IN THE SUPREME COURT OF THE STATE OF NEVADA

OMAR RUEDA-DENVERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84403

FILED

DEC 01 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, two counts of possession of explosive or incendiary device, and transportation or receipt of explosives for an unlawful purpose with substantial bodily harm. Eighth Judicial District Court, Clark County; Michael Villani, Senior Judge.

Appellant Omar Rueda-Denvers and his codefendant Porfirio Duarte-Herrera were convicted of five felony counts for a bombing that killed one person in a parking garage at the Luxor Hotel & Casino in 2007. In a separate case, Duarte-Herrera was also tried and convicted for another bombing he committed in a Home Depot parking lot some months prior to the Luxor bombing. We affirmed Rueda-Denvers' first conviction on appeal in 2012. *Rueda-Denvers v. State*, No. 55296, 2012 WL 642346 (Nev. Feb. 24, 2012) (Order of Affirmance). However, in 2019, the United States District Court for the District of Nevada overturned the conviction and remanded the case for a new trial. *Rueda-Denvers v. Baker*, 359 F. Supp. 3d 973 (D. Nev. 2019).

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In that retrial, Rueda-Denvers was tried alone, again convicted, and sentenced to serve a prison term of life without the possibility of parole. Now on appeal for the second time, he argues that the district court abused its discretion during the retrial by (1) denying his motion to admit evidence of Duarte-Herrera's prior bomb-related acts and later finding that the State did not open the door to the admission of the precluded evidence, (2) denying his motion to suppress statements made to investigating officers, (3) denying his motion for a mistrial in light of the State's closing arguments, and (4) overruling his objection to testimony by the State's explosives expert regarding damage to the victim's hand. Finally, Rueda-Denvers argues cumulative error requires reversal.

Codefendant's prior bad acts

Duarte-Herrera's prior bad acts were properly excluded under the law-of-the-case doctrine

Rueda-Denvers argues that the district court misapplied the law of the case doctrine. We disagree. The district court did not abuse its discretion in denying Rueda-Denvers' motion to admit evidence of Duarte-Herrera's prior bomb-related acts because the law-of-the-case doctrine bars its admission. "The law of the case doctrine states that the first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Clem v. State*, 119 Nev. 615, 620, 81 P. 3d 521, 525 (2003). More specifically, "Under the law of the case doctrine, '[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" *Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (2007) (alteration in original) (quoting *Wickliffe v. Sunrise Hosp.*,

104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)). The doctrine "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In affirming Rueda-Denvers' first conviction, we did not just affirm the district court's decision to exclude the Duarte-Herrera bad act evidence as improper character evidence,[1] rather, we held that under NRS 48.035(1), the "evidence was *also* properly excluded because its marginal relevance was substantially outweighed by its risk of misleading the jury."[2] *Rueda-Denvers*, No. 55296, 2012 WL 642346, at *1-2 (emphasis added). Our focus was not on "who" was on trial but rather "what" was on trial; we noted that the district court had severed Duarte-Herrera's "Home Depot-related charges because of the lack of connection between the Home Depot and Luxor incidents." *Id.* at *2. We specifically stated that the evidence of Duarte-Herrera's bad acts "would have been inadmissible even at a separate trial." *Id.* at *3. Therefore, we determined that the evidence had minimal relevance and was not admissible under NRS 48.035 during a trial focused solely on the Luxor bombing. *Id.*

Rueda-Denvers may not avoid the law-of-the-case doctrine by arguing this time that the evidence went to a non-propensity purpose. *See*

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[1]*See* NRS 48.045(2) (providing that "[e]vidence of other crimes . . . is not admissible to prove the character of a person in order to show that the person acted in conformity therewith").

[2]*See* NRS 48.035(1) (explaining that "relevant[ ] evidence is not admissible if its probative value is substantially outweighed by," among other things, the risk of confusing the jury).

Hall, 91 Nev. at 316, 535 P.2d at 799. Rueda-Denvers argued in his retrial that the evidence went to Duarte-Herrera's motive. This court specifically declined to consider whether "[Duarte-]Herrera's bomb-related activities should have been admissible for another purpose," such as proof of motive after the first trial, because Rueda-Denvers did not raise the issue in his prior appeal. *Rueda-Denvers*, No. 55296, 2012 WL 642346, at *1 n.4. Thus, Rueda-Denvers' motive argument appears to be an attempt to present "a more detailed and precisely focused argument" regarding the admissibility of Duarte-Herrera's prior bad acts that he "made after reflection upon the previous proceedings." *Hall*, 91 Nev. at 316, 535 P.2d at 799. Therefore, we conclude that the law-of-the-case doctrine applies and the district court correctly excluded Duarte-Herrera's bad act evidence in the retrial.

