IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE GERARD HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80750-COA

FILED

APR 28 2021

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

ORDER OF AFFIRMANCE

Rene Gerard Harris appeals from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with use of a deadly weapon, and one count of battery with use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Harris and his girlfriend, Alyce Yvette McCoy, sold a vehicle to Harris's older brother, Michael Harris.[1] Michael failed to make payments, which led to a subsequent dispute between the sellers, McCoy and Harris, and the buyer, Michael. Late one evening, McCoy and Harris drove to Michael's apartment, and saw the vehicle parked outside. McCoy decided to repossess the car and called AAA Towing to have the car towed. A surveillance video shows McCoy arriving, and she admitted Harris was with her. The video also shows McCoy getting out of her car, followed by Harris, who pulled a sawed-off shotgun out of his pants.

While the AAA tow truck driver was unlocking the car, Michael came out of his second-floor apartment and got into a verbal argument with McCoy. At some point after the AAA driver unlocked the car, Michael saw Harris come out from behind a tree with a sawed-off shotgun. Michael ran

[1]We recount the facts only as necessary for our disposition.

back up the stairs and his five-year-old daughter came outside from his apartment at the same time. Harris fired the shotgun, hitting Michael in the back; the child was not injured. The AAA driver left the scene when he heard the gunshot, and McCoy and Harris fled the scene, leaving Michael's car there.

Michael's downstairs neighbor witnessed the incident and called 9-1-1. Because it was dark, she could not clearly identify the shooter, but provided the police a description that matched Harris. Police arrived to find Michael injured with pellet wounds to his back, neck, head, and face, which were consistent with being hit by a shotgun blast. The lead detective, Sergeant Ina Zerbe, interviewed Michael at the hospital, where Michael identified Harris as the shooter and McCoy as Harris's companion. Michael also told the detective that he heard McCoy yell "bro" during the shooting.

A grand jury indicted Harris on four charges: (1) conspiracy to commit murder; (2) attempt murder with use of a deadly weapon; (3) battery with use of a deadly weapon resulting in substantial bodily harm; and (4) child abuse, neglect, or endangerment. The State charged McCoy as a co-defendant but she entered into a guilty plea agreement, wherein she pleaded guilty to conspiracy to commit murder by conspiring with Harris, and agreed to testify truthfully at trial.

The jury found Harris guilty of attempted murder with a deadly weapon and battery with a deadly weapon resulting in substantial bodily harm. The jury found him not guilty on the remaining charges. The district court adjudicated Harris as a habitual criminal and imposed a sentence of life in prison for each offense with parole eligibility in ten years, to run concurrent to each other, but consecutive to another sentence Harris was

serving. Harris now raises numerous issues on appeal. We address each in turn.[2]

The district court did not abuse its discretion when it limited the scope of cross-examination

Just before Michael's testimony, Harris requested that the district court allow him to cross-examine Michael about child sex-abuse charges Michael was facing in California. Harris claimed that he and Michael had a strong disagreement about the charges and had an acrimonious relationship. Harris wanted to elicit this testimony to show that Michael had a motive to falsely accuse Harris of the shooting due to the underlying dispute. The court would not allow the questioning, noting that absent Harris testifying to lay a foundation about the issues, it would be an inappropriate line of questioning. The district court noted that Harris could still ask Michael about any ongoing argument or disagreement.

Harris now asserts the district court abused its discretion when it limited the scope of cross-examination, denying him the opportunity to present a complete defense and in violation of the Confrontation Clause. Harris claims the testimony was permissible to elicit bias. The State

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[2]Harris first argues the district court abused its discretion when it allowed Sergeant Zerbe to testify about the meaning of the term "bro." This issue was not properly preserved for appeal. At trial, Harris objected to Sergeant Zerbe's testimony as leading and improper expert testimony. On appeal, however, Harris argues the testimony was improper lay witness testimony. We need not address this issue. *See Bejarano v. State*, 122 Nev. 1066, 1073 n.12, 146 P.3d 265, 270 n.12 (2006) (noting that claims not adequately raised below are not properly raised for the first time on appeal). Even if the issue was properly preserved, Harris failed to argue the testimony resulted in a prejudicial error that affected his substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

contends that testimony about the unrelated charges was not relevant, not appropriate, and was only intended to smear Michael's character.

