entitled to a mistrial based upon an error that he himself triggered and that the district court took diligent steps to cure even when it was not required to do anything.

Sufficiency of the Evidence

Finally, there was sufficient evidence to support Pressler's conviction of eluding the police. In reviewing the sufficiency of the evidence, we must decide "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." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). It is the jury's function to assess the evidence's weight and determine witnesses' credibility, not a reviewing court. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

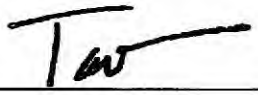
Viewing the evidence in the light most favorable to the State, there was sufficient evidence to convict Pressler of eluding the police. Multiple eyewitnesses saw Pressler drive the pick-up truck, including Nye and Officer Taylor, both of whom know Pressler. Although Grate, the private investigator who testified for Pressler at trial, noted that there were factors that would have made it difficult for Officer Taylor to identify Pressler, he did not say it was impossible. Moreover, an officer found casino player cards with Pressler's name in the pick-up truck. Also, Nye's mother, Stewart, took a photo of Pressler's pick-up truck when he was sleeping in

her driveway, further evincing that he owned and possessed the pick-up truck. Thus, there was sufficient evidence to convict Pressler for eluding the police.

Therefore, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Alvin R. Kacin, District Judge
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