IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEENAN WATKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79719-COA

ORDER OF AFFIRMANCE

Keenan Watkins appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, and two counts of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Watkins, Maurice Duncan, and one other unidentified suspect burglarized a home and robbed three victims inside.[1] As soon as the suspects entered the home, one of the victims fled and called the police. That victim never saw Watkins. The two remaining victims inside the home testified that the suspects threatened them with guns, including Watkins, demanded valuables, and took several items from their home. Both victims positively identified Watkins as one of the armed suspects.

A police officer responding to the scene arrived as two of the suspects were leaving the home. The police officer observed the suspects leave and then re-enter the home; that officer later identified Watkins at a show-up investigation. Before the show-up investigation, the two suspects then ran out of the back door, jumped the back wall, and fled. A canine officer found Watkins sweaty and hiding in a shed in a nearby backyard.

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

Police officers recovered Watkins's wallet and identification cards nearby, along with some stolen items from the home. They also located a car in the same area that Watkins had the key to, and Watkins's fingerprints were on the car and documents with his name were found inside.

At trial, Watkins wanted to discuss in his opening statement and question witnesses about marijuana found in the home at the time of the crime. The district court prohibited Watkins from addressing the marijuana in his opening statement, but allowed him to ask questions about the marijuana while examining witnesses. Watkins asked the witnesses whether anyone in the home sold marijuana, how much marijuana was in the home, and if the victims knew that marijuana possession at the time was illegal. The district court also allowed Watkins to examine the victims about possible bias and motivation for their testimony because they were not prosecuted for possession of marijuana or related crimes. However, the district court prohibited Watkins from asking about specific details, such as where the victims stored the marijuana, because it found the information irrelevant.

Before Watkins's trial, Duncan pleaded guilty to conspiracy to commit robbery by conspiring with Watkins, burglary while in possession of a firearm, and robbery with use of a deadly weapon. At his trial, Watkins called Duncan to testify but Duncan invoked his privilege against self-incrimination. Watkins also attempted to introduce a letter purportedly written by Duncan that contained exculpatory evidence. However, Watkins presented only one signature from Duncan as a handwriting comparison to demonstrate the letter's authenticity. The district court found that even if the signature was properly authenticated, it failed to meet the hearsay exception of statement against interest because there was insufficient

evidence to ascertain the trustworthiness of the letter. The district court then excluded the letter.

Watkins argues five errors on appeal. First, that the district court violated his Sixth Amendment right to confront witnesses because the district court limited his cross-examinations and opening statement.[2] Second, that the district court erred when it allowed Duncan to invoke the Fifth Amendment privilege against self-incrimination. Third, that the district court erred by excluding a letter purportedly written by Duncan. Fourth, that the State failed to present sufficient evidence to support the jury's verdict. Fifth, that the cumulative nature of the errors below warrants reversal.[3] As we discern no error, we affirm the judgment of conviction.

Limitation of cross-examination and opening statement

Watkins asserts that the district court erred by prohibiting him from discussing marijuana in his opening statement and from cross-examining witnesses on the marijuana found in the home, and proffers that the district court did not allow him to examine the victims' possible motives for bias.

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[2]As the Confrontation Clause provides parties with the right to confront witnesses, and an opening statement is not a witness examination nor evidence, the district court did not violate the Sixth Amendment by curtailing Watkins's opening statement. Watkins also failed to supply any legal support for the proposition that limiting an opening statement was a violation of the Sixth Amendment. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that it is appellant's responsibility to provide cogent argument and relevant authority).

[3]Because Watkins has not established any trial error, there is nothing to cumulate. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

We review the district court's evidentiary rulings for an abuse of discretion, but the question of whether a defendant's Confrontation Clause rights were violated de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54.

