IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KEVIN GRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48338

FILED

DEC 0 4 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of indecent exposure, six counts of lewdness with a minor under the age of 14, one count of attempted sexual assault of a minor under the age of 14, and one count of sexual assault of a minor under the age of 14. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Brian Gray raises several arguments with respect to his convictions. Except as specifically noted below, Gray's trial counsel did not object to any of the issues now raised on appeal. The failure to object at trial generally precludes appellate review.[1] However, this court has discretion to address an error if it was plain and affected the defendant's substantial rights.[2] In conducting our plain error review, we must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights.[3] The burden is on the defendant to show actual prejudice or a miscarriage

[1]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[2]Id.

[3]Id.

07-26128

of justice.[4] The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we affirm.

Detective Demas's testimony

Gray contends that the district court committed plain error by admitting certain testimony by Detective Matthew Demas. First, Gray argues that the district court erred in allowing Demas to proffer lay opinion testimony concerning Gray's veracity. Second, he contends that the district court erred in failing to strike a non-responsive statement accusing Gray of lying. Third, Gray asserts that the district court erred in allowing Demas to testify that he had never arrested anybody under a false accusation. Fourth, Gray argues that the district court erred in allowing Demas to testify about his understanding of DNA evidence.

With respect to Gray's first contention, the record demonstrates that the prosecution only asked Demas about Gray's veracity after defense counsel brought the issue up during cross-examination. Accordingly, we conclude that Gray's counsel "opened the door" to the testimony at issue.[5]

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[4]Id.

[5]See McKenna v. State, 114 Nev. 1044, 1056, 968 P.2d 739, 747 (1998) (concluding that defense counsel opened the door to appellant's gang affiliation and that the prosecutor's subsequent elicitation of testimony from a witness that the gang was a "white supremacy group" was proper); Rippo v. State, 113 Nev. 1239, 1253, 946 P.2d 1017, 1026 (1997) (noting that "[w]here counsel opens the door to the disputed questions . . . opposing counsel may properly question the witness in order to rehabilitate him or her").

With respect to Gray's second argument, the State concedes that Demas's non-responsive statement was improper. When viewed in context of the entire trial, however, we conclude that this statement does not warrant reversal. Similarly, with respect to Gray's third contention, we conclude that although Demas's testimony about his arrest record was improper, it did not rise to the level of plain error.[6]

With respect to Gray's last argument, we conclude that he has failed to demonstrate actual prejudice or a miscarriage of justice. In fact, Gray's trial counsel conceded: "I don't think there's an issue about DNA . . . and I'm not disputing that . . . [.]" Thus, we conclude that Demas's testimony was not sufficiently prejudicial to constitute plain error.

Medical examination testimony

Gray argues that the district court committed plain error by allowing testimony by a nurse about medical examinations performed on sexual assault victims. While the nurse's testimony was only relevant to

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[6]Gray cites two cases from other jurisdictions in which appellate courts have held that it is error to deny a motion for mistrial after police officers make gratuitous statements during trial. In the first case, the officer stated that he saw the defendant standing in front of a "dope den." People v. Page, 199 N.W.2d 669, 670-71 (Mich. 1972). In the second case, the officer stated that he overheard another officer call the defendant "the king pin of the burglary organization." State v. Foss, 310 So.2d 573, 574 (La. 1975). We conclude