IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLIFFORD BENNIE BAYSINGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84683-COA

ORDER OF AFFIRMANCE

Clifford Bennie Baysinger appeals from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon and burglary during which a deadly weapon is obtained. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

In the late evening hours of October 26, 2019, Baysinger went to the Peacock Bar in Carlin, Nevada.[1] He had already consumed some beer and had one tequila shot at another bar earlier that night and continued drinking beer at the Peacock Bar. Baysinger estimated that, over the course of the evening, he consumed a 12-pack of beer. Baysinger began to get a strange feeling from other patrons at the bar and believed that there was a plan to harm him or his family. When Baysinger's friend jokingly commented that the patrons may have left a bomb in the bathroom, Baysinger went to investigate. While he was in the bathroom, Baysinger discovered a set of vehicle keys in his pocket that did not belong to him, nor did he know how the keys got there, which added to his sense of unease. Baysinger and his party began talking to the other patrons, and everyone started getting loud and boisterous. Around midnight, the bartender, James Dudding, called police to have everyone removed. Officer Nathaniel

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

Sexton with the Carlin Police Department arrived and evicted everyone from the bar. Baysinger left without incident but made a comment that he did not know how this situation was going to end.

Baysinger went home and found his bedroom in disarray with broken glass everywhere. Believing there was a plan to hurt his family, Baysinger began to focus on the bartender, Dudding. Baysinger wondered how Dudding knew him by name when they had never met, and he became convinced that Dudding was involved in a malicious plot against him. Around 3:30 a.m., Baysinger returned to the bar to "get answers" from Dudding.[2]

When he approached the front door, Baysinger saw Dudding alone in the bar looking at his cell phone. At that moment, Baysinger became convinced that Dudding's phone held the "answers" he wanted. Dudding testified that Baysinger entered the bar and demanded his phone, telling Dudding that "[i]f you don't give me your phone, I'm going to drive my knife into your heart." When Dudding held his phone behind his back, Baysinger tried to reach around and take the phone from him. After a brief struggle, Dudding was able to grab a baseball bat kept under the bar. As Dudding retreated, he swung the bat, hitting Baysinger in the thigh. Baysinger continued to advance and Dudding, while walking backwards, tripped on a floor mat and fell to the ground.

When Dudding hit the ground, Baysinger picked up the bat and repeatedly struck Dudding with what the State characterized as "full-on" swings. At one point, Baysinger stopped hitting Dudding, removed his jacket to set it on a nearby barstool, and then resumed striking Dudding

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[2]All of the events that occurred inside the Peacock Bar were captured on surveillance cameras that recorded video, but not audio.

with the bat. In total, Baysinger struck Dudding with the bat 11 times, including at least three times on the head.

While standing over Dudding, who was bleeding and not moving, Baysinger reached into Dudding's pocket to retrieve Dudding's cell phone and began to search through the phone. As he was looking through the phone, Dudding's longtime family friend, Jeffrey Morreira, entered through the bar's front doors. When Morreira entered, Baysinger picked up the bat again and told Morreira to sit down because he did not want to hurt anyone else. Morreira sat down and saw Dudding on the floor. While Morreira went to help Dudding, Baysinger went to the front door and locked the deadbolt. Morreira was able to help Dudding get up and stood between Dudding and Baysinger, distracting Baysinger so that Dudding could escape out the back door. Dudding went across the street to the Cavalier Motel, where he collapsed in the lobby office.

Baysinger told Morreira they needed to find Dudding to get him medical help. With Baysinger still holding the bat, they exited the bar together to look for Dudding across the street. As they walked outside, Baysinger saw his friend, Dayna Bennett, who was walking by on her way to work. Baysinger called her over and told Bennett that he just smashed the bartender's head at the Peacock Bar. The three of them walked together across the street to the Cavalier Motel to look for Dudding. When they found him, Baysinger himself called 9-1-1 and told the dispatcher that he attacked a man at the Peacock Bar with a bat. After calling 9-1-1, Baysinger left the baseball bat propped against the wall in the Cavalier Motel and walked home.

Dudding suffered severe head injuries and underwent emergency surgeries, including a surgery in which a large portion of his

skull was removed. As a result of the attack, Dudding lost his hearing, walks with a cane, speaks with a stutter, and needs special utensils to eat.

Baysinger was charged with a total of six felonies. The first four were charged as counts in the alternative: attempted murder with use of a deadly weapon, battery with intent to kill with the use of a deadly weapon, battery with a deadly weapon resulting in substantial bodily harm, and battery resulting in substantial bodily harm. The fifth and sixth counts, burglary during which a deadly weapon is obtained and burglary, were likewise charged in the alternative. The matter proceeded to a four-day jury trial. At trial, Baysinger's defense relied primarily on his mental state at the time, arguing that he could not form the specific intent necessary for attempted murder and burglary. The State argued otherwise and called an expert witness, Dr. Steven Zuchowski, who testified without objection that Baysinger could form the specific intent to kill. Dr. Zuchowski also testified, based on his review of the surveillance video, that Baysinger did not appear "so grossly intoxicated" that he could not form the specific intent.

The jury convicted Baysinger of the two highest charges, attempted murder with use of a deadly weapon and burglary during which a deadly weapon is obtained. Baysinger was sentenced to serve an aggregate prison term of 10-25 years.

On appeal, Baysinger raises seven issues. He contends that (1) there was insufficient evidence to sustain a conviction for attempted murder, (2) there was insufficient evidence to sustain a conviction for burglary, (3) the district court violated his due process rights when it declined to give a voluntary intoxication instruction, (4) Dr. Zuchowski's expert testimony improperly invaded the province of the jury, (5) the State

committed prosecutorial misconduct during its rebuttal closing argument, (6) the district court abused its discretion at sentencing and relied on suspect evidence and argument, and (7) cumulative error warrants reversal.

There was sufficient evidence to support Baysinger's convictions

As his first and second issues on appeal, Baysinger argues that his convictions were not supported by sufficient evidence because he did not form the specific intent to kill or commit a burglary. With regard to the attempted murder conviction, Baysinger contends that there was ample testimony that he "was drunk," and that his intoxication negated the specific intent to kill. As to the burglary conviction, Baysinger claims that he entered the Peacock Bar "to talk to the bartender," and so he lacked the specific intent to commit a felony upon entry. Baysinger further argues that voluntary intoxication negated the specific intent to commit a felony when he entered the bar, precluding any conviction for burglary.

When determining whether a jury verdict was based on sufficient evidence, this court will inquire "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) (emphasis and internal quotation marks omitted). "As an appellate court, we do not independently weigh the evidence and the credibility of the witnesses at trial . . . ." *Mercado v. State,* 100 Nev. 535, 538, 688 P.2d 305, 307 (1984).

A defendant's voluntary intoxication can be considered when a "particular purpose, motive or intent is a necessary element" of the offense. NRS 193.220. Both attempted murder and burglary are specific intent crimes. NRS 200.010-20; NRS 205.060. However, in order to receive a jury instruction that voluntary intoxication may negate "specific intent, the

evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

In this case, the record contained sufficient evidence for the jury to find that Baysinger had the requisite specific intent notwithstanding his consumption of alcohol. At trial, several witnesses testified about Baysinger's level of intoxication. Baysinger testified that he was "buzzed," but he "didn't feel like [he] was really intoxicated" when he went to the Peacock Bar. Dudding testified that when Baysinger returned to the bar after being evicted, Baysinger did not seem intoxicated. Baysinger's friend Bennett similarly testified that, after the attack, Baysinger was not stumbling around or slurring his words at the Cavalier Motel. Lastly, Dr. Zuchowski acknowledged that Baysinger had been drinking, but he concluded that Baysinger was not so grossly intoxicated that he was unable to form specific intent. Therefore, viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have considered evidence of Baysinger's voluntary intoxication and still found that he formed the specific intent required for attempted murder and burglary. *Origel-Candido,* 114 Nev. at 381, 956 P.2d at 1380.

