IN THE SUPREME COURT OF THE STATE OF NEVADA

IVAN JAY ANDREWS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85653

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, discharge of a firearm from within a structure or vehicle, and discharging a firearm at or into an occupied structure, vehicle, aircraft or watercraft. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Respondent the State of Nevada charged appellant Ivan Andrews, Jr., with six felonies, including murder with use of a deadly weapon, stemming from the October 2019 shooting death of Corey Jones. The State alleged that Andrews fired his gun at a car that Jones was riding in following a drug deal that had gone awry. Following trial, a jury found Andrews guilty of (1) conspiracy to commit murder, (2) discharge of a firearm from or within a vehicle, and (3) discharging a firearm at or into an occupied vehicle. The jury, however, failed to reach a verdict on the murder charge. The district court subsequently imposed the maximum sentence of 10 years with a minimum parole eligibility after 4 years for each of the three counts for which the jury convicted Andrews. The district court ordered each sentence to run consecutively, meaning that Andrews faces 12 to 30 years in prison.

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Andrews now appeals the judgment of conviction and sentence, arguing that the district court improperly admitted evidence during both the trial and sentencing phases. During trial, Andrews alleges that the district court improperly permitted the State to introduce (1) photos and video of Andrews handling a Glock .45 GAP pistol that was alleged to have been the murder weapon, (2) video of the police interrogation of Andrews following his arrest, and (3) text messages sent to and from Andrews' cell phone. Andrews argues that these errors independently or cumulatively violated his right to a fair trial. During the sentencing phase, Andrews argues that the district court abused its discretion by relying on impalpable and highly suspect evidence introduced by the State regarding Andrews' past history of criminal and illicit conduct. Thus, alternatively, Andrews requests that this court at least vacate his sentence based on this alleged error.

"[R]eview[ing] 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), we find no reversible error on the part of the district court in admitting the pieces of evidence at trial to which Andrews objects. First, we disagree with Andrews that the photos and video of him handling the Glock pistol were irrelevant or unfairly prejudicial. Given that the State introduced ballistic evidence that a Glock .45 GAP was one of very few models from which the fatal bullet could have been fired, these images were relevant because they had *some tendency* to make it *more probable* that Andrews was in possession of a firearm that could have been the murder weapon, and that he could have been the shooter. *Cf.* NRS 48.015 (providing that "'relevant evidence' means 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" (emphases added)). And while Andrews' appearance and behavior in the photos and videos may have incurred *some* prejudice, we are not convinced that it rises to the level of *unfair* prejudice or *substantially outweighs* the probative value of the photos and videos. *Cf.* NRS 48.035(1); *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933-34, 267 P.3d 777, 781 (2011) ("Because all evidence against a defendant will on some level 'prejudice' (*i.e.*, harm) the defense, NRS 48.035(1) focuses on 'unfair' prejudice.").[1]

Second, we disagree with Andrews' assertion that the video of his police interrogation was not relevant. The State appears to have proffered the video to show Andrews' claims to police that he was with his girlfriend at the time of the shooting and had not handled weapons during the previous month. The State then presented evidence that those alibis were false. Thus, the statements were relevant as evidence that Andrews was attempting to conceal his crime. *Cf.* NRS 48.015. Andrews further objects that his statements in the video "were only introduced so the State could impeach them with collateral evidence." Indeed, this court has explained that, under NRS 50.085(3), "[i]t is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter." *McKee v. State*, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996). But impeachment occurs when a party attacks the credibility of a witness. *See State v. Huebler*, 128 Nev. 192, 200 n.5, 275 P.3d 91, 96 n.5

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[1]We further note that, contrary to Andrews' assertion, the State did not proffer the photos and video to prove bad character or propensity to handle firearms, but to establish the *identity* of the shooter based on Andrews' ownership of the type of gun that could have fired the fatal bullet. *Cf.* NRS 48.045(2) (providing that evidence inadmissible to prove character or propensity may be admissible to prove identity).

(2012) ("'Impeachment evidence' is defined as '[e]vidence used to undermine a witness's credibility.'" (quoting *Impeachment Evidence*, *Black's Law Dictionary* (9th ed. 2009)). Here, Andrews did not testify at trial, and the State proffered the video merely to indicate Andrews' guilt, rather than attack his credibility, so no impeachment occurred and NRS 50.085 does not apply. Moreover, the issues addressed in the video regarding Andrews' whereabouts and possession of firearms were not "collateral" but *central* to his guilt or innocence. *See McKee*, 112 Nev. at 646, 917 P.2d at 943; *see also* NRS 50.085(3).

Third, Andrews argues that the State introduced the text messages without proper authentication. *Cf.* NRS 52.015(1) (requiring "authentication or identification" of evidence "as a condition precedent to admissibility"). In *Rodriguez v. State*, we held that "establishing the identity of the author of a text message through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility." 128 Nev. 155, 162, 273 P.3d 845, 849 (2012). Here, the State satisfied this requirement because the text message threads included photos of Andrews, photos of the Glock pistol, and use of the moniker "SD" which the State established to be Andrews' alias. Moreover, we note that even if admission of these messages was in error, like *Rodriguez*, any such error was harmless given that "[t]here was other overwhelming evidence to support the jury's verdict." 128 Nev. at 163, 273 P.3d at 850.

Andrews further claims that admission of the text message threads improperly allowed for the use of out-of-court testimonial statements in violation of his Sixth Amendment Confrontation Clause rights. *Cf. Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (holding that out-of-court statements by witnesses that are *testimonial in nature* are

barred, under the Confrontation Clause, unless those witnesses are unavailable and the defendant had a prior opportunity for cross-examination). Reviewing an alleged Confrontation Clause violation de novo, *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009), we find Andrews' claims to be without merit. First, the district court issued a limiting instruction that the jury could only consider statements of *others* in the text messages for their effect on Andrews, and not for the truth of the matter they asserted. C*f. Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as *non-hearsay*." (Emphasis added.)). Given that "[a] jury is presumed to follow its instructions," *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting *Weeks v. Angelone*, 528 U.S. 225, 234 (2000)), it is difficult to see how statements made by others are testimonial *hearsay* in violation of the Confrontation Clause if not considered for their truth per the limiting instruction, *cf.* NRS 51.035 (defining hearsay as "a statement offered in evidence to prove the truth of the matter asserted"). Second, we also note that Andrews has not identified a single testimonial statement contained in the text messages. *Cf. Flores v. State*, 121 Nev. 706, 716, 120 P.3d 1170, 1176-77 (2005) (identifying a "core class of testimonial hearsay" pursuant to *Crawford* (internal quotation marks omitted)).

Thus, finding no error with respect to admission at trial of any of the evidentiary items to which Andrews objects, we conclude that there can be no cumulative error that violated Andrews' constitutional right to a fair trial. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

Finally, we conclude that the district court did not rely on impalpable or highly suspect evidence at sentencing. *Brown v. State*, 113 Nev. 275, 292, 934 P.2d 235, 246 (1997) ("[A]n abuse of discretion will be found when the defendant's sentence is *prejudiced* from consideration of information or accusations founded on *impalpable or highly suspect evidence*." (emphases added) (quoting *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982))). Indeed, the State filed a sentencing memorandum which argued for the maximum sentence based not only on the conviction, but also on Andrews' history of criminal and illicit conduct preceding the shooting. The record indicates that the district court did not find it "appropriate" to "strike" the sentencing memorandum given the relaxed evidentiary standards for sentencing proceedings.[2] But, more importantly, the district court explained that it would not consider the information set forth in the memorandum.[3] Instead, the record clearly demonstrates that the district imposed its sentence based on victim impact statements from Corey Jones' wife and mother, as well as the senseless nature of Andrews' crime. Thus, we are not persuaded that Andrews'

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[2]*See Todd v. State*, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) ("A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial." (internal quotation marks omitted)); *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment.").

[3]The district court specifically told Andrews that its "intent with sentencing is to focus on . . . what he was convicted of and sort of apply the range that you're talking about and when I look at the seriousness of everything."

sentence is prejudiced from consideration of impalpable or highly suspect evidence.[4]

Finding no error with respect to the evidentiary issues at trial or at sentencing raised by Andrews, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Carli Lynn Kierny, District Judge
The Law Firm of C. Benjamin Scroggins, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]Andrews also makes the erroneous argument that the Nevada Rules of Evidence apply to sentencing. *Cf.* NRS 47.020(3)(c) (providing that the provisions of NRS Title 4 governing witnesses and evidence do not apply to sentencing). *Buschauer v. State* does not hold otherwise, as Andrews incorrectly claims. 106 Nev. 890, 892, 804 P.2d 1046, 1047 (1990) (holding that polygraph results are "highly suspect or impalpable" for evidentiary use at sentencing, while separately noting that polygraphs are generally inadmissible at trial). The remainder of *Buschauer* pertains to the use of victim impact statements, which is not at issue here. 106 Nev. at 893-94, 804 P.2d at 1048-49 (discussing NRS 176.015(3)).