The purpose of the Confrontation Clause is to secure for both sides the opportunity to cross-examine a witness. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Additionally, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis omitted). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or *only marginally relevant*." *Farmer v. State*, 133 Nev. 693, 702-03, 405 P.3d 114, 123 (2017) (second alteration in original) (emphasis added) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). In addition, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17.

We conclude the district court did not abuse its discretion in restricting Watkins from asking questions about the marijuana found in the victims' home because the district court's limits were reasonable. The limitation the district court placed on Watkins was the scope of his questions about marijuana. In fact, the district court granted Watkins great latitude—it allowed him to ask the victims if they knew marijuana was present in the home, how much marijuana was in the home, if anyone in the home sold marijuana, and if their testimony was motivated by the State's decision not to prosecute them for possession of marijuana. The district court did not stop Watkins from seeking to expose the victims' possible biases and motives for testifying in the manner they did because he questioned them about them. Therefore, we conclude the district court did not violate Watkins's confrontation rights, nor did it abuse its discretion in limiting Watkins's questions.

Duncan's invocation of the Fifth Amendment

Watkins argues the district court erred when it allowed Duncan to invoke the Fifth Amendment privilege against self-incrimination. To that end, we review the validity of a witness's assertion of the Fifth Amendment privilege against self-incrimination de novo. *McCaskill v. State,* Docket No. 55147 (Order of Affirmance, March 9, 2011); *see Jones v. State*, 108 Nev. 651, 657, 837 P.2d 1349, 1353 (1992). "A defendant's objections to a witness's wrongful assertion of the privilege against self-incrimination may not be entertained on appeal absent a timely challenge by the party presenting the witness." *Jones*, 108 Nev. at 656, 837 P.2d at 1352.

The Fifth Amendment provides witnesses the privilege to refuse to answer questions when doing so might subject them to future

prosecution. *Id.* at 657, 837 P.2d at 1352. A witness may assert this privilege if it is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

However, the failure to object generally prevents our review, absent plain error. *Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 71 (2008). To obtain relief under plain-error review, "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) (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "[A] plain error affects a 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 (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008)).

Because Watkins failed to object to Duncan's invocation of his Fifth Amendment privilege against self-incrimination, he forfeits the right to assert it on appeal. Instead, we review for plain error.[4]

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[4]We recognize that there was a discussion on the record about Duncan invoking the Fifth Amendment as it related to "venue", however, there was no formal objection lodged by either party. Without any objection brought to the district court's attention, the court would not have been on notice to conduct a factual inquiry into any possible issues with Duncan invoking the Fifth Amendment. Further, without any objection to the issue, the State was not afforded the opportunity to respond or provide possible solutions to dispel Duncan's fear of prosecution. *Fish v. State*, 92 Nev. 272, 276, 549 P.2d 338, 341 (1976) ("Unless the error is fundamental, *specific* objection must be made thereto at trial in order to preserve the issue for consideration on appeal." (emphasis added)).

First, it is not clear that it was error to permit Duncan to invoke his privilege against self-incrimination. Duncan could easily have had a reasonable fear of prosecution. Indeed, the statute of limitations had not run on all state felonies by the time Duncan invoked the privilege, which could support a reasonable fear of prosecution. *See* NRS 171.085. Or Duncan could have been fearful of prosecution for a crime committed in a secret manner, such as coercion, in which the statute of limitations had not run. *See* NRS 171.095(1)(a) and 207.190. Furthermore, Duncan was susceptible to criminal prosecution for perjury if he testified falsely or he contradicted anything he said under oath previously. *See* NRS 199.120 and 199.145.

Second, even if this was an error, it was not apparent from a casual inspection of the record. When the district court discussed Duncan's invocation, Watkins never suggested in any way that Duncan's Fifth Amendment invocation was improper. In fact, Duncan was represented by counsel at the hearing who was advising him regarding invoking the Fifth Amendment. Therefore, Duncan's apparent fear of possible prosecution was not plainly vague, subjective, or unreasonable from a casual inspection of the record.