The record also contained sufficient evidence that Baysinger had formed the specific intent to kill. Baysinger threatened to kill Dudding if he did not give Baysinger his phone shortly before the attack. After Baysinger began striking Dudding with the baseball bat, Baysinger stopped the attack, removed his jacket to set it on a nearby barstool, and then returned to Dudding and resumed hitting him with the bat. In total, Baysinger struck Dudding 11 times, including at least three times on the

head. The injuries to Dudding's head were so severe that he underwent emergency surgery and had a large portion of his skull removed. Thus, we conclude that the record contained sufficient evidence of Baysinger's specific intent for the attempted murder conviction.[3]

Baysinger further asserts there was insufficient evidence for his attempted murder conviction because the district court erroneously gave the jury a definition of "malice" that included inferred or implied malice. The jury had been provided the proper definition of "express malice" in its initial jury instructions. However, during deliberations, a juror wrote a note to the judge and requested the definition of just "malice." After receiving the note, the judge called both parties into the courtroom to address the juror's request. The court suggested providing the jury with the complete statutory definition of malice under NRS 193.0175, and both the State and Baysinger agreed with the court's proposal.[4]

Because defense counsel did not object, this court conducts plain error review. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In conducting plain error review, this court examines "whether there was

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[3]Baysinger also argues that absent the testimony of Dr. Zuchowski, the verdict would have been "not guilty" on the attempted murder charge. Even if this court were to disregard Dr. Zuchowski's testimony, there was still sufficient evidence to support Baysinger's conviction based on the testimony of other witnesses, including Baysinger himself.

[4]NRS 193.0175 states the following:

> "Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.* (footnote omitted) (citing *United States v. Olano*, 507 U.S. 725, 732-35 (1993)).

The offense of attempted murder requires express malice, and therefore it was error for the court to provide the jury with a definition of malice that included "inferred" or "implied" malice. *Keys v. State*, 104 Nev. 736, 739, 766 P.2d 270, 272 (1988) ("The mens rea encompassed by implied malice has no application in a prosecution in which a specific intent to kill is a required element of the accused offense. An instruction on implied malice in relation to the crime of attempted murder is misleading to a jury."). However, the jury received the correct definition of express malice as well as an instruction that attempted murder required express malice, and "[j]urors are presumed to follow the instructions they are given." *McNamara v. State*, 132 Nev. 606, 622, 377 P.3d 106, 117 (2016); *see also Cortinas v. State*, 124 Nev. 1013, 1025, 195 P.3d 315, 323 (2008) (holding that "an erroneous instruction that makes available an invalid alternative theory of liability . . . does not vitiate the jury's findings"). Baysinger further fails to argue how the error affected his substantial rights or caused actual prejudice. *Green*, 119 Nev. at 545, 80 P.3d at 95. Even assuming *arguendo* that the improper malice instruction reduced the State's burden of proof, because the jury was ultimately instructed on the correct definition of express malice and there is substantial evidence in the record to support the attempted murder conviction, we conclude that Baysinger is not entitled to relief under plain error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (finding that unpreserved errors of constitutional dimension are reviewed for plain error).

The record also contained sufficient evidence that Baysinger possessed the specific intent to commit assault, battery, or a felony when he entered the Peacock Bar. The burglary statute in effect at the time of the offense, former NRS 205.060(1), *see* 2013 Nev. Stat., ch. 488, § 1, at 2987, provided in pertinent part, that "a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store . . . with the intent to commit grand or petit larceny, *assault or battery on any person or any felony*, or to obtain money or property by false pretenses, is guilty of burglary." (Emphasis added.) Baysinger testified that when he entered the bar, his intent was "to grab" or "get" Dudding's phone. When Baysinger was asked why he walked into the bar in a hurry, he further testified that he "was trying to get to [Dudding's] cell phone," which he decided to do "before [he] came through the door." After entering the bar, Baysinger threatened Dudding by telling him that "[i]f you don't give me your phone, I'm going to drive my knife into your heart." Baysinger then battered Dudding to obtain his cell phone. We conclude that Baysinger's testimony, coupled with his actions immediately upon entering the bar, provided sufficient evidence for the jury to find that Baysinger formed the specific intent to support his burglary conviction.

