IN THE SUPREME COURT OF THE STATE OF NEVADA

NABOR REYES-RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85009

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

On two separate occasions in 2013 and 2014, appellant Nabor Reyes-Rodriguez engaged in lewd acts with Y.A., his stepchild. Both times, Reyes-Rodriguez rubbed his bare erect penis on Y.A.'s backside. Y.A. was 10 years old during the first incident and 11 years old during the second. Immediately following the 2014 incident, Y.A. disclosed the interaction to her mother, and later that day to a forensic interviewer. The police investigated and issued a warrant for Reyes-Rodriguez's arrest. In 2019, a grand jury indicted Reyes-Rodriguez for two felony counts of lewdness with a minor under the age of 14 pursuant to NRS 201.230. Reyes-Rodriguez was charged with one count for each incident.

A 14-day jury trial commenced in 2022. The jury returned a verdict of guilty on both counts. During trial, Y.A. testified as to the events of the 2013 and 2014 incidents. Y.A.'s mother testified regarding what occurred after Y.A. disclosed the 2014 incident one morning, including her call with a 911 operator that same morning where she attempted to recant on Y.A.'s behalf because of her concern over Reyes-Rodriguez's immigration status. Y.A.'s mother also testified about Y.A.'s participation in mental

health counseling following the investigation. The investigating detective also testified and was cross-examined as to the reason that the police failed to collect physical and photographic evidence following the 2014 incident.

Following trial, Reyes-Rodriguez moved for a judgment of acquittal or for a new trial on the basis that there was insufficient evidence to support the conviction. The district court denied the motion. Reyes-Rodriguez was convicted of two counts of lewdness with a child under the age of 14 and sentenced to concurrent sentences of life with the possibility of parole after 10 years on both counts. Reyes-Rodriguez now appeals on the bases that (1) inadmissible other crimes, wrongs, or acts evidence was admitted in error, (2) the prosecution committed reversible misconduct through improper vouching during witness testimony and closing argument, (3) the district court abused its discretion in prohibiting the use of certain demonstrative aids, (4) the district court erred when it refused two of the defense's proposed jury instructions, (5) the evidence was insufficient to support a conviction, and (6) cumulative error requires reversal.

Y.A.'s testimony did not constitute inadmissible evidence of other crimes, wrongs, or acts

Reyes-Rodriguez argues that statements made by Y.A. regarding times when he would stare at her and an occasion when he pulled her onto his lap constitute inadmissible other crimes, wrongs or acts testimony. He adds that the State committed prosecutorial misconduct by eliciting the other wrongs testimony and that the district court erred in failing to issue a curative instruction or *sua sponte* conduct a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). We conclude that Y.A.'s allegations do not constitute other crimes, wrongs, or acts evidence, and that even if it did, the admission constitutes harmless

error. The district court did not err by not issuing a curative instruction or *sua sponte* conducting a *Petrocelli* hearing.

Reyes-Rodriguez failed to object in a timely manner to the admission of the alleged other crimes, wrongs, or acts evidence, so we review for plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (holding that misconduct not objected to at trial is not preserved and is subject to plain error review). A plain error is one that is apparent from a casual inspection of the record and will not require reversal unless the defendant can demonstrate that their substantial rights were affected through "actual prejudice or a miscarriage of justice." *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). A defendant's substantial rights are affected when the error "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity . . . of the judicial proceedings." *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (internal quotation marks omitted). Where there is no indication that the error has affected the outcome of the proceeding, the error is not reversible. *Jeremias v. State*, 134 Nev. 46, 57, 412 P.3d 43, 53 (2018).

First, the evidence complained of does not rise to the level of other crimes, wrongs or acts contemplated by NRS 48.045 and therefore does not require a *Petrocelli* hearing. Neither the purported staring nor the instance where Reyes-Rodriguez attempted to pull Y.A. onto his lap constitute criminal or wrongful conduct. Of note, regarding the allegation that Reyes-Rodriguez once attempted to pull Y.A. onto his lap, Y.A. testified that the incident took place in the kitchen of their house, both parties were fully clothed and there was no inappropriate touching that occurred. Second, prosecutorial misconduct is not plainly apparent from the record,

as Y.A. spontaneously testified about the conduct unprompted by the state. Third, Reyes-Rodriguez never requested a specific remedy from the court, thus the court did not err in failing to *sua sponte* craft a curative instruction or hold a *Petrocelli* hearing after the testimony had already been admitted. *See McNelton v. State*, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999) ("The district court's failure to hold a *Petrocelli* hearing does not necessarily require reversal of conviction.").

But even if the testimony was admitted in error, Reyes-Rodriguez fails to demonstrate how his substantial rights were violated. Where there is no indication that the error has affected the outcome of the proceeding, the error is not reversible. *Jeremias*, 134 Nev. at 57, 412 P.3d at 53. Y.A.'s testimony addressed two instances of conduct by Reyes-Rodriguez that did not constitute crimes and were not wrongful. There is no evidence in the record that indicates the introduction of this testimony influenced the outcome of the trial nor does Reyes-Rodriguez articulate a basis to find such. Accordingly, we conclude that there is no reversible error stemming from the introduction of Y.A.'s testimony that Reyes-Rodriguez had stared at her previously or attempted to pull her onto his lap on one occasion.

Reyez-Rodriguez fails to demonstrate reversible prosecutorial misconduct

Reyes-Rodriguez also alleges that the State committed prosecutorial misconduct by: (1) vouching for Y.A.'s credibility by eliciting testimony from Y.A.'s mother about Y.A receiving counseling and (2) in making comments during closing argument. Neither of Reyes-Rodriguez's vouching arguments were preserved below, thus they are also reviewed for plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

Regarding the counseling testimony, Reyes-Rodriguez argues that the State committed prosecutorial misconduct when it asked Y.A.'s

mother whether Y.A. received counseling after the incident. Rodriguez contends that the prosecution's line of questioning "suggest[ed] . . . that Y.A. is telling the truth because she was a mess." However, the record clearly demonstrates that the State only asked whether Y.A. had received counseling. Neither the State nor the witness made any reference to any findings or opinions rendered by any counseling professionals. And no explicit statements vouching for Y.A.'s credibility were made by the prosecution or the witness during the exchange. Thus, we conclude there is no plain error in the record.

Regarding the prosecution's closing argument, Reyes-Rodriguez argues that the prosecution improperly vouched for Y.A. by saying that "she testified truthfully about everything she remembered," and asking, "[W]hat motive or interest would she have to lie[?]" We have held that "vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (alteration in original) (internal quotation marks omitted). However, whether the prosecution is vouching largely depends on the circumstance surrounding the statement. *Rowland*, 118 Nev. at 40, 39 P.3d at 119 ("The line between appropriate argument on the credibility of a witness and improper prosecutorial argument is occasionally difficult to define[, and] we must look to the attorney for the defendant to object and the district judge to make his or her ruling on a case-by-case basis.").

When examining the context of the prosecution's statement in closing argument, we cannot say that the prosecution improperly vouched for Y.A.'s credibility. The prosecution discussed all of the witnesses who had testified and reminded the jury that they had all admitted when they

had lied in the past. The prosecution also directed the jury to the evidence regarding Y.A.'s mannerisms in her police interview and during her testimony. Additionally, the prosecution did not offer a personal opinion as to Y.A.'s credibility, but instead asked the jury to evaluate whether Y.A. had any motive or interest to lie. We emphasized in *Rowland* that "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness." 118 Nev. at 39, 39 P.3d at 119. As such, we conclude there is no plain error as the prosecution did not commit misconduct when arguing that Y.A. testified truthfully and had no motive to lie.

The district court was within its discretion to prohibit certain demonstrative aids

Reyes-Rodriguez argues that the district court erred when it prohibited him from using certain demonstrative aids during cross-examination of State witnesses. We disagree.

"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), and "will respect the trial court's determination as long as it is not manifestly wrong." *Colon v. State*, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). The mode and order of interrogation and presentation are squarely within the trial court's discretion. *See* NRS 50.115(1) ("The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . .")

The district court prohibited the use of Reyes-Rodriguez's demonstrative aids during cross-examination because trial counsel's stated intent was to summarize the witness testimony in counsel's own words while the witness was testifying, as opposed to using an aid to help explain

the witness's testimony. Because the aids were counsel's notes, outlines, and summarizations, the court told counsel that the aids would be limited to use during closing argument. The district court appropriately exercised its discretion in modulating counsel's interrogation of witnesses and presentation of evidence, and thus we find no error.

