IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN DAVID CARTY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85494-COA

ORDER OF AFFIRMANCE

Brian David Carty appeals from a judgment of conviction, pursuant to a jury verdict, of leaving the scene of an accident involving personal injury.[1] Eighth Judicial District Court, Clark County; Mark Gibbons, Senior Judge.[2]

On March 30, 2020, law enforcement responded to reports of a life-threatening situation that occurred at 4200 West Charleston Boulevard in Las Vegas at approximately 2:30 p.m. Law enforcement arrived at the scene of a motorcycle crash where the motorcycle driver had suffered severe injuries.[3] Law enforcement located camera surveillance from a business across the street from where the crash occurred and spoke to witnesses who saw a Hummer abruptly pull in front of the motorcycle, causing the motorcycle to crash, and then drive away from the scene. The motorcycle driver, Eric Twitty, sustained brain damage, a collapsed lung, and a lacerated liver. Shortly thereafter, law enforcement received a call from

[1]The Honorable Michael P. Gibbons, Chief Judge, did not participate in the decision of this matter.

[2]We note that the Honorable Carolyn Ellsworth, Senior Judge, presided over the jury trial and sentencing, and that the Honorable Mark Gibbons, Senior Judge, signed the judgment of conviction.

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

Shawn Spencer, a co-owner of Carty's employer, who identified Carty's vehicle and stated that Carty may have been involved in an incident earlier that day. Law enforcement spoke with Carty, and he acknowledged that he was at the scene of the crash and was the driver of a Hummer, but he said that he did not see the motorcycle crash. However, based on law enforcement's investigation, Carty's vehicle was positioned so that the crash was in his "field of view."

Subsequently, Carty was charged with one count of violating NRS 484E.010(1) (duty to stop at the scene of a crash involving death or personal injury). Carty's jury trial began in July 2022. During its opening statement, the State played the video surveillance of the motorcycle crash, which was admitted into evidence without objection. The State called multiple lay witnesses, who were present at the time of the crash, to testify. The witnesses uniformly testified that they observed Carty's Hummer abruptly switch lanes from the center lane into the right lane the motorcycle was driving in, thus causing the motorcycle to crash. The witnesses also testified that they saw the driver of the Hummer drive away from the scene without stopping. Twitty could not remember anything about the crash but testified that he now stuttered and had limited mobility.

The State also called the other co-owner of Carty's employer, Scott Flanigan, to testify about incriminating statements Carty had made on the day of the crash. Flanigan testified that Carty returned from lunch and began pacing back and forth in the hallway. When Flanigan asked Carty what was going on, Carty told him he had been in an "incident" while driving and that, after he went to pull in, a motorcycle "wrecked" behind him. Flanigan testified that Carty appeared "worried" during their conversation and that he believed Carty should have called the police. Flanigan also testified that he and Carty were the only people in the office that day.

Carty indicated that he was going to testify on his own behalf during trial. He acknowledged the district court's warning that he could be questioned about any prior felony conviction for impeachment purposes during cross-examination. The State indicated it would cross-examine Carty about his driver's license being suspended at the time of the crash. The State explained that, even though driving with a suspended license was only a misdemeanor, it would ask Carty about his suspended license for impeachment purposes because it showed motive for leaving the scene of the crash. When Carty stated his intention to object to that line of questioning, the State noted that Carty had admitted to having a suspended driver's license during a recorded interview with detectives. The district court indicated that because evidence of Carty's suspended driver's license was relevant to his motive for leaving the scene, it was not improper propensity evidence. The district court then asked Carty if this changed his decision as to whether he wanted to testify, to which Carty responded, "[n]o."

Carty testified that he did not know that his vehicle crashed into Twitty's motorcycle and that he did not see the crash in his rear-view mirror. Instead, Carty claimed that he learned about the accident when he got back to work and a co-worker told him about it. He thus testified that he did not knowingly leave the scene of the crash. On direct examination, in response to a question by his own attorney, Carty acknowledged that, at the time of the crash, his driver's license was suspended because of a prior DUI. The jury ultimately returned a guilty verdict. Subsequently, Carty was sentenced to a maximum of 15 years imprisonment with a minimum parole eligibility after 6 years. This appeal followed.

