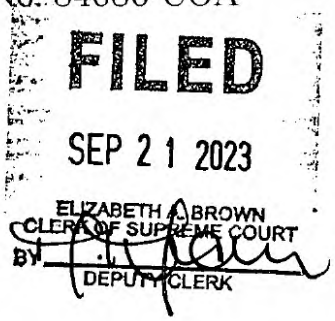
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT VIETH WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84686-COA



ORDER OF AFFIRMANCE

Robert Vieth Wilson appeals from a judgment of conviction, pursuant to a jury verdict, of six counts of unlawful possession [of a controlled substance] not for the purpose of sale, sale of a controlled substance, unlawful extraction of concentrated cannabis, possession of a controlled substance for sale, possession of a controlled substance, and possession of a dangerous drug without a prescription. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Wilson was charged with committing five different trafficking or sales of a controlled substance offenses that involved psilocybin mushrooms and methamphetamine and occurred on or between August 29, 2019, and October 9, 2019. Specifically, Wilson possessed, sold, or delivered the drugs to a confidential informant (CI), for cash. The CI was acting at the behest of law enforcement. Wilson was also charged with committing five different drug offenses that occurred on October 16, 2019, after his home was searched pursuant to a search warrant that was obtained without the CI's knowledge. Law enforcement found controlled substances within Wilson's home, including approximately 2,000 grams of psilocybin mushrooms, concentrated cannabis, Suboxone, and Gabapentin. Wilson's defense was that the CI was an unreliable agent and witness who planted the drugs at his home before the drug sales. Further, he contended that the

CI, who did not know about the impending search, also planted the various drugs and drug paraphernalia found throughout Wilson's home the day before the search warrant was executed.

The CI was a 14-time convicted felon who was facing charges of drug possession, possession of a firearm, and petty theft when he agreed to work with the Douglas County Sherrif's Department to help identify and apprehend drug dealers. The CI hoped to receive leniency in the severity of the sentence he might face for his offenses. *See generally* NRS 453.3405(2) (stating the court may reduce or suspend the sentence of any person convicted of trafficking in a controlled substance if the court finds that the convicted person rendered substantial assistance in the investigation or prosecution of any offense). The CI identified Wilson as a drug dealer and stated that he could buy psilocybin mushrooms and methamphetamine from him. Therefore, Wilson was targeted for controlled buy/sell transactions.

Before each controlled buy, the CI and his vehicle were searched for controlled substances, and he was given cash to make the buys. He was also outfitted with a wire that allowed for oral and/or video transmission and recording of his activities when he was out of the sight of law enforcement. The CI went to Wilson's home four separate times with these procedures in place. Each time, he quickly returned with the drugs and no money. Law enforcement monitored him during the transactions and investigators or deputies were able to identify Wilson each time as the person the CI met with by his voice, his appearance, or both. There was very little conversation recorded during the buy/sell transactions.

As mentioned, Wilson's defense was that the CI set him up by obtaining the illicit drugs himself, hiding them at Wilson's residence, and then unobtrusively recovering them during the scheduled drug transactions

with Wilson at the house. Wilson also argued that the CI disposed of the cash that was to be used for the purchases and relinquished the drugs he planted at Wilson's residence to law enforcement immediately thereafter. During a sale in a Walmart parking lot, which was audio and video recorded and partially observed in-person by a sheriff's sergeant, Wilson was heard on the wire referring to a box. The CI went straight from the Walmart parking lot to a nearby prearranged location to meet with law enforcement where he relinquished a box that contained approximately 27 grams of methamphetamine.

A week later, law enforcement obtained a search warrant without the knowledge of the CI. Deputies and investigators searched Wilson's home and found numerous controlled substances, primarily 2,000 grams of psilocybin mushrooms worth approximately $15,000, concentrated cannabis, and drug paraphernalia throughout the home, including vials that matched the vials used in the prior methamphetamine sales, and packaging matching that which was used in the psilocybin mushroom sales. Law enforcement also searched Wilson's safe and found drugs and a large amount of United States currency, none of which was the controlled buy money provided to the CI.

Because Wilson's defense was that the CI surreptitiously planted all the drugs on these six different occasions and he was an unreliable agent and witness, attacking the CI's credibility was the primary strategy to be employed at trial. The State had named the CI as a witness and obtained an order to produce him at trial. Prior to trial, Wilson, through his counsel and a private investigator, met with the CI in prison for more than an hour to question him, but did not ask him about the content of his forthcoming testimony. Wilson met a second time with the CI again before the trial as well. Wilson learned on both occasions that the CI did not want

to testify, and even the CI's attorney, who was present at the second visit, just shrugged when asked by Wilson if the CI was going to testify.

A five-day jury trial began in October 2021. During his opening statement, Wilson outlined his defense theory, namely, that the CI planted the drugs on Wilson's property, pocketed the money from law enforcement, and then provided the drugs to law enforcement, framing Wilson. Included was a large photographic display of the CI. The initial evidence at trial from the State consisted primarily of the audio and video recordings of the drug sales and law enforcement testimony explaining the same. All of this evidence was admitted without objection by Wilson. During cross-examination of the law enforcement officers, Wilson had them elaborate on the criminal background of the CI and the reason he was assisting them to obtain leniency for the pending charges. Further, the officers testified that the CI was paid money and given other financial benefits for his undercover work. Additionally, the officers testified that the CI committed crimes while assisting law enforcement including using illegal drugs and driving a sheriff's vehicle without a driver's license.

Thereafter, the State called the CI to testify in the State's case-in-chief. Once on the stand while in front of the jury, the CI refused to testify while in front of the jury. He repeatedly stated that he would not like to testify even when directed by the district court to answer. The only testimony he gave was that he knew Wilson in 2019. After providing this information, he again refused to answer any questions, and the jury was excused. The CI was allowed to consult with his attorney. The court then indicated that the trial would continue with the State calling other witnesses, and at an appropriate time, outside of the presence of the jury, the court would hear from the CI and his counsel. The State then called witnesses regarding the recovery and analysis of the contraband. Later that

day, after consulting with his attorney outside the presence of the jury, the CI continued to refuse to testify even though his attorney advised him of the possible penalties for contempt. The CI asserted it was best for his and his family's safety if he did not testify. The district court then found him in contempt of court. The CI continued to refuse to testify.

Subsequently, Wilson moved for a mistrial, arguing that all the evidence that had been introduced thus far hinged on the CI, and that Wilson was now unable to exercise his right to confront the CI. The district court recessed for the evening and denied the motion the following morning. The court issued a detailed written order explaining why a mistrial would be inappropriate, finding that Wilson's right of confrontation was not violated, and that Wilson knew about the CI's reluctance to testify before trial and did not attempt to compel his appearance. Further, the court reasoned that the CI's unavailability was a circumstance that could happen in any trial. The court also noted that the State was not required to call the CI as a witness, its actions had nothing to do with the CI's refusal to testify, and it did not know with certainty that the CI would refuse to testify. Finally, the district court determined that the right of confrontation never attached as to the CI's testimony from the very limited appearance the CI made in front of the jury.

During the defense's case, Wilson called two witnesses who testified that the CI was a regular visitor to Wilson's home in 2019 and that the CI was a drug user and seller. One of the witnesses testified that the CI would often appear erratic, and that the CI was at Wilson's home alone the day before the search warrant was executed. One of the witnesses also corroborated that Wilson delivered a package to the CI in the Walmart parking lot. Further, the witness testified that Wilson had conversed with her about psilocybin mushrooms. To minimize any prejudice for the CI's

refusal to testify, the district court gave an adverse inference jury instruction which allowed Wilson to argue that the jury may draw inferences against the State because of the CI's refusal to testify. The State was prohibited from arguing any positive inferences to the jury. In closing arguments, Wilson characterized the CI as a criminal, and argued that nothing the CI did was reliable, such that he must have planted the drugs to set up Wilson for his own benefit and the State did not prove Wilson guilty beyond a reasonable doubt. The jury found Wilson guilty of all the drug-related offenses.

On appeal, Wilson argues that the district court should have declared a mistrial because the State intentionally put the CI on the witness stand when it knew he would not testify. Wilson also argues that the district court abused its discretion by admitting the audio and video recordings because they contained hearsay, preventing him from confronting and cross-examining the CI about the same after he refused to testify, and violating his due process rights. Wilson also contends that the State presented insufficient evidence to convict him beyond a reasonable doubt,[1] the State and one of its witnesses improperly vouched for the CI,[2] and cumulative error requires the reversal of his conviction.[3] We disagree.