The district court did not err in declining Reyes-Rodriguez's proposed jury instructions

The district court declined to include two jury instructions that Reyes-Rodriguez proposed: (1) the failure-to-collect-evidence jury instruction, and (2) the two-reasonable-interpretations jury instruction. Reyes-Rodriguez argues that the district court abused its discretion in declining the instructions because the defense is entitled to have the jury instructed on the defense's theory of the case. *Brooks v. State*, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008). We conclude that the district court was within its discretion to decline Reyes-Rodriguez's proposed instructions.

We review a district court's decision regarding jury instructions for abuse of discretion or judicial error, as the district court has broad discretion in settling jury instructions. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). While the defense is entitled to instructions on its theory of the case, those instructions must still be legally accurate. *Brooks*, 124 Nev. at 211, 180 P.3d at 662.

Regarding the failure-to-collect-evidence instruction, Reyes-Rodriguez complains of the police's failure to retain the mother's 911 call, failure to collect the shorts Y.A. was wearing on the day of the 2014 incident, and failure to photograph the crime scene. While Reyes-Rodriguez's theory

of the case was that the police failed to collect sufficient evidence, the failure to collect evidence jury instruction requested by Reyes-Rodriguez is an instruction on a legal presumption, not a defense theory. *See Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) (listing prerequisites for the defense to be entitled to the presumption that the uncollected evidence was unfavorable to the State). Thus, the instruction is only legally proper if the defense can demonstrate it is entitled to the presumption.

Law enforcement officers generally do not have a duty to collect all potential evidence in a case. *Gordon v. State*, 121 Nev. 504, 509, 117 P.3d 214, 218 (2005). The defense is only entitled to the failure-to-collect-evidence presumption if they can demonstrate that the evidence was material such that there is a reasonable probability that the result of the proceedings would have been different and that failure to gather the evidence was a result of gross negligence or bad faith. *Randolph*, 117 Nev. at 987, 36 P.3d at 435. During the investigation and at trial, Y.A. never testified to any ejaculation by Reyes-Rodriguez, warranting the collection of her shorts. Additionally, Y.A. and Reyes-Rodriguez lived in the same home, so touch DNA evidence may have been present as a result of cohabitation. As the investigating detective explained at trial, the presence or lack thereof of any touch DNA evidence related to Reyes-Rodriguez at the scene or on Y.A.'s shorts would not have altered his decision to submit the case for prosecution. Thus, it does not appear that such evidence was material. But even if it were, Reyes-Rodriguez did not demonstrate that any gross negligence or bad faith occurred. *Cf. Steese v. State*, 114 Nev. 479, 492 n.3, 960 P.2d 321, 329 n.3 (1998) (the failure to find certain evidence did not imply that the police acted in bad faith or with gross negligence). There was likewise no showing of gross negligence regarding the failure to photograph

the crime scene given the overall circumstances present in the case. Finally with regard to the 911 call, standard operating procedure dictates that phone recordings are retained only for a certain number of years; thus, the police were not grossly negligent in not retaining the recording.

After considerable argument from Reyes-Rodriguez and the State, the district court determined that the evidence that was not collected was not material and resulted from simple negligence. It thus declined to grant Reyes-Rodriguez the presumption. The district court's decision not to give the presumption jury instruction was neither arbitrary nor capricious, nor did it exceed the bounds of the law, given that the uncollected pieces of evidence dealt with either uncontested facts or would have had a speculative impact on the trial.

Regarding the two-reasonable-interpretations instruction, the district court rejected this proposed instruction because it felt that it was adequately covered in a separate, legally appropriate reasonable doubt jury instruction. We have previously held that when an appropriate reasonable doubt jury instruction is provided, it is not error for a district court to reject a two-reasonable-interpretations jury instruction. *See Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976). Accordingly, we conclude that the district court did not abuse its discretion in denying Reyes-Rodriguez's proposed jury instructions.