The district court was within its discretion to exclude Duarte-Herrera's prior bad acts

Even considering Rueda-Denvers' motive argument on the merits, the district court properly exercised its discretion in excluding Duarte-Herrera's prior bad acts. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Only relevant evidence is admissible.[3] NRS 48.025; *see Sterling v. State*, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992). However, relevant evidence is "not admissible if its probative value is substantially outweighed by the danger of unfair

[3]Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015.

prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." NRS 48.045(2). But prior bad act evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* To be an admissible bad act, the district court must determine, outside the presence of the jury, that the moving party established that "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

Rueda-Denvers argues that the district court's refusal to admit Duarte-Herrera's prior bomb-related acts violated the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV. Rueda-Denvers cites *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted), for the proposition that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." But "*Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a valid reason . . . ." *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

As previously noted, the district court did not abuse its discretion in excluding the prior bad act evidence. First, since the "fact that is of consequence" before the jury was whether Rueda-Denvers was aware that Duarte-Herrera had a bomb with him on the night in question, evidence of Duarte-Herrera's prior bad acts involving bombings was not relevant. NRS 48.015. Second, Rueda-Denvers did not make the requisite showing to introduce the evidence for a non-propensity purpose under NRS 48.045(2). *See Bigpond*, 128 Nev. at 117, 270 P.3d at 1250. Because Rueda-Denvers sought to admit evidence to prove Duarte-Herrera's motive under NRS 48.045(2), it was his responsibility to show the acts were relevant, proven by clear and convincing evidence, and that their probative value was not substantially outweighed by the danger of unfair prejudice. *Id.* Here, Rueda-Denvers attempted to argue the evidence went to motive, but the district court rejected his argument after finding "that the requested evidence goes more to propensity evidence and does not make the issue in controversy[,] knowledge of Duarte-Herrera's conduct[,] more or less probable." Thus, we conclude the district court properly exercised its discretion in excluding Duarte-Herrera's bad acts under NRS 48.045(2).

The State did not "open the door" to admitting the prior bad acts

Rueda-Denvers argues that the district court erred by finding that the State did not "open[ ] the door to the facts of the Home Depot bombing" during its direct examination of the State's explosives expert. In doing so, he notes that during the State's examination of the expert, the expert was shown a photo of a kitchen timer and the expert commented that the timer "was later related to a different case" and Rueda-Denvers further points to the State's comment in its opening statement that Rueda-Denvers

told police that Duarte-Herrera "had no motive to hurt [the Luxor bombing victim]."

The collateral fact rule generally prohibits parties from impeaching a witness's "credibility with extrinsic evidence relating to a collateral matter." *McKee v. State,* 112 Nev. 642, 646, 917 P.2d 940, 943 (1996). But, in some cases, false statements on direct examination "open the door to the curative admissibility of specific contradiction evidence." *Jezdik v. State*, 121 Nev. 129, 138, 110 P.3d 1058, 1064 (2005) (internal quotation marks omitted). "[W]hen a party resorts to extrinsic evidence to show a specific contradiction with the adversary's proffered testimony, the evidence should squarely contradict the adverse testimony." *Id.* at 139, 110 P.3d at 1065.

We conclude that the State did not open the door to the admission of Duarte-Herrera's prior bombing. First, the State's use of the photograph of a kitchen timer and the expert's comment did not mention Rueda-Denvers. Moreover, the evidence established that the timer was located during a search of Duarte-Herrera's residence. The district court did not abuse its discretion in declining to admit all evidence regarding the Home Depot bombing because, consistent with this court's approval of such curative measures in other cases, *see, e.g.*, *Jezdik*, 121 Nev. at 138-40, 110 P.3d at 1064-65, it provided Rueda-Denvers with an opportunity to clarify the expert's comment by eliciting testimony that the other case involved only Duarte-Herrera.

Second, the district court properly held that the State did not open the door during its opening statement, particularly because opening statements are not evidence or testimony. *Watters v. State*, 129 Nev. 886, 890, 313 P.3d 243, 247 (2013) ("In a criminal case, '[t]he prosecutor's

opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible.'" (alteration in original) (quoting *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, Standard 3-5.5 (Am. Bar Ass'n 1993))). The State's comment in its opening statement focused on what Rueda-Denvers himself told police about Duarte-Herrera. When speaking with police, Rueda-Denvers attempted to distance himself and Duarte-Herrera from having any reason to injure the victim and the State's reference to Rueda-Denvers' statement did not open the door to Duarte-Herrera's prior bombing activities. Therefore, we conclude that the district court did not abuse its discretion in finding that the State did not open the door to evidence of the Home Depot bombing.