Third, Watkins has not demonstrated actual prejudice or a miscarriage of justice. As such, we find no error, plain or otherwise.

Duncan's letter

Watkins argues the district court erred when it excluded a letter purportedly written by Duncan that may have contained exculpatory statements about Watkins participating in the crimes under threats from Duncan. Watkins notes that after the district court found Duncan unavailable, it erred by finding there was not sufficient corroborating

evidence to overcome the issue of hearsay, despite assertions by his counsel that the letter was signed under penalty of perjury by Duncan and Watkins provided the district court with a sample of Duncan's signature to corroborate the handwriting.[5]

We review evidentiary decisions by a district court for an abuse of discretion. *Farmer v. State*, 133 Nev. 693, 702, 405 P.3d 114, 123 (2017). NRS 51.315 provides that a hearsay statement may be admissible if the declarant is unavailable and the "nature and the special circumstances under which it was made offer strong assurances of accuracy." In addition, a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." NRS 51.345.

We conclude the district court did not abuse its discretion by excluding the letter because Watkins failed to provide assurances of accuracy outside the letter to support the exception to hearsay. Neither Duncan nor any other witness testified about the letter. Further, statements made by former co-defendants trying to exculpate the person on trial generally should be viewed skeptically. *See Jones*, 108 Nev. at 657, 837 P.2d at 1353 ("[E]xonerating testimony of a co-defendant who has already been sentenced should normally be viewed with some skepticism."). The only evidence demonstrating the letter's trustworthiness were statements made by counsel, which are not evidence. *See Rudin v. State*,

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[5]The letter was not included in the record or the trial transcript. As such, we presume the missing letter supports the district court's decision to exclude it. *See Fields v. State*, 125 Nev. 785, 790, 220 P.3d 709, 712 (2009); NRAP 30(b)(3).

120 Nev. 121, 138, 86 P.3d 572, 583 (2004) ("The statement of an attorney is not evidence."). Thus, the district court's decision to exclude the evidence was within its discretion based on the absence of authentication and corroborating evidence, which indicated a lack of trustworthiness. Finally, exclusion of the letter is harmless considering that two victims described Watkins as armed with a handgun and no one indicated he appeared to be acting under duress. *See* NRS 178.598.

Sufficiency of the evidence

Watkins argues the jury's verdict lacks sufficient evidence. He first cites identification issues. He then contends the State never proved he entered the home. Finally, he asserts the State failed to provide sufficient evidence to support the robbery, burglary, and conspiracy convictions.

When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). This court will not disturb the jury's verdict on appeal where substantial evidence supports it. *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). "[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 witnesses." *McNair*, 108 Nev. at 56, 825 P.2d at 573. Circumstantial evidence alone may support a conviction. *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

We conclude sufficient evidence supports the jury's verdict. For the robbery and burglary counts, a victim testified that Watkins entered the

home, held a gun to her head, demanded her possessions, and left her home. This fact alone demonstrates the elements of burglary because Watkins clearly entered the home with the intent to commit assault, larceny or a robbery because he immediately pointed a gun at the victim and made threats. *See* NRS 205.060. Another victim also identified Watkins as the man pointing a gun at the first victim and demanding and taking valuables from her or in her presence, which establishes robbery. *See* NRS 200.380. Circumstantial evidence also supports the jury's verdict, such as the fact that officers found Watkins's wallet and identification cards near the scene; Watkins was hiding nearby and sweating, presumably from running from the scene; and lastly, the car located nearby had Watkins's fingerprints on it and his documents were found inside the car. As for conspiracy, the State needed to provide evidence that there was an unlawful agreement between two people for an unlawful purpose. *Nunnery v. Eighth Judicial Dist. Court*, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008). Circumstantial evidence shows Watkins and Duncan entered the home together and robbed the victims, which demonstrates that there was an agreement between the two. Therefore, we conclude there was sufficient evidence to support the jury's verdict.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk