IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL KIZER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89230-COA

FILED

MAY 21 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Kizer appeals from a judgment of conviction, entered pursuant to a jury verdict, of discharging a firearm into an occupied structure, battery with a deadly weapon, assault with a deadly weapon, principal to robbery, principal to residential burglary, principal to grand larceny of a motor vehicle, and principal to false imprisonment. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Kizer first contends the district court erred by refusing to disqualify his trial counsel. Specifically, Kizer contends his counsel improperly contacted a State witness even though counsel knew the witness was represented by different counsel in violation of Nevada Rule of Professional Conduct (NRPC) 4.2.[1] Kizer did not seek to disqualify defense counsel below. Moreover, four days before trial was scheduled to begin, the State filed an emergency motion seeking to remove defense counsel, and Kizer did not join the State's motion. Therefore, Kizer did not preserve this

[1]NRPC 4.2 states that, "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer . . . ."

claim, and we review for plain error. *Cf. Rowland v. State*, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002) (stating plain error review applied where a defendant "failed to join [a codefendant's] objection or provide his own objection"). To demonstrate plain error, an appellant must show "(1) there was an 'error'; (2) the error is 'plain,' meaning that is it clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[D]istrict courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case." *Leibowitz v. Eighth Jud. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003).

As previously mentioned, the State filed a motion seeking to remove defense counsel below. In that motion, the State contended that Kizer and defense counsel had direct contact with a State witness even though the witness—a codefendant who had pleaded guilty to charges and was awaiting sentencing—was represented by counsel. In particular, the State contended that (1) Kizer had gone to the witness's place of employment and told her that his counsel wanted to speak with her; and (2) defense counsel had contacted the witness by phone, offered to buy the witness dinner with Kizer, Kizer's girlfriend, and another witness/codefendant, and told the witness that Kizer had an alibi and that counsel believed the witness felt like she had to name Kizer as a suspect in order to get recommended for probation in her case. The State contended that defense counsel committed ethical violations and had a potential conflict of interest due to this communication and, thus, that the district

court should remove defense counsel from the case, appoint new counsel, and reschedule the trial.

The district court held a hearing on the motion. At the hearing, defense counsel conceded he had a conversation with the witness over the phone and invited the witness to a dinner as part of a "witness meeting," but he contended that he did not know the witness was represented in this case, that he stopped contacting the witness once he was contacted by her counsel, and that nothing improper occurred during this conversation. The State conceded the witness did not attend this meeting.

Based on this record, it is not clear under current law from a casual inspection of the record that defense counsel violated NRPC 4.2 in contacting the witness. Moreover, defense counsel's conversation with the witness did not come up during the witness's testimony, and the record does not indicate defense counsel's conduct influenced the witness's testimony. In light of the foregoing, Kizer fails to demonstrate the district court plainly erred in refusing to disqualify his counsel, and we conclude he is not entitled to relief on this claim.[2]

Second, Kizer contends the district court erred by allowing generalized references to prior "murder charges" for which he was not convicted. Specifically, Kizer contends defense counsel indicated during his opening statement that Kizer had previously been accused of murder and that the murder was highly publicized.

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[2]Kizer's claims that defense counsel should have raised certain arguments challenging the witness's testimony rather than "propos[ing] a 'dinner conversation'" likewise fail to demonstrate that the district court plainly erred in refusing to disqualify counsel.

"[O]pening statements of counsel . . . are not evidence of any character or of anything, and cannot be so considered by the jury." *Rodriguez v. State*, 128 Nev. 155, 160 n.3, 273 P.3d 845, 848 n.3 (2012) (quoting *State v. Olivieri*, 49 Nev. 75, 77-78, 236 P. 1100, 1101 (1925)); *see also Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); *Rippo v. State*, 113 Nev. 1239, 1260, 946 P.2d 1017, 1030 (1997). Moreover, Kizer invited any purported error because his own counsel made the challenged statements. *Cf. Chadwick v. State*, 140 Nev., Adv. Op. 10, 546 P.3d 215, 225-26 (Ct. App. 2024) (holding a defendant "invited any error from the admission of" bad act evidence when he "directly elicited" the challenged testimony); *see also Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

Kizer appears to contend the invited error doctrine only applies if the State "presented something improper," which it did not do. We reject this claim. Under the invited error doctrine, "a party will not be heard to complain on appeal of errors *which he himself induced* or provoked *the court or the opposite party* to commit." *Chadwick*, 140 Nev., Adv. Op. 10, 546 P.3d at 227 (emphases added) (quoting *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994)). As Kizer contends the district court erred by allowing improper statements, and Kizer's counsel proffered the allegedly improper statements, the doctrine applies, and Kizer is not entitled to relief on this claim.[3]

[3]To the extent Kizer contends defense counsel was ineffective for making these statements, this claim was not raised below, and we decline to consider this claim on appeal in the first instance. *See Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) ("[W]e have generally declined

Third, Kizer contends the district court erred by failing to suppress the victim's identification testimony. Here, four people pushed into the victim's home after the victim opened her door; two of those individuals restrained the victim while the other two began taking items from the home. At trial, the victim testified that, at the time of the offense, she was "pretty sure" Kizer was one of the individuals restraining her, but that she did not identify Kizer to the police upon first contact at the hospital because she was not "100 percent sure at the time" and she "didn't want to identify the wrong person." The victim further testified that, after she was released from the hospital, she went online, saw Kizer's picture, and "knew [she] was correct." The victim then reported Kizer to the police, and the victim testified that there was no doubt in her mind that Kizer was one of the perpetrators.

Kizer contends this testimony should have been stricken because (1) it cannot be determined whether it was trustworthy without the picture the victim relied upon, which the State did not preserve; and (2) the victim's testimony violated the best evidence rule. Kizer did not raise these claims below; therefore, we review for plain error. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

Kizer does not cite any authority that holds a district court must assess the reliability of a witness's identification in the absence of improper law enforcement influence. To the contrary, the United States Supreme Court has held that "the Due Process Clause does not require a

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to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary."), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012).

Regarding the best evidence rule, the State did not seek to prove the content of the online picture, *see Young v. Nev. Title Co.*, 103 Nev. 436, 440, 744 P.2d 902, 904 (1987) ("The best evidence rule requires production of an original document where the actual contents of that document are at issue and sought to be proved."), and none of Kizer's cited authority holds the best evidence rule precludes a witness from testifying as to a defendant's identity in circumstances similar to the present matter, *see Stephans v. State*, 127 Nev. 712, 716-18, 262 P.3d 727, 731-32 (2011) (holding the best evidence rule precluded a witness from testifying to the value of stolen goods where the witness's knowledge of value stemmed from "his memory of reading the price tags"); *see also T.D.W. v. State*, 137 So. 3d 574, 576 (Fla. Dist. Ct. App. 2014) (holding the best evidence rule precluded a detective from testifying that "she saw a better camera angle, not present on the video in evidence, that clearly depicted appellant's face"). Therefore, Kizer fails to demonstrate any error was clear under current law from a casual inspection of the record, and we conclude he is not entitled to relief on these claims.

Fourth, Kizer contends the district court erred by failing to give his proposed instruction on identification as the theory of the case. Kizer's proposed instruction provided that:

> Identification testimony is an expression of belief by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

> In appraising the identification testimony of a witness, you may consider the following: the opportunity of the witness to view the criminal and the time of the crime; the witness's degree of attention; the accuracy of his or her prior description of the criminal; the level of certainty demonstrated at the confrontation; and the time between the crime and the confrontation. Identity of the Defendant as the Perpetrator must be proven beyond a reasonable doubt. IF you have reasonable doubt whether the Defendant was a perpetrator of the crime then you must vote Not Guilty and Acquit him of the crimes.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A defendant is entitled, upon request, "to have the jury instructed on their theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Id.* at 751, 121 P.3d at 586 (quotation marks omitted). However, a defendant is not entitled "to instructions that are misleading, inaccurate, or duplicitous," *id.* at 754, 121 P.3d at 589, and the supreme court has held that "specific eyewitness identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt," *Nevius v. State*, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985).

Here, the district court instructed the jury that Kizer's identity must be proven beyond a reasonable doubt and that the jury must return a verdict of not guilty if it has a reasonable doubt that Kizer was a perpetrator of the crime. However, the district court determined that the remainder of the proposed instruction need not be given in light of the court's general credibility instruction. After review, we conclude the district court properly

instructed the jury as to identification and credibility and did not abuse its discretion by declining to use the entirety of Kizer's proposed instruction.[4]

Fifth, Kizer contends counsel was ineffective for (1) only listing two alibi witnesses when there were more, (2) filing a written notice of his intent to claim an alibi defense that did not comply with NRS 174.233, and (3) failing to seek a short continuance so the second alibi witness could appear for trial. As previously noted, "[t]his court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless." *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). The district court did not hold an evidentiary hearing on these claims, and Kizer fails to demonstrate such a hearing would be unnecessary. Therefore, we decline to consider these claims in the first instance on direct appeal.

Finally, Kizer contends the trial court abused its discretion by "allowing a potentially biased juror to sit without adequate canvassing." In response, the State contends the challenged juror was not actually seated

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[4]To the extent Kizer contends *Nevius* is no longer good law in light of *Perry*, we disagree. *Perry* does not mandate that specific eyewitness instructions be given when a defendant's identity is at issue. Rather, *Perry* merely acknowledged that there were "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability," such as the right to confront witnesses and the right to counsel, and that some federal and state courts had adopted specific eyewitness instructions to "warn the jury to take care in appraising identification evidence." *Perry*, 565 U.S. at 245-46. At present, Nevada does not require such instructions, *see Nevius*, 101 Nev. at 248-49, 699 P.2d at 1060, and we cannot overrule supreme court precedent, *see Eivazi v. Eivazi*, 139 Nev., Adv. Op. 44, 537 P.3d 476, 487 n.7 (Ct. App. 2023).

on the jury. Kizer concedes this point in his reply brief. Thus, we conclude Kizer is not entitled to relief on this claim. *See Preciado v. State*, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014) ("If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." (quoting *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005))).

For the foregoing reasons,[5] we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. John Schlegelmilch, District Judge
Richard F. Cornell
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk

[5]To the extent Kizer contends cumulative error warrants reversal, Kizer fails to demonstrate multiple errors to cumulate. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we conclude Kizer is not entitled to relief on this claim.