IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRICK THEUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84397-COA

ORDER OF AFFIRMANCE

Derrick Theus appeals from a judgment of conviction, pursuant to a jury verdict, of child abuse, neglect, or endangerment and battery by strangulation. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

In January 2021, 11-year-old J.O. and his siblings were living with his mother and her boyfriend, Theus.[1] On January 20, Theus dragged J.O. into Theus' bedroom and threw him on the bed. Theus got on top of J.O. and slapped his face multiple times with an open hand. He then choked J.O. by grabbing him with both hands around his neck. After Theus released J.O., J.O. went to his bedroom that he shared with his other siblings. J.O.'s older sister used her cell phone to record a video of J.O. describing the strangulation incident and sent the video to their aunt, who contacted law enforcement.

LVMPD Officer Oswaldo Gonzalez responded to J.O.'s house the same evening. Officer Gonzalez observed red marks and bruising along J.O.'s face, neck, arms, and lower back. When Officer Gonzalez asked J.O. about the marks on his body, J.O. told him that the marks on his face were inflicted by a dog. J.O.'s older sister also told Officer Gonzalez about two prior

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

instances when Theus physically abused her, and this disclosure was recorded on another officer's body camera.

Early the next morning, J.O. was taken to the hospital for a strangulation examination. The nurse found positive signs of strangulation, including injuries to J.O.'s neck and petechial hemorrhaging in his eyes, as well as contusions on J.O.'s face that were consistent with being hit by an open hand.

In July 2021, the State charged Theus with one count of child abuse, neglect, or endangerment and one count of battery by strangulation. Following a *Faretta*[2] canvass, the district court determined that Theus was competent to represent himself but later appointed stand-by counsel.

Shortly before trial, the State filed a motion to admit prior bad acts, seeking to introduce prior instances where Theus had physically abused J.O., J.O.'s older sister, and his brother. The State argued the evidence was relevant to explain why the children sought help from their aunt, rather than from their mother, and why J.O. and his siblings were initially hesitant to disclose Theus' abuse. At the hearing on the State's motion, the State provided the district court with discs containing video of a lengthy family court hearing where J.O. and his siblings each testified about Theus' prior abuse and were subject to cross examination by Theus. The district court asked Theus if he planned on "assert[ing] anything in regard to the children not going to the mother and going to the aunt as part of your defense," and Theus responded "[y]es." The court then asked Theus if he "plan[ned] to challenge [J.O.] at all in terms of his initial statement to authorities versus his subsequent statement to authorities," to which Theus responded.

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[2]*Faretta v. California*, 422 U.S. 806 (1975).

"[a]bsolutely." The court stated that it would review the video of the children's testimony before making a final decision on the State's motion.

Theus' trial commenced, and following jury selection, the district court found, based on the video, that the testimony of J.O. and his older sister regarding Theus' prior abuse was admissible. The court found that the children's testimony established the prior bad acts by clear and convincing evidence. The court also determined that the bad acts were relevant to show how the children's "mother's awareness of those bad acts and failure to act on the bad acts led them to believe that she would not take action on the acts," and that Theus' prior abuse was relevant to the children's "state of mind when speaking with the authorities and to explain why they did not go to their mother in reference to the events at issue in this trial."

The district court also held an evidentiary hearing outside of the presence of the jury where J.O.'s brother testified that Theus had hit him with a belt, and he could not tell his mother about Theus hitting him and his other siblings because "she was on his side." The district court ruled that the prior physical abuse against J.O.'s brother was proven by clear and convincing evidence and admissible for the same reasons as the prior abuse against J.O. and his older sister.

Theus' first trial resulted in a hung jury, and the district court declared a mistrial with the consent of both parties. Theus was thereafter retried on the same charges, and in November 2021, the jury found him guilty on both counts. He was sentenced to 13-72 months for child abuse, neglect, or endangerment and to 12-60 months for battery by strangulation, to run concurrently. Theus timely appealed.

On appeal, Theus contends that (1) the district court improperly admitted numerous prior bad acts, (2) the court failed to give proper *Tavares* limiting instructions prior to admitting the bad act evidence, (3) the court

erred in admitting Theus' jail calls from the Clark County Detention Center, and (4) the State violated its discovery obligations by failing to disclose photos of abuse against J.O.'s older sister.

The district court did not err in admitting prior bad acts

First, Theus contends that the district court abused its discretion in admitting testimony of multiple prior bad acts that were irrelevant, prejudicial, and offered to show Theus' propensity to commit the crimes charged.

This court reviews preserved challenges to evidence admitted under NRS 48.045(2) for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). Evidence of other bad acts is inadmissible to show the defendant's propensity to commit the crime charged, but such evidence may be admitted if offered for a non-propensity purpose. NRS 48.045(2). To admit other bad act evidence for a non-propensity purpose, the State must establish at a *Petrocelli*[3] hearing that "(1) the incident is relevant to the crime charged; (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." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).

Theus contends that the district court erred in admitting the following testimony without holding a *Petrocelli* hearing: testimony from J.O.'s aunt that the children were prohibited from talking to family and that she was concerned with their safety; J.O.'s testimony that he was forced to call Theus "dad" and that J.O. currently lives with his grandmother; testimony from J.O.'s sister that she was also forced to call Theus "dad," that

[3]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

Theus did not want her talking to family, and that she is currently living with her grandmother; testimony from J.O.'s brother that he lives with his grandmother; and testimony from J.O.'s grandmother that Theus offended her by using aggressive language and that she received a call from CPS to take the children. Theus did not object to this testimony at trial, therefore we will review only for plain error. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that plain error permits reversal only if an error, clear from the record, affected the defendant's substantial rights and the defendant showed actual prejudice or a miscarriage of justice).

We conclude that the district court did not plainly err by permitting the challenged testimony without conducting a *Petrocelli* hearing because this testimony did not implicate bad acts under NRS 48.045(2). It did not impute any improper conduct on Theus' part or collateral offenses for which he could have been charged, and thus no *Petrocelli* hearing was required. *See Salgado v. State*, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998); *see also Ayala v. State*, No. 69877, 2017 WL 1944321, *3 (Nev. May 9, 2017) (Order of Affirmance) (concluding that a witnesses' testimony about the defendant previously firing a handgun was not a bad act because it "did not implicate [the defendant] in a crime or other bad act or provide inadmissible character evidence"). Thus, Theus does not establish any error, let alone an error that affected his substantial rights.

Theus also challenges the admissibility of the prior acts of abuse that were referenced in the State's pretrial motion, specifically the prior instances of abuse against J.O., his older sister, and his brother. He alleges that the district court failed to hold a *Petrocelli* hearing because no witnesses testified and that the court also failed to make a proper ruling to admit this bad act evidence.

However, Theus' claims are belied by the record. At the hearing on the State's motion to admit other bad acts, the State provided the district court video testimony of the three children in lieu of their live testimony, and Theus did not object. After viewing that video, the district court found that the prior acts of abuse against J.O. and his older sister were proven by clear and convincing evidence and admissible for non-propensity purposes.[4] Then, the court held a separate *Petrocelli* hearing where J.O.'s brother testified in open court about Theus' prior abuse. After this hearing, the district court found that the bad acts against J.O.'s brother were proven by clear and convincing evidence and admissible as well. Therefore, Theus' claims that the district court failed to conduct a *Petrocelli* hearing or make the necessary findings to admit the evidence are without merit.

Contrary to Theus' claims, the prior bad acts were also properly admitted for a non-propensity purpose and were not unfairly prejudicial. The State argued that the bad acts were relevant to explain why J.O. and his siblings sought help from their aunt and why they were hesitant to disclose the abuse. The district court asked Theus if he planned to raise these specific issues as part of his defense, and Theus responded that he did. Therefore, based on Theus' responses, the prior bad acts were properly admitted for a non-propensity purpose—to respond to Theus' anticipated defenses at trial—and the district court did not abuse its discretion by admitting them. *Mclellan*, 124 Nev. at 269, 182 P.3d at 110.

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[4]To the extent that Theus argues the district court erred in finding that the prior abuse against J.O. and his sister was admissible, Theus failed to transmit the video of the district court proceedings in the family division that the district court relied on when making its admissibility determination. As a result, this court must presume that the missing portions of the record supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

The district court gave adequate Tavares *limiting instructions*

Second, Theus argues that the district court failed to give *Tavares*[5] instructions before the admission of some prior bad act evidence.[6] He also contends that two of the given *Tavares* instructions were untimely because they were read to the jury after the bad act evidence was admitted, rather than before.

When the State introduces bad act evidence, it has "the duty to request that the jury be instructed on the limited use of prior bad act evidence. Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue *sua sponte*." *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001). If the district court fails to provide a *Tavares* limiting instruction, this court reviews whether "the error 'had substantial and injurious effect or influence in determining the jury's verdict.' Thus, unless [this court] is convinced that the accused suffered no prejudice as determined by the *Kotteakos* test, the conviction must be reversed." *Id.* at 732, 30 P.3d at 1132 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

At trial, the nurse who performed J.O.'s strangulation examination testified that not only did J.O. show positive signs of strangulation, but also that contusions on his face were consistent with being struck by an open hand. Theus contends that a *Tavares* instruction should

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[5]*Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001).

[6]As noted above, several of the alleged bad act testimony that Theus challenges on appeal are not bad acts under NRS 48.045(2). Insofar as Theus also argues that such testimony should have been preceded by a *Tavares* limiting instruction, because that testimony did not implicate prior bad acts, no limiting instruction was necessary. *See Lamb v. State*, 127 Nev. 26, 41, 251 P.3d 700, 710 (2011) (providing that NRS 48.045(2) is not implicated where the conduct referenced is not a bad act or crime).

have been given because this testimony referenced an uncharged bad act under NRS 48.045(2). Similarly, Theus also argues a *Tavares* instruction was required before the State played body camera footage that depicted J.O.'s older sister describing Theus' prior abuse against her.

We conclude that in both instances, even if the district court was required to give *Tavares* instructions, any error was harmless. The jury was given *Tavares* instructions after J.O. testified that Theus slapped him with an open hand and before J.O.'s sister testified about Theus' prior abuse. Further, these limiting instructions were broadly phrased to apply to "evidence that Defendant [Theus] committed offenses other than that for which he is on trial," and the nurse's testimony and body camera footage simply corroborated the children's earlier testimony. Theus does not explain how the absence of additional *Tavares* instructions prejudiced him, particularly where the jurors also received a general *Tavares* limiting instruction prior to deliberations, which they were presumed to follow. *See McNamara v. State*, 132 Nev. 606, 622, 377 P.3d 106, 117 (2016) ("Jurors are presumed to following the instructions they are given."). Therefore, even if the district court should have given additional *Tavares* instructions prior to the nurse's testimony or the body camera footage, the failure to do so was harmless, and Theus is not entitled to relief.[7]

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[7]Theus argues that the limiting instruction following J.O.'s testimony did not address all the bad acts J.O. described because the instruction referenced Theus hitting J.O. with a belt and a broom, but not with his hands. However, the instruction also included the more generally phrased statement, as noted above, that it applied to "offenses other than that for which [Theus] is on trial." Theus does not provide any authority for his assertion that a limiting instruction must specifically reference every bad act, particularly if the instruction also includes a catch-all limitation regarding all bad act evidence, and therefore we decline to further consider his argument. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)

Theus also contends that two given *Tavares* instructions—one following J.O.'s testimony and another following Officer Gonzalez's testimony—were untimely because they were read to the jury *after* the admission of the bad act evidence, not before. Even if the district court did err in giving the instructions after the bad act testimony, Theus did not object to the timing of the instructions, and so his claim is reviewed for plain error. *Green*, 119 Nev. at 545, 80 P.3d at 95. Theus cannot demonstrate that the district court plainly erred because he cannot show actual prejudice or a miscarriage of justice. Any error in the timing of the instructions was harmless given that the instructions were provided immediately following the testimony regarding the bad acts and again at the end of trial, and jurors are presumed to follow the instructions they are given. *McNamara*, 132 Nev. at 622, 377 P.3d at 117. Therefore, Theus is not entitled to relief.

The district court did not abuse its discretion in admitting Theus' jail calls

Third, Theus argues that the district court erred in admitting three jail calls that he made to J.O.'s mother. Theus contends the calls were irrelevant, hearsay, and not properly authenticated.