The jury verdict is supported by sufficient evidence

Reyes-Rodriguez argues that there was insufficient evidence to support the verdict because the police failed to preserve Y.A.'s mother's 911 call or collect the shorts Y.A. was wearing at the time of the second incident. We conclude that there was sufficient evidence to establish each element of lewdness with a child under the age of 14 for both counts.

Evidence is sufficient to support a verdict if "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Hager v. State*, 135 Nev. 246, 256, 447 P.3d 1063, 1070 (2019) (emphasis and internal quotation marks omitted). As we held in *Rose v. State*, a sexual assault victim's testimony alone may be sufficient to sustain a guilty verdict so long as the victim testifies with some particularity regarding the incident. 123 Nev. 194, 203, 163 P.3d 408, 414 (2007). Thereafter, this court acknowledged the applicability of that proposition in lewdness cases when we held that "a lewdness victim's testimony need not be corroborated." *Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757-58 (2019). It is the jury's responsibility alone to assess witness credibility and determine the weight of the testimony, therefore the jury's verdict will not be disturbed on appeal where substantial evidence supports the verdict. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The crime of lewdness with a minor requires the State to prove (1) the child's age, (2) that there was a lewd or lascivious act, (3) upon or with the child's body, and (4) the defendant had the "intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of [themself] or of [the] child." NRS 201.230(1). Here, the state proved Y.A.'s age at the time of the two charged incidents by eliciting testimony about what year Y.A. was born. Y.A. further testified with particularity regarding the two instances when Reyes-Rodriguez approached her from behind and rubbed his bare and erect penis on her behind. This testimony alone is sufficient to establish that there was (1) a lewd act, (2) upon Y.A.'s body, and (3) that Reyes-Rodriguez had the intent to arouse or gratify himself. By virtue of

the jury's verdict, we also conclude that the jury found Y.A. to be a competent, credible witness who was able to adequately and accurately recall the events that had occurred and describe them for the jury.

Again, law enforcement officers generally do not have a duty to collect all potential evidence in a case. *Gordon*, 121 Nev. at 509, 117 P.3d at 218. Regardless, the officer's choice not to collect the shorts Y.A. was wearing or to preserve her mother's 911 call do not undermine the jury's verdict. The State established the essential elements of the crime and the evidence sufficed for the jury to find each element beyond a reasonable doubt.[1] Accordingly, we hold that there was sufficient evidence for the jury to convict Reyes-Rodriguez of both counts of lewdness.

There is no cumulative error warranting reversal

To the extent the district court may have erred in allowing Y.A.'s testimony regarding Reyes-Rodriguez's staring and attempt to pull her into his lap, Reyes-Rodriguez fails to demonstrate actual prejudice under our plain error review. We find any errors to be harmless, even in aggregate, and thus find no cumulative error warranting reversal. *See Alfaro v. State*, 139 Nev., Adv. Op. 24, 534 P.3d 138, 151-52 (2023) (holding

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[1]Reyes-Rodriuez also argues that the district court erred in denying his motion for judgment of acquittal and/or new trial on the grounds of insufficient evidence. Our review of a motion for a judgment of acquittal is essentially the same as review of the sufficiency of the evidence. *Kassa v. State*, 137 Nev. 150, 152, 485 P.3d 750, 755 (2021). As such, the district court did not err in denying Reyes-Rodriguez's motion for judgment of acquittal. Further, Reyes-Rodriguez failed to argue and address the appropriate standard of review for the denial of a motion for a new trial, thus we decline to review the issue. *See Jeremias*, 134 Nev. at 59, 412 P.3d at 54 (stating that we may decline to consider arguments that are not supported by cogent argument or authority).

that the erroneous introduction of two uncharged acts were harmless and did not amount to cumulative error).

Reyes-Rodriguez failed to demonstrate any reversible prosecutorial misconduct regarding the alleged other crimes, wrongs, or acts evidence and vouching. Additionally, we find no error in the district court's decisions not to address the alleged other wrongs or acts, not allowing the use of certain demonstrative aids during cross examination, and not accepting two of Reyes-Rodriguez's proposed jury instructions. Sufficient evidence supports the jury's verdict, and no cumulative error warrants reversal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon

_____, J.
Lee

_____, J.
Bell

cc: Hon. Mary Kay Holthus, District Judge
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