Rueda-Denvers' statements to police

Rueda Denvers' statements to law enforcement were properly excluded under the law-of-the-case doctrine

Rueda-Denvers argues that his statements to investigating officers were not voluntarily given, thus the district court abused its discretion in denying his motion to suppress those statements. However, we conclude that the law-of-the-case doctrine also bars reconsideration of the admissibility of Rueda-Denvers' statements to police as the voluntariness of his statements were addressed by this court in his first appeal, and his current argument is merely "a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *Hall*, 91 Nev. at 316, 535 P.2d at 799. In his first appeal, Rueda-Denvers challenged the admission of his statements because of alleged violations of the Vienna Convention. This court, however,

addressed what appeared to be a related, overall challenge to the voluntariness of his statements to police. *Rueda-Denvers*, No. 55296, 2012 WL 642346, at *4 n.9. Specifically, this court found that "[a]fter reviewing the record, we are confident that both waivers were given voluntarily and knowingly and intelligently." *Id.* (internal quotation marks omitted).

Additionally, during his retrial, Rueda-Denvers conceded that he sought to exclude his statements on different grounds than in the first trial, stating the following:

> [W]e became aware of that once we had a whole trial and we saw the homicide detectives testify at the last trial. I tried to attack the voluntariness of it during the trial. Whereas, when we first brought the motion, we brought it under the *Vienna Convention* . . . .

Similar to the defendant in *Hall*, Rueda-Denvers now attempts to present a more focused attack on the validity of his statement after his other argument was rejected. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99. Thus, we conclude the law of the case bars exclusion of Rueda-Denvers' statements to police.

Rueda-Denvers waived his privilege against self-incrimination

Even on the merits, Rueda-Denvers' statements to investigating officers were admissible. "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning." *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); *see also Miranda v. State*, 384 U.S. 436, 479 (1966); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the privilege against self-incrimination is applicable to states). After *Miranda* warnings are

given, a defendant may still waive their Fifth Amendment rights, but the waiver's validity "must be determined in each case by examining the facts and circumstances of the case such as the background, conduct and experience of the defendant." *Falcon v. State*, 110 Nev. 530, 534, 874 P.2d 772, 775 (1994). An effective waiver of one's Fifth Amendment right against self-incrimination must be knowing and intelligent. *Miranda*, 384 U.S. at 479; *see also Tomarchio v. State*, 99 Nev. 572, 576, 665 P.2d 804, 806-07 (1983). "Further, a confession must be made freely and voluntarily, without compulsion or inducement." *Taylor*, 114 Nev. at 1083, 968 P.2d at 324; *see also Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987).

"When a defendant waives *Miranda* rights and makes a statement, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence." *Dewey v. State*, 123 Nev. 483, 492, 169 P.3d 1149, 1154 (2007). The relevant question in determining voluntariness "is whether the defendant's will was overborne when he confessed." *Passama*, 103 Nev. at 214, 735 P.2d at 323. Several factors must be considered in determining voluntariness, including "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Id.* An individual's understanding of the English language may also be considered. *Gonzales v. State*, 131 Nev. 481, 491-92, 354 P.3d 654, 661 (2015).

The record does not support, nor does Rueda-Denvers allege, that the police interrogation was otherwise prolonged in nature or that the police utilized any form of physical punishment to elicit his statements. *Cf. Passama*, 103 Nev. at 214, 735 P.2d at 323. The length of the first interview

does not appear on the transcript, though it seems to have gone on for two or more hours. The second interview lasted approximately one hour and fifteen minutes.

While Rueda-Denvers claims he did not knowingly and intelligently waive his *Miranda* rights because of his poor understanding of the English language, we conclude that this argument is belied by the record which shows that the interview was conducted in Spanish. *See Gonzales*, 131 Nev. 490-91, 354 P.3d at 660-61. In fact, both of Rueda-Denvers' police interviews indicate on their transcripts that they were conducted in Spanish. One of the detectives conducting both interviews was fluent in Spanish. The other detective did ask some questions in English, but the questions were translated into Spanish by the other detective. Detectives asked him in the first interview if he spoke English and he replied, "[a] little" but only "[i]f you talk to me slowly." At the start of each interview, the officers read Rueda-Denvers his *Miranda* rights, and he signed a separate *Miranda* waiver. The record further demonstrates that Rueda-Denvers understood English and was able to intelligently respond to questions in English. Furthermore, the district court found that, under a totality of the circumstances, Rueda-Denvers' statements were freely, knowingly, and voluntarily given. The district court found that Rueda-Denvers failed to unequivocally state that he wished to cease all questioning, noting that Rueda-Denvers stated at some points that "maybe [he] should stop talking" but nonetheless continued talking and providing responsive answers to the questions asked. Because Rueda-Denvers fails to establish that his "will was overborne" during his police interrogation, *Passama*, 103 Nev. at 214, 735 P.2d at 323, we conclude that the district court did not abuse its discretion by denying Rueda-Denvers' motion to

suppress and finding that he waived his Fifth Amendment right against self-incrimination.