On appeal, Carty argues that the State committed prosecutorial misconduct at trial. Specifically, Carty argues that the State introduced inadmissible and inflammatory evidence, disparaged the defense, engaged in

improper burden shifting, improperly used propensity evidence, and improperly commented on Carty's exercise of his Fifth Amendment right to assert his innocence at the time of sentencing. Carty further argues that the district court erred at sentencing because the court was influenced by Carty's refusal to admit guilt at trial. Conversely, the State denies that it committed prosecutorial misconduct. It further argues that it did not improperly comment on Carty's rights at sentencing and that the district court properly sentenced Carty because his sentence was within the statutory limits. We address Carty's arguments in turn.

Carty has not identified any prosecutorial misconduct that warrants reversal for plain error

When analyzing claims of prosecutorial misconduct, the appellate court engages in a two-step analysis. "First, [the appellate court] 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, 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).

Carty concedes that he did not object below, and therefore his claim on appeal is forfeited unless Carty can demonstrate plain error. Before this court will correct a forfeited error, an appellant must demonstrate that (1) there was an "error"; (2) the error was "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." *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted). Additionally,

"we 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 alleged emotional appeal to the jury

Carty alleges the State committed misconduct when the prosecutor asked lay witnesses if they would have stayed at the scene of the crash. He argues that this was an inappropriate, inflammatory attempt to appeal to the sympathies of the jury that was irrelevant to the crime charged. For the same reasons, Carty contends that the State committed misconduct by asking Flanigan what he thought Carty should have done after the accident. Carty argues that the State used the witnesses' answers to these questions to suggest that the people who stopped "did the right thing" and were "reasonable" people from the community.[4]

The Nevada Supreme Court has previously considered whether a prosecutor's alleged emotional appeal to the jury was prejudicial to a defendant, thereby denying the defendant the right to a fair trial. *See Mears v. State*, 83 Nev. 3, 12, 422 P.2d 230, 235 (1967) (holding that a prosecutor's emotional appeal to consider the victim's family was improper); *see also McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) (holding the prosecutor's closing argument "that the jurors should place themselves in the position of the victim" was "exceedingly improper").

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[4]To the extent Carty argues that this issue was compounded by the State arguing the public policy reasons behind NRS 484E.010, he has failed to demonstrate plain error requiring reversal. *See Rose*, 123 Nev. at 210, 163 P.3d at 419 (holding that while a prosecutor's appeal to the jury's sympathy was improper, it did not constitute plain error).

The State's question to lay witnesses about what they would have or should have done in Carty's circumstances was arguably improper. It went beyond explaining how the crash occurred and the witnesses, who observed the accident from different angles and perspectives than Carty, could only have speculated as to what they would have done in Carty's position. Further, the lay witnesses' speculative testimony that they would have remained at the scene under the circumstances does not bear on whether *Carty* knew or should have known he was in an accident when he left the scene of the crash. *See Hamrick v. State*, No. 74787, 2019 WL 2339543, at *2 (Nev. May 31, 2019) (Order of Affirmance) (concluding that the district court abused its discretion when it did not strike the speculative response of a witness as to whether he thought the defendant knew of the search for the victim, but deeming the error harmless).

Nevertheless, we see no basis for reversal as to this issue given the strong evidence presented at trial, which included the testimony of multiple witnesses, video evidence that the driver of the Hummer caused the motorcycle to crash, and that the driver left the scene. Carty's own testimony, along with his incriminating statements to his employer on the day of the crash, supports a finding that he knew or should have known of the accident when he left the scene. Therefore, we conclude that Carty has failed to demonstrate that this error requires the reversal of his conviction.[5] *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

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[5]We are also not persuaded that reversal is warranted based on Carty's contention that the State improperly bolstered its witnesses' testimony by stating, in its closing argument, that the lay witnesses were "reasonable people." *See Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002) (noting that the State is allowed "reasonable latitude" to argue concerning the credibility of witnesses).