Wilson does not demonstrate a violation of the Confrontation Clause

Wilson argues that his right to confront the CI was violated. However, Wilson's right of confrontation never attached since he has not

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[1]Having considered this argument, we reject it as unpersuasive. *See Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975) ("[I]t is the function of the jury, not the appellate court, to weigh the evidence.").

[2]Having considered this argument, we reject it as unpersuasive.

[3]We conclude that Wilson has not demonstrated cumulative error.

demonstrated that the evidence at issue was hearsay let alone testimonial hearsay, and the CI provided virtually no testimony for the State due to his refusal to testify. Thus, Wilson's right of confrontation never attached. Further, even if it did attach, any alleged error was harmless.

Forfeiture

Wilson claims hearsay statements were improperly admitted, but he acknowledges he did not object below. *See* NRS 47.040(1)(a). Additionally, he never cogently argues the hearsay rule because he does not identify the alleged individual hearsay statements nor why the statements were offered for the truth of the matters asserted. Further, he does not argue that the statements were inadmissible under the plain error rule. As a result of these failures, Wilson has forfeited the hearsay claim. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018). Further, even if plain error review were applied, Wilson does not demonstrate or even argue two of the three elements to establish plain error. *See id.* at 50, 412 P.3d at 48 (stating that an appellant must show there was an error, the error was plain or clear from a casual inspection of the record, and the error affected the appellant's substantial rights). Therefore, Wilson's claim regarding the Confrontation Clause cannot be reached.

Hearsay

Even if these fatal procedural defects are overlooked, the statements Wilson now vaguely challenges for the first time on appeal are not clearly hearsay. Hearsay is "a statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. However, "a party's statement offered to provide context to another person's statement, rather than for its own truth, is not hearsay." *Carroll v. State*, 132 Nev. 269, 276, 371 P.3d 1023, 1028 (2016). Additionally, a statement is by definition not hearsay if it was made by the party and is offered against that party at trial.

NRS 51.035(3)(a). Therefore, none of Wilson's statements heard on the recordings are hearsay.

Furthermore, as the State argues and Wilson does not rebut, the CI's statements are also not hearsay because they were intended to provide context for the drug buys and Wilson's conduct. *See Carroll*, 132 Nev. at 276, 371 P.3d at 1028-29 (holding that the district court properly admitted statements made on a wire recording as they provided context). Further, as the district court specifically found in its order denying Wilson's motion for a mistrial, the statements were not hearsay because they were not offered for the truth of the matter asserted. Accordingly, Wilson has not established that the statements were hearsay and were inadmissible.

Plain error review

Wilson nevertheless argues that the Sixth Amendment Confrontation Clause was violated. The Confrontation Clause bars the introduction of *testimonial hearsay* unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 42 (2004). However, if the evidence is not hearsay, *Crawford* does not apply. *See Davis v. Washington*, 547 U.S. 813, 823 (2006) (stating that the Confrontation Clause only applies to testimonial hearsay). Normally, an appellate court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004). Because Wilson did not object to the admissibility of any of the CI's wired conversations during the controlled buys with Wilson, and no hearing was held to determine the purpose of the statements made during the drug transactions, the district court did not have the opportunity to contemporaneously determine admissibility, and therefore, no error has been shown.

As previously explained, plain error review can be applied if the argument is not forfeited. Here, because the record is undeveloped, we cannot determine for the first time on appeal from a casual inspection of the record that these statements were in fact hearsay, or if they were hearsay, that they were testimonial in nature. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48; *see also Young v. State*, 139 Nev., Adv. Op. 20, 534 P.3d 158, 171 (Ct. App. 2023) (recognizing that where appellant failed to timely object to hearsay, "we cannot determine in the first instance whether [it] was offered for the truth of the matter asserted, if it was nonhearsay or a hearsay exception may have applied. And we cannot say the district court plainly erred in admitting it."); *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004) (recognizing that the admission of statements made by a confidential informant do not violate the Confrontation Clause when their sole purpose is to serve as background information to explain why a government official made investigatory decisions).

The State argues that the statements were not offered for the truth of the matters asserted and that conclusion was also reached by the district court in its order denying the motion for a mistrial. Wilson does not explain how the statements were offered for the truth of the matters asserted except to broadly argue that the State needed them for the truth. Yet Wilson never identifies which statements are challenged as hearsay and what specific statements were in fact offered for the truth of the matters asserted, nor does he demonstrate how the admission of any individual statement affected his substantial rights. On the contrary, Wilson argues that the State did not have sufficient evidence to convict because the recorded statements did not demonstrate that Wilson participated in an illegal drug transaction.