The district court did not abuse its discretion by denying Rueda-Denvers' motion for a mistrial based on the State's closing argument

Rueda-Denvers argues that, in closing argument, the State used PowerPoint slides showing corresponding numbers on batteries, and doing so amounted to the presentation of false evidence, such that the district court should have declared a mistrial. "The trial court has discretion to determine whether a mistrial is warranted, and" this court will not overturn the district court's decision "absent an abuse of discretion." *Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* "If the prosecution uses [false evidence] which it knew or should have known was [false], a conviction obtained by such testimony is 'fundamentally unfair' and 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jimenez v. State*, 112 Nev. 610, 622, 918 P.2d 687, 694 (1996) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)).

We conclude that the district court did not abuse its discretion by denying Rueda-Denvers' motion for a mistrial because the State did not present false evidence during its closing argument. *See Jimenez*, 112 Nev. at 622, 918 P.2d at 694. The evidence presented at trial suggested that an Eveready nine-volt battery was used in the bomb and detectives recovered numerous Eveready nine-volt batteries from a shed used by Rueda-Denvers

at his place of work. The bomb battery and many of the shed batteries all had the number "0807" on their exteriors. The State presented numerous PowerPoint slides in its closing argument that corresponded to their argument that Rueda-Denvers provided the battery for the bomb and the State referred to the same "number" being on the bomb battery and the batteries found during a search of Rueda-Denvers' shed. However, the PowerPoint slides did not indicate that the common numbers were "lot number[s]." And the State did not argue that they were lot numbers. It was also never established at trial that the numbers were expiration dates as Rueda-Denvers argued in his closing following the denial of his motion. Thus, it was not "false" that the batteries shared a common number.[4] *See Jimenez*, 112 Nev. at 622, 918 P.2d at 694. Therefore, we conclude that the district court did not abuse its discretion in denying Rueda-Denvers' request for a mistrial.

The district court did not abuse its discretion by allowing the State's explosives expert to testify regarding damage to the victim's hand

Rueda-Denvers argues the district court abused its discretion by overruling his objection to the testimony of the State's explosives expert addressing the damage the bomb caused to the victim's hand. He claims that the evidence was gruesome and cumulative because photos of the victim's hand had already been admitted. While it is true that "photographs of a victim's injuries tend to be highly probative and thus are frequently deemed admissible in criminal cases despite their graphic content," they are

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[4]We reject Rueda-Denvers' argument that the State committed prosecutorial misconduct in its closing argument for arguing that the "lot numbers" were the same given that there is no evidence in the record to support this contention.

not "*always* admissible, regardless of the facts and circumstances of a given case." *Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 210 (2018). Instead, such photographs "are subject to the balancing test set out in NRS 48.035(1), which precludes the admission of evidence when its probative value is substantially outweighed by the danger of unfair prejudice." *Id.* at 880, 432 P.3d at 210-11. Thus, the district court abuses its discretion where the record does not show that it engaged in "a meaningful weighing of the potential for unfair prejudice against each photograph's probative value" under NRS 48.035(1). *Id.* at 880, 432 P.3d at 211.

Here, the photographs had already been admitted earlier in the trial by stipulation and the district court was therefore not required at the time of the expert's testimony to reengage in a meaningful analysis pursuant to NRS 48.035(1). Because the photos were being used to aid the expert's testimony about the basis of his opinions, the district court did not abuse its discretion in overruling Rueda-Denvers' objection to the use of the photographs and the expert's testimony concerning the victim's hand. *See id.* Moreover, Rueda-Denvers has not identified how this testimony prejudiced him or otherwise influenced the jury's verdict as the photos were already admitted into evidence by stipulation and the State moved to confirm them without objection. *Cf. Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (holding that an error or defect not affecting substantial rights shall be disregarded), *holding modified on other grounds by Mclellan*, 124 Nev. 263, 182 P.3d 106; NRS 1788.598. Thus, we conclude that the district court was within its discretion to allow the expert's testimony.

Cumulative error

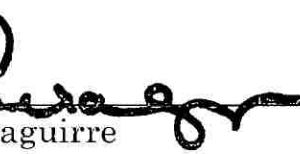
Having discerned no error or abuse of discretion by the district court, we conclude that the district court did not commit cumulative error. *See Valdez v. State*, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008) (holding that, in the absence of multiple errors, evidence of guilt is sufficient to support the conviction).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Herndon

_____, J.
Lee



_____, J.
Parraguirre

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