Disparagement of the defense

Carty asserts that the State improperly disparaged the defense by stating during its closing argument that Carty could not be believed. Carty specifically challenges the State's remarks that "it's no surprise what you heard from the defense . . . . Blame the victim."; "here he goes with, as you could tell from his defense, right, I had no idea."; and "to believe the defendant didn't know about this that day you'd have to believe he's the luckiest person in the world, that he was driving a Hummer, he didn't know someone crashed right next to him."

At the outset, we note that the State is permitted to argue that a defense theory is not credible. *See Williams v. State*, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997) (determining that it is not improper for the State to respond to an argument set forth by the defense), *overruled on other grounds by Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). Moreover, the State is permitted to make an inference from the evidence presented at trial. *See Taylor v. State*, 132 Nev. 309, 324, 371 P.3d 1036, 1046 (2016) (stating that a prosecutor's comments expressing opinions or beliefs are not improper when they are reasonable conclusions or fair comments based on the presented evidence); *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) ("The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."); *cf. Butler v. State*, 120 Nev. 879, 898-900, 102 P.3d 71, 84-86 (2004) (concluding that statements portraying the defense's presentation of evidence and defense tactics as a dirty technique were improper). Here, the State was permitted to respond to the defense theory that Carty did not know he caused the crash. And prosecutors may also respond to issues and arguments raised by defense counsel. *Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997), *receded from on other grounds by*

Byford, 116 Nev. at 235, 994 P.2d at 713. We note that Carty testified that the crash was not his own fault. Moreover, in his closing argument, Carty argued that, although he did not "want to" blame Twitty for causing the accident, Twitty was nonetheless partially responsible. However, even if the remarks were disparaging, Carty has failed to demonstrate that he suffered actual prejudice or a miscarriage of justice, and therefore he is not entitled to relief under plain error review. *See Green*, 119 Nev. at 545, 80 P.3d at 95 ("[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.").

Improper burden shifting

Carty next argues that the State improperly shifted the burden of proof to the defense during its closing rebuttal argument. A prosecutor improperly shifts the burden of proof to the defendant where the prosecutor comments on the defense's failure to call witnesses or produce evidence. *See Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996). However, a prosecutor does not improperly shift the burden of proof by commenting on the defense's failure to substantiate its theories with supporting evidence. *Evans v. State*, 117 Nev. 609, 631, 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). Likewise, in *Gould v. State*, the supreme court determined that the State did not impermissibly shift the burden of proof by arguing that the defense failed to call a witness because the State's argument responded to an assertion made in the defense's opening statement about a witness the defense intended to call. No. 83429, 2022 WL 6838327, at *5 (Nev. Oct. 11, 2022) (Order of Affirmance).

Here, the State noted in closing that the defense's closing argument did not discuss the status of the victim or whether a crash occurred. However, the State also argued that the evidence demonstrated

that Carty caused the motorcycle to crash and then fled from the scene. The State replayed the video evidence of the Hummer causing the motorcycle to crash and discussed witness testimony stating that Carty caused the crash and drove away. The record also supported that, based on law enforcement's investigation, Carty's vehicle was positioned so that the crash was in his "field of view." And the record further supports that Carty had knowledge of the accident when he spoke to his employer. Thus, even if the State's remarks may have suggested that Carty failed to address certain issues that he was not required to address, this did not amount to improper burden shifting as the statements were made for the purpose of arguing that the defense theory was unpersuasive in light of the evidence presented at trial. Additionally, the jury was properly instructed that the State had the burden to prove beyond a reasonable doubt every element of the crime charged. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (noting that juries are presumed to follow instructions). Thus, based on our plain error review, we are not persuaded that reversal on this ground is warranted.

Propensity evidence

Carty argues that the State impermissibly used his suspended driver's license as propensity evidence when asking him on cross-examination, "[y]ou're so cautious, you're driving around on a suspended license; correct?"[6] Evidence of other crimes, wrongs, or acts is inadmissible to prove propensity, but may be admissible for other purposes, including "as proof of motive." NRS 48.045(2). Appellate courts review the district court's decision to admit such evidence for an abuse of discretion "and will not

[6]Carty does not argue on appeal that the district court erred by failing to give a *Tavares* instruction. *Cf. Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

reverse except on a showing that the decision is manifestly incorrect." *Flowers v. State*, 136 Nev. 1, 5, 456 P.3d 1037, 1043 (2020) (internal quotation marks omitted).