Therefore, Wilson has not demonstrated all three elements of plain error. Under these circumstances, we cannot conclude that the right of confrontation ever attached to the recorded statements introduced at trial and the foundation for Wilson's argument fails.

The CI's limited appearance at trial did not result in a reversible constitutional violation of the Confrontation Clause

Turning now to the extremely limited appearance that the CI made during trial towards the end of the State's case-in-chief, an examination of the one substantive statement he made reveals that even if there was any error, it was harmless, as the State argues because the jury already received in evidence all of the recorded statements of both the CI and Wilson during the controlled buys by the time the CI testified at trial. Wilson only argues in his reply brief that the CI gave critical testimony that required cross-examination. He never explains how it was critical testimony and how its admission was reversible error, and therefore, he has not made a cogent argument. *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).

However, assuming that the Confrontation Clause attached, it is undisputed that Wilson did not have the opportunity to cross-examine the CI since the CI then refused to testify and was held in contempt for his refusal. When reviewing such a violation, we ask "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error" when evaluating the harmlessness of a constitutional error. *Tavares v. State*, 117 Nev. 725, 732 & n.14, 30 P.3d 1128, 1132 & n.14 (2001) (footnote and internal quotation marks omitted) (citing *Chapman v. California*, 386 U.S. 18 (1967)), *modified in part on other grounds by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008).

The CI only made one substantive statement before he refused to continue testifying. The CI's statement was that he knew Wilson in 2019. This same evidence was provided by Wilson when the two witnesses he called in the defendant's case-in-chief testified that the CI was frequently at Wilson's residence in 2019. In fact, Wilson originally highlighted this evidence in his opening statement and cross-examinations of the State's witnesses and then again in closing argument—that the CI had been to his home about 30 to 40 times in 2019. Therefore, the CI's admission that he knew Wilson in 2019 bolstered and was not harmful to Wilson's defense that the CI had the opportunity to set him up by planting drugs. Further, even without the statement, the State presented both direct evidence that Wilson was identified by voice and appearance and circumstantial evidence that Wilson participated in five drug transactions and had extensive amounts of drugs and drug paraphernalia throughout his home when it was searched. *See Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (stating that "circumstantial evidence alone may support a conviction").

Accordingly, based on the totality of the evidence presented at trial, we conclude beyond a reasonable doubt that Wilson would have been found guilty even if this alleged error had not occurred, and the harmless error doctrine prevents reversal under these facts.[4]

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[4]We decline Wilson's invitation to overrule precedent and declare a confrontation violation to be structural error. *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." (quotation marks and internal punctuation omitted)).

The district court did not abuse its discretion in denying a mistrial

Wilson argues, his motion for a mistrial should have been granted and a new trial should be prohibited. We conclude that the district court did not abuse its discretion in denying the motion for a mistrial. A district court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 346, 213 P.3d 476, 489 (2009). The district court abuses its discretion when it makes an "arbitrary or capricious" decision or "exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2009). Here, the district court thoroughly explained its reasoning in its written order, including that the State did not know if the CI would actually refuse to testify once he was on the witness stand. Nevertheless, Wilson's argument is that the State intentionally put the CI on the stand knowing he would refuse to testify. Therefore, Wilson argues, the mistrial should have been granted and a new trial is prohibited. But, the record belies this claim.

The record on appeal supports the district court's denial of Wilson's motion for mistrial, and the court did not abuse its discretion. The jury had already received, without objection, the audio and video evidence of the controlled buys between Wilson and the CI as well as law enforcement testimony describing the drug transactions. The CI's later refusal to testify was a known possibility to both Wilson and the State prior to trial and, though unfortunate, is an event that can occur in any trial, and the CI's refusal to testify at trial was not caused by the State. Wilson has failed to show that he was denied a fair trial or due process. Moreover, the district court's adverse inference instruction in favor of Wilson and against the

State minimized any possible prejudice and supports that the district court did not abuse its discretion in denying a mistrial.[5] Accordingly,

We ORDER the judgment of conviction AFFIRMED.[6]

_____, C.J.
Gibbons

_____, J.
Westbrook

_____, Sr. J.
Silver

cc: Hon. Thomas W. Gregory, District Judge
Karla K. Butko
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

[5]Insofar as Wilson raises other arguments that are not specifically addressed herein, they need not be reached given the disposition of this appeal.

[6]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.