We review a district court's evidentiary rulings for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Whether a defendant's Confrontation Clause rights were violated is subject to de novo review. *Id.* Discretion lies with the district court to limit the scope of cross-examination, so long as "sufficient cross-examination has been permitted to satisfy the sixth amendment." *Crawford v. State*, 121 Nev. 744, 758, 121 P.3d 582, 591 (2005) (quoting *Crew v. State*, 100 Nev. 38, 45, 675 P.2d 986, 990 (1984)). The court's discretion is more limited if the purpose is to expose bias. *Id.* "Generally, [t]he only proper restriction should be upon inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy, or humiliate the witness." *Lobato v. State*, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) (alteration in original) (internal quotation marks omitted); *see also Farmer v. State*, 133 Nev. 693, 702-03, 405 P.3d 114, 123 (2017) (holding that courts have wide latitude under the Confrontation Clause to limit cross-examination for "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986))).

While it is true that the district court's discretion is more limited when the defendant is trying to elicit testimony to show bias, the court may still limit testimony based on relevance and prejudice. The district court here noted that the evidence had limited relevance, and would require the defendant to testify in order to lay a proper foundation (he did not assert he would be testifying). Further, there was a risk that the questions would confuse or mislead the jury about the charged act at issue

in this case. *See* NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."). Further, Harris was still permitted to inquire about possible bias—whether he and Michael had an underlying dispute, and argue the same during his closing argument. Accordingly, the district court did not abuse its discretion when it limited the scope of cross-examination.

The district court did not abuse its discretion in excluding unauthenticated documents

At the start of the second day of trial, Harris sought to introduce documents that allegedly showed Michael forged title documents for the vehicle he purchased from McCoy and Harris. Apparently, a member of Harris's family gave the documents to the district court marshal during trial. Harris admitted that the documents were not authenticated or certified. He argued that the documents showed a dispute about the vehicle ownership which led to the shooting. The court denied admission of the documents as not authenticated and extrinsic to trial.

Harris contends the district court abused its discretion because the documents were material and relevant to Michael's bias and truthfulness. The State argues the documents were unauthenticated and improper impeachment evidence because the alleged forgery is a collateral matter. *See* NRS 50.085(3) (stating that specific instances of conduct by a witness may not be proved by extrinsic evidence to attack credibility). Harris does not address the authentication issue. At trial, he admitted the documents were not authenticated. *See* NRS 52.015 (providing that documents must be authenticated to be admissible). Therefore, we need not reach Harris's arguments on this issue. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents'

argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). Therefore, an unchallenged basis exists supporting the district court's ruling.

The district court did not abuse its discretion when it denied Harris's motions for mistrial and new trial

During Harris's cross-examination of Sergeant Zerbe, Harris inquired about dates Sergeant Zerbe spoke to Michael after the initial hospital interview. Sergeant Zerbe was unsure, but referenced when Michael called her about other threats from Harris. The district court immediately sustained Harris's objection and granted a motion to strike. Again during cross-examination, Sergeant Zerbe mentioned Harris's other threats, and the court again struck the testimony. The court later admonished the jury to disregard Sergeant Zerbe's statements, saying she was mistaken on the issue about threats.

After the State rested, Harris made an oral motion for mistrial based on Sergeant Zerbe's comments, arguing they caused significant prejudice and a curative instruction or admonition was not sufficient. The district court concluded the statements did not result in sufficient prejudice to warrant a mistrial, given the court's admonishment. After the jury reached its verdict, Harris filed a motion for new trial based on Sergeant Zerbe's testimony and NRS 176.515(4). The district court denied the motion.

On appeal, Harris argues the court abused its discretion in denying both motions[3] because Sergeant Zerbe's testimony was highly prejudicial and could not be remedied. The State responds that the district court did not abuse its discretion because its admonishment was sufficient.

"The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse." *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted). Improper testimony that the defendant "is suspected of having committed other crimes similar to the" crime charged may be severely prejudicial. *United States v. Frederick*, 78 F.3d 1370, 1376 (9th Cir. 1996). We must determine if the district court's admonishment cured the error caused by Sergeant Zerbe's testimony about threats. "To establish reversible error at the guilt phase, an appellant must prove that the evidence was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury." *Middleton v. State*, 114 Nev. 1089, 111, 968 P.2d 296, 312 (1998) (internal quotation marks omitted). "[T]his court should consider four factors: (1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing." *Id.*

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[3]Harris treats the motion for mistrial and motion for new trial as a singular legal issue. Harris does not make any argument, or provide any authority, that the motion for new trial was proper under NRS 176.515(4), which provides that a defendant may file a motion for new trial on grounds other than new evidence, but it must be within seven days of the verdict. Accordingly, we need not address Harris's argument regarding his motion for new trial. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Here, Harris unintentionally solicited Sergeant Zerbe's testimony about threats. Immediately after both of Sergeant Zerbe's remarks, the district court sustained objections and struck the statements. After the conclusion of Sergeant Zerbe's testimony, the court admonished the jury to disregard the statements at issue, going so far as to tell the jurors that Sergeant Zerbe was mistaken, which could have been a detriment to the State. Sergeant Zerbe's testimony focused on the timeline of events, not the threats. While the testimony does have some prejudicial effect, given that the statements were extremely brief and did not describe the threats, coupled with the court's strong admonishment, the statements were not so "clearly and enduringly prejudicial" to warrant reversal. *See id.*

Further, evidence of guilt was convincing in this case. The following evidence supported guilt: Michael's identification; McCoy's testimony that Harris was at the scene; McCoy's identification of Harris taking a shotgun out of his pants on the surveillance video; the neighbor's description of the shooter that matched Harris; and Harris's conduct after the gunshot. Therefore, Sergeant Zerbe's testimony did not create a reversible error and the district court did not abuse its discretion when it denied Harris's motion for mistrial.

The State did not commit prosecutorial misconduct

During the State's rebuttal argument, the prosecutor started by saying,

> Folk[s], it's no surprise what you've heard from the defense. The evidence in this case is overwhelming, so we did this, right? Let's not talk about the fact that you have the brother, who's the victim, pointing out his other brother. How often do you think that happens?

> Let alone, the other person involved pointing out that man is the shooter. But yet, somehow they're the ones conspiring against this man. Yeah, right.

Harris did not object.[4] Later during the State's rebuttal, the prosecutor commented on Harris's attack of the AAA employee's credibility:

> Ned. What was the attack on him? Is he compromised? Absolutely, too. This man took off, never called 911. He wanted no part. Whether he was scared, whether he was scared of retaliation, whether he just don't care, and on and on. Does that make him any less of a witness? No.
>
> Told you, he didn't see the shooter. Is it possible he really did see the shooter? Yeah. Of course, it's possible. Can we speculate to that? Sure.

Harris also did not object. Harris now asserts these statements were improper.

We will review issues of prosecutorial misconduct for harmless error only when properly preserved. *Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." *Id.* at 1190, 196 P.3d at 477 (alteration in original) (internal quotation marks omitted). If the error is not preserved, we will conduct plain error review. *Id.* Here, Harris failed to make a timely objection, so we review for plain error. *Id.*; *see also Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

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[4]Harris claims he objected to this statement, but his claim is belied by the record. Harris did object to the State's next comment where the prosecutor seemed to imply that Harris called Michael a bad man.

When reviewing claims of prosecutorial misconduct, we engage in a two-step analysis. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. "First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether that improper conduct warrants reversal." *Id.* (footnote omitted). Prosecutor "statements should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014) (internal quotation marks omitted).

Prosecutors may not misstate facts, but they may comment on evidence and invite the jury to draw reasonable inferences. *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005); *Bridges v. State*, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000). The State may also respond to defense theories and arguments. *See Williams v. State*, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Prosecutors may not "interject his or her beliefs into an argument" but may argue his or her "opinion, belief, or knowledge as to the guilt of the accused . . . as a deduction or a conclusion from the evidence introduced in the trial." *Parker v. State*, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (internal quotation marks omitted).

First, Harris argues the prosecutor improperly told the jury that it could speculate that the AAA employee saw the shooter, but feared retaliation, despite there being no evidence presented about retaliation. But this argument is misplaced. The prosecutor did not make improper comments regarding the AAA employee's testimony. And Sergeant Zerbe

testified that the AAA employee was possibly afraid of retaliation.[5] Based on this evidence, the State invited the jury to make reasonable inferences based on the evidence presented during trial, and in any event was responding to Harris's closing argument. Such remarks are permissible.

Harris next claims the State improperly attacked his defense strategy by implying it is unlikely one brother would shoot another. However, the State was commenting on the fact that Michael was able to identify his brother as the shooter, rather than commenting about the supposed frequency with which one brother would shoot another.

Third, Harris asserts the prosecutor improperly inserted his personal opinions into argument when he said "Yeah, right." Here, the prosecutor's statement was not a reflection of personal belief; the State responded to Harris's closing argument in which Harris insinuated McCoy and Michael had ulterior motives for pointing to Harris as the shooter. Therefore, the prosecutor's comment was proper argument.

Lastly, Harris argues the State misrepresented the defense's argument when the prosecutor commented about conspiracy, because the defense never argued there was a conspiracy against Harris. Again, the prosecutor's comment, when viewed in context, shows the prosecutor was rebutting Harris's argument that McCoy and Michael were both not credible and had reasons to mislead the jury. The State made no actual argument that Harris claimed McCoy and Michael were conspiring against

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[5]On appeal, Harris claims this comment was inappropriate, yet he does not develop his argument, so we need not address it. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. Additionally, because there was no objection to the statement during trial, we decline to consider it. *See Jeremias*, 134 Nev. at 52, 412 P.3d at 49 ("[T]he decision whether to correct a forfeited error is discretionary . . . .").

Harris. Accordingly, there was no prosecutorial misconduct and the elements for plain error have not been established. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

The district court did not err when it denied Harris's request for eight peremptory challenges

Before trial, the State filed a notice of its intent to seek punishment as a habitual criminal, noting that Harris had ten prior felony convictions. If punished as a habitual criminal, Harris was at risk of a life sentence. *See* NRS 207.010(1)(b). Before jury selection began, Harris requested eight peremptory challenges pursuant to NRS 175.051(1). The district court denied the request, noting that the habitual criminal enhancement does not entitle Harris to eight peremptory challenges. Harris now argues that this court should apply the plain meaning of NRS 175.051(1) to determine that he was entitled to eight peremptory challenges, and that this court should overrule *Nelson v. State*, 123 Nev. 534, 170 P.3d 517 (2007).

NRS 175.051(1) provides that "[i]f the *offense charged* is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges." (Emphasis added.) In *Schneider v. State*, the Nevada Supreme Court concluded that "the habitual criminal statute constitutes a status determination and not a separate offense," so a defendant adjudicated as a habitual criminal is not entitled to eight peremptory challenges. 97 Nev. 573, 575, 635 P.2d 304, 305 (1981). In *Nelson*, the supreme court was asked to overturn *Schneider* but declined, affirming that "the number of peremptory challenges allowed to a defendant depends on the sentence he faces if convicted of the *primary offense*, not the sentence he faces if adjudicated as a habitual criminal." *Nelson*, 123 Nev. at 546-47, 170 P.3d at 525-26 (emphasis added). Therefore, the district

court did not err when it declined to allow Harris eight peremptory challenges because the court's decision was consistent with Nevada law.[6]

Sufficient evidence supported the convictions

Harris asserts the evidence at trial was not sufficient to support the guilty verdict because the only evidence against him was Michael's and McCoy's testimony, who were both witnesses with questionable credibility. The State responds that there was sufficient evidence to support the convictions and Harris's argument that there was not sufficient evidence because of witness credibility is unavailing. We agree with the State.

In reviewing the sufficiency of the evidence, the appellate court must decide "whether, after reviewing 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "[I]t is the jury's function, not that of the [reviewing] court to assess the weight of the evidence and determine the credibility of the witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Circumstantial evidence alone may sustain a conviction. *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980).

Harris's argument that evidence was not sufficient is solely based on his assertion that "[t]he only evidence admitted at trial

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[6]Despite Harris's request, we cannot overturn Nevada Supreme Court jurisprudence. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court"); *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007), *as modified* (August 15, 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the [California Supreme Court]." (alterations in original) (internal quotation marks omitted)).

connecting" Harris to the shooting was Michael's and McCoy's testimony, and that neither was a credible witness. Yet, the jury assesses witness credibility, not this court, so Harris's arguments are not convincing. Further, as previously explained, not only does sufficient evidence support Harris's convictions, the evidence could be viewed as overwhelming. Because the entirety of Harris's sufficiency-of-the-evidence argument raised on appeal relates to witness credibility, we need not further address the evidence presented at trial. Therefore, we will not disturb the convictions.[7]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

______, C.J.
Gibbons

______, J.
Tao

______, J.
Bulla

cc: Hon. Linda Marie Bell, Chief Judge Eighth Judicial District Court
Department 3, Eighth Judicial District Court
AMD Law, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[7]Because we find no error in any of the foregoing, we need not address Harris's cumulative-error claim. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting "insignificant or nonexistent" errors do not warrant cumulative error review); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").