Here, we note that Carty voluntarily took the stand in his defense knowing that the State would question him about his suspended driver's license. Carty testified, on direct examination by his counsel, that he had a suspended driver's license because of a prior DUI. Thus, the evidence had already been admitted when the State cross-examined Carty. Additionally, the State's cross-examination of Carty with respect to his suspended driver's license was relevant to establish a motive for why Carty did not remain at the scene of the crash as required. *See* NRS 48.045(2). Further, Carty opened the door to this line of questioning when he testified that he was driving cautiously on the day in question. *See* 81 Am. Jur. 2d *Witnesses* § 864 (2015) ("While it is improper to use prior convictions as substantive evidence of guilt or a defendant's propensity to commit crimes, it is permissible to use them to attack the defendant's truthfulness and credibility in his or her testimony."). Thus, we conclude Carty's argument that the State used the evidence of his suspended license as improper propensity evidence requiring reversal is unavailing.

The district court did not abuse its discretion in sentencing Carty

Carty argues that the district court violated his Fifth Amendment right against self-incrimination by sentencing him harshly for declining to admit guilt at trial. The district court generally has wide discretion in sentencing matters, and "absent an abuse of [that] discretion, the district court's determination will not be disturbed on appeal." *Brake v. State*, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997) (quoting *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)). However, the imposition of a harsher sentence due to a defendant's refusal to admit guilt violates a

defendant's Fifth Amendment right and constitutes an abuse of discretion. *Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245 (1997).

Here again, Carty did not object to the district court's remarks during sentencing[7] and, therefore, we engage in plain error review. *See Green*, 119 Nev. at 545, 80 P.3d at 95. Carty's argument that he received a harsher sentence because he did not admit guilt at trial is without merit. First, Carty's sentence was within the parameters provided by NRS 484E.010(3), which outlines a sentencing range of 2-20 years in prison. Second, the district court did not impose the sentence based on Carty's refusal to admit his guilt at trial. *Cf. Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981) (reversing a sentence where the district court expressly stated its sole reason for imposing a harsher sentence was the defendant's exercise of his Fifth Amendment rights). Moreover, the record belies Carty's claim the district court relied on his failure to admit guilt when imposing his sentence.[8] Although the district court noted that Carty denied seeing and causing the accident, the district court specifically stated this in connection with the fact that Carty's presentence investigation report revealed that he was "under the influence of meth at the time of the accident." The court also

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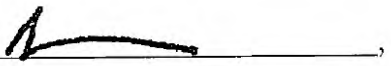
[7]We note that the district court's specific comments at the sentencing hearing were "[s]o, of course, . . . not only did you deny ever . . . initially causing the accident, now I see in the [presentence investigation report] you say you were under the influence of meth at the time of the accident."

[8]Carty contends that the State improperly commented on his refusal to admit guilt at sentencing. We agree that the State's comments were improper. Nevertheless, Carty failed to object, and the State's comments did not render the sentencing unfair or harsh because the district court neither imposed the maximum sentence under the statute nor relied on Carty's failure to admit guilt during sentencing. *Cf. Brake*, 113 Nev. at 585, 939 P.2d at 1033.

noted the victim's statements during sentencing that he had contemplated committing suicide due to the injuries he sustained from the crash. Therefore, it is not clear from a plain review of the record that the court relied on Carty's refusal to admit guilt to impose a harsher sentence in light of the other reasons explained by the district court when imposing Carty's sentence. Therefore, we conclude that Carty fails to demonstrate that the district court abused its discretion at sentencing.[9]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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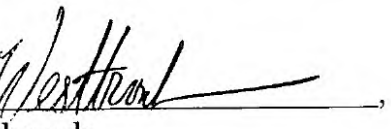

_____, J.
Westbrook

cc: Hon. Mark Gibbons, Senior Judge
Hon. Carolyn Ellsworth, Senior Judge
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[9]Insofar as Carty raises other arguments that are not specifically addressed herein, we have considered the same and conclude that they do not present a basis for relief.