Ordinarily, a district court's decision to admit evidence is reviewed for an abuse of discretion. *See generally Carroll v. State*, 132 Nev. 269, 279, 371 P.3d 1023, 1030 (2016). However, Theus did not object to the admission of the calls, and therefore his claims are reviewed for plain error. *Green*, 119 Nev. at 545, 80 P.3d at 95 (2003).

In this case, Theus cannot show error, plain or otherwise, from the admission of the jail calls. The calls were relevant because Theus discussed the allegations against him, including the video of J.O. describing the strangulation incident. *See* NRS 48.015 (defining relevance). Further,

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(explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Theus' own statements on the calls were not hearsay. NRS 51.035(3)(a) (providing that a statement of a party opponent is not hearsay). To the extent that the statements of J.O.'s mother on the calls could be hearsay, Theus does not argue any of her statements prejudiced him, and thus his claim fails under plain error review. *Green*, 119 Nev. at 545, 80 P.3d at 95.

The calls were also sufficiently authenticated. Under NRS 52.065, "[a] voice, whether heard firsthand or through mechanical or electronic transmission or recording, is sufficiently identified by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." In this case, LVMPD Officer Edwardo Garcia testified to the detention center's phone system and its authentication requirements, including an ID number, PIN code, and voice recognition protocols. Officer Garcia further confirmed it was Theus who made the three calls, and Theus did not object to or dispute Officer Garcia's identification. Therefore, Theus is not entitled to relief on this claim.

Theus also contends that the admission of "jail calls" impermissibly referenced his custody status. Informing the jury that a defendant is in jail at the time of trial raises an inference of guilt similar to bringing the defendant to the courtroom in shackles. *Haywood v. State*, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991).

However, prior to playing the jail calls, the State informed the jury that the calls were placed when Theus was in jail for a few days after his arrest. If the jury receives jail calls "recorded in the days immediately following [the defendant's] arrest," then "any inference of [the defendant's] custodial status that can be implied from the phone conversation is limited to [his] custodial status at the time of his arrest and not necessarily at the time of trial." *Arthur v. State*, No. 52046, 2010 WL 3908950, *3 (Nev. Oct. 4, 2010) (Order of Affirmance). "Simply because a juror learns that a defendant

was in custody at the time of his arrest, it cannot be reasonably presumed that the juror will believe that the defendant is still in custody at the time of trial." *Id.* Therefore, in this case, Theus' jail calls from a few days after his arrest did not improperly implicate his custody status at the time of trial, and the district court did not abuse its discretion in admitting them.

The State did not violate its discovery obligations under Brady

Fourth, Theus contends that the State violated its discovery obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose pictures taken by J.O.'s older sister that purportedly showed her injuries from Theus' prior abuse. J.O.'s sister testified at trial that she sent pictures to CPS, and Theus contends these pictures must have been favorable to him, otherwise "the State would have presented [her] pictures and recordings to the jury." The State responds that even if these pictures were sent to CPS, they were neither favorable nor material.

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material to either guilt or punishment. *Jimenez v. State*, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996). "[E]vidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed. . . . A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial." *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

Even assuming that the State withheld these pictures, Theus does not show that the pictures were either favorable or material. The pictures purportedly show injuries on J.O.'s sister that resulted from Theus' abuse, and therefore would not have been favorable. While Theus argues that they must have been exculpatory because otherwise the State would have presented them to the jury, he does not offer any authority or cogent

argument in support of his assertion that evidence's favorability can be inferred by virtue of the State's failure to introduce it. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Further, the evidence was not material because, even if it showed that Theus did *not* abuse J.O.'s sister, Theus was charged with abusing J.O., and that abuse was independently substantiated by J.O.'s testimony, his documented injuries, and the nurse's trial testimony regarding the positive signs of strangulation and abuse during J.O.'s medical examination. Therefore, Theus does not demonstrate that the State violated its discovery obligation under *Brady v. Maryland*.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.[8]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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

[8]Theus also argues that cumulative error warrants reversal. However, he does not identity any errors that would entitle him to relief, and therefore there are no errors to cumulate. *Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) ("Because we have rejected Chaparro's assignments of error, we conclude that his allegation of cumulative error lacks merit."). Insofar as Theus has raised any other arguments that are not specifically addressed in this decision, we have considered the same and conclude that they do not present a basis for relief.