The district court did not err when it declined to give Baysinger's proposed voluntary intoxication instruction

Baysinger argues the district court committed error when it refused his voluntary intoxication instruction. The State responds that Baysinger failed to present evidence as to the "intoxicating effect" of his alcohol consumption or "the resultant effect" on his mental state and then failed to object when the district court declined to give the instruction, requiring this court to review for plain error. Baysinger acknowledges that trial counsel did not object when the district court declined to give his

proposed voluntary intoxication instruction, but contends that the error was preserved.

Prior to trial, the parties submitted their proposed jury instructions to the district court. Before closing arguments, the court reviewed the instructions, including Baysinger's proposed voluntary intoxication instruction. The court asked the parties if the burden of production had been met to give an instruction on voluntary intoxication as a defense. The State argued in the negative, noting that there was no testimony or evidence to suggest that Baysinger's alcohol consumption had such an effect on him that it would negate his specific intent. When the court asked if defense counsel had "anything on that," counsel replied "no." The court agreed with the State and declined to give the instruction.

Generally, a party's failure to contemporaneously object in the district court waives that issue and precludes appellate review. *Green*, 119 Nev. at 545, 80 P.3d at 95. However, a challenge to the district court's failure to offer a proposed jury instruction may be properly preserved if the appellant prepared and offered the proposed instruction to the court. *State v. Fouquette*, 67 Nev. 505, 524, 221 P.2d 404, 414 (1950) (determining that appellant failed to preserve the issue that the jury was not instructed to disregard testimony because "if he believed that the jury should have been so instructed, it was his right and his duty to have prepared such an instruction and asked the court to give it"); *see also Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (concluding that appellant failed to preserve issue for appeal because he did not object or offer any additional or alternative instructions).

In this case, when the district court asked if Baysinger had anything to add on his proposed voluntary intoxication instruction in

response to the State, Baysinger affirmatively declined to offer any argument and thereafter did not object. Baysinger's proposed instruction itself also did not contain any citations or argument. Under these circumstances, Baysinger arguably consented to the error that he now challenges on appeal. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (holding that appellant's consent to the hearing below prevents him from complaining on appeal that the hearing was error).

Nevertheless, we need not decide whether Baysinger properly preserved this issue because we find that Baysinger was not entitled to receive a voluntary intoxication instruction and that any error in failing to give that instruction would have been harmless beyond a reasonable doubt. As noted above, "[i]n order for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060; *see also* NRS 193.220. Here, the district court correctly found that Baysinger did not show that the resultant effect of the alcohol or his intoxication precluded him from forming specific intent.

Baysinger testified that he was "buzzed," although he "didn't feel like [he] was really intoxicated" when he went to the bar. He further testified that he was "confused" and that he "was almost like more being in a dream state, how your dream jumps around." Dr. Zuchowski also provided testimony about Baysinger's intoxication. He testified, after reviewing the surveillance video, that Baysinger was able to walk and stay upright, intentionally returned to the bar, targeted Dudding (specifically, Dudding's

phone and then Dudding himself), was walking around deliberately, and appeared to issue commands to Morreira. From this, Dr. Zuchowski concluded that Baysinger did not appear "so grossly intoxicated" that he was unable to form the specific intent required. Lastly, both Dudding and Bennett testified respectively that Baysinger did not appear to be intoxicated before and after the attack.

Although Baysinger testified that he was "confused" and in a dream-like state, he never attributed this mental state to alcohol consumption or any particular cause. *Id.* In addition, the court noted Dr. Zuchowski's testimony that Baysinger was not so intoxicated that he lacked the ability to form specific intent. Therefore, the district court did not err in declining to instruct the jury on voluntary intoxication.

Further, any error in failing to give an advisory instruction on voluntary intoxication was harmless beyond a reasonable doubt. As set forth above, the record contained ample evidence to support Baysinger's convictions for attempted murder with the use of a deadly weapon and burglary during which a deadly weapon is obtained. Baysinger was not precluded from arguing in his closing arguments that his alcohol consumption prevented him from forming specific intent. Indeed, Baysinger argued that a myriad of causes, including alcohol consumption, lack of sleep, and anxiety, all prevented him from forming specific intent. Because we find, under the facts of this case, that the district court's refusal to give a voluntary intoxication instruction was harmless beyond a reasonable doubt, Baysinger is not entitled to relief on this claim.

Dr. Zuchowski's expert testimony was proper

Baysinger next argues on appeal that Dr. Zuchowski improperly invaded the jury's province by opining on "the ultimate question of any element of a charged offense," namely that "Baysinger had the ability

to form the intent to kill that evening." In response, the State argues that Dr. Zuchowski's testimony as to Baysinger's *ability* to form specific intent was proper because the legal conclusion—whether Baysinger actually formed specific intent—was left to the jury. As Baysinger concedes, this claim is also reviewed for plain error because trial counsel did not object.

Baysinger relies primarily on *Winiarz v. State*, 104 Nev. 43, 51, 752 P.2d 761, 766 (1988), to argue that Dr. Zuchowski improperly testified as to Baysinger's mental state. *Winiarz* held it was error for a State expert to testify that the defendant was guilty of killing her husband "in a premeditated fashion," because this comment on the defendant's guilt and mental state improperly usurped the jury's function. *Id.* However, as correctly noted by the State, Baysinger's reliance on this language from *Winiarz* was expressly disavowed by the Nevada Supreme Court in *Pundyk v. State*, 136 Nev. 373, 467 P.3d 605 (2020). As the supreme court explained, "[a]ny subsequent decisions that relied solely on *Winiarz* as standing for the proposition that any expert witness testimony regarding the mental state of the defendant is prohibited because it embraces an ultimate issue do not comport with NRS 50.295, and we disavow their application of *Winiarz*." *Id.* at 376-77, 467 P.3d at 608 (footnote omitted).

In addition, *Pundyk* also overruled *Estes v. State*, 122 Nev. 1123, 146 P.3d 1114 (2006). In *Estes*, the supreme court held the State's psychological expert improperly testified that the defendant's behavior "seemed deliberate and thoughtful." *Pundyk*, 136 Nev. at 377 n.3, 467 P.3d at 608 n.3 (quoting *Estes*, 122 Nev. at 1130, 146 P.3d at 1119). *Pundyk* expressly overruled *Estes* because "the expert did not offer an opinion as to guilt or innocence or characterize the defendant as a murderer." *Id.*

In this case, Dr. Zuchowski testified that Baysinger had the ability to form specific intent, but he did not offer an opinion on Baysinger's guilt or innocence or improperly characterize Baysinger's conduct. *Id.* It was ultimately left to the jury to determine whether or not Baysinger actually possessed the specific intent to kill or burglarize. Therefore, we conclude that Baysinger cannot establish error, let alone plain error, with the admission of Dr. Zuchowski's testimony.

The State did not commit prosecutorial misconduct during its rebuttal closing argument

Baysinger contends the State committed prosecutorial misconduct by making two inappropriate comments during its rebuttal closing argument. First, Baysinger argues the State improperly shifted the burden of proof when it stated that "the only evidence that you heard from Dr. Zuchowski was that he had the ability to form that intent. That's it. *No other doctor testified* and said he didn't. That's it." (Emphasis added.) Second, Baysinger claims the State improperly referred to the jury as "the conscience of the community."

When analyzing claims of prosecutorial misconduct, the appellate court engages in a two-step analysis. "First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (footnote omitted). Prosecutorial misconduct may also be of a constitutional dimension if the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted).

Because Baysinger failed to object to either of the prosecutor's statements, his claims are reviewed for plain error. Appellate courts "will

consider prosecutorial misconduct under plain error review, if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." *Rose v. State*, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007) (internal quotation marks omitted).

The State's comment that "[n]o other doctor testified" about Baysinger's ability to form specific intent is a true statement of the evidence presented at trial. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (holding that a "prosecutor may argue inferences from the evidence and offer conclusions on contested issues" (internal quotation marks omitted)). The State's comment accurately referenced Dr. Zuchowski's testimony about Baysinger's ability to form specific intent. Therefore, although an unnecessary comment, we conclude that the comment was a statement of fact supported by the evidence and did not improperly shift the burden of proof.

Baysinger also argues the State committed misconduct when, after Baysinger conceded guilt on Count 3 (battery with the use of a deadly weapon resulting in substantial bodily harm), the State in rebuttal "argued that Count 3 would not be enough for Mr. Baysinger to pay for his actions that night." This comment, Baysinger contends, improperly referred to the jury as the "conscience of the community."

During Baysinger's closing argument, defense counsel stated the following:

> And one of the things you might wonder is, well, why in heaven's name did the defense get up and say he's guilty of Count 3 [battery with a deadly weapon resulting in substantial bodily harm]? Maybe this was a trick to get you to not find him guilty of Count 1 or Count 2 because there's a

> dramatic difference in the sentence he might receive.
>
> Number one, you've been instructed not to consider sentencing. But we will go out and explain – at least make a statement there are not dramatic differences in the sentencing outcomes for a conviction of Count 1 [attempted murder] as opposed to a conviction of Count 3.
>
> Mr. Baysinger wants, understands, that he committed Count 3. We told you that in the opening statement. He told you that on the witness stand.

In rebuttal, the State asked the jury, "[i]s the fact that Mr. Baysinger is devastated about what he did and is the fact that he's willing to take responsibility for at least Count 3, is – is that enough?"

On its face, the State's comment was not a request for the jury to act as the "conscience of the community." Rather, it was a direct response to Baysinger's own closing argument. Because "[t]he prosecutor's remarks were a reasonable response to [defense counsel's] challenge," the prosecutor's statements were not misconduct. *Evans v. State*, 117 Nev. 609, 630, 28 P.3d 498, 513 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015); *see also Pascua v. State*, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006) (finding that the defendant was not deprived of a fair trial when "[t]he prosecutor's comments during closing arguments were rebuttal to [the defendant's] closing argument"). Therefore, we conclude that Baysinger fails to establish plain error with respect to his prosecutorial misconduct claims.

The district court did not abuse its discretion at sentencing

Baysinger argues that the district court abused its discretion at sentencing by imposing an "excessive, offensive" sentence in violation of the Eighth Amendment prohibition against cruel and unusual punishment. He

further argues that the court "relied upon suspect evidence and unconstitutional argument."

At his sentencing hearing, Baysinger asked for probation given his lack of criminal history, his existing mental health issues, and the multiple mitigation letters submitted on his behalf. He also argued that his actions were aberrant and atypical for his character and that he was deemed a low risk to reoffend. Dudding and the State both requested that Baysinger receive the maximum possible sentence of 22-55 years, given the egregiousness of the attack and its lifelong effect on Dudding. Before pronouncing the sentence, the court analyzed the circumstances of the crime, Baysinger's criminal history, the impact on Dudding, and Baysinger's evidence in mitigation. The court ultimately sentenced Baysinger to an aggregate prison term of 10-25 years and noted that "[i]t would have been higher but for the fact that the defendant had no other violent convictions of violent offenses."

It is well established that "[a] sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979) (citing *Lloyd v. State*, 94 Nev. 167, 170, 576 P.2d 740, 743 (1978)). Here, Baysinger "does not challenge the constitutionality of the statutes and the sentence imposed is well within statutory limits; and therefore, this argument is without merit." *Id.* at 435, 596 P.2d at 222; *see* NRS 193.153, 193.130. Further, we conclude that Baysinger's sentence is not unreasonably disproportionate to the offense.

Although Baysinger claims that the district court relied upon suspect evidence or unconstitutional argument, Baysinger fails to include

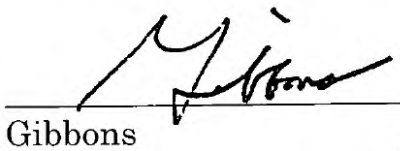
any citations to the record, nor does he identify any erroneous evidence or argument and, therefore, we conclude that he is not entitled to relief. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Cumulative error does not warrant reversal

Lastly, Baysinger argues that cumulative error warrants reversal. However, Baysinger cannot prevail on a cumulative error claim because he has not identified more than one error that could be cumulated. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016) (concluding that "one error cannot cumulate" and justify reversal). Aside from a single unpreserved error—the giving of an implied malice instruction—Baysinger fails to identify any other errors in this case. Therefore, we conclude that cumulative error does not warrant reversal.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Alvin R. Kacin, District Judge
Karla K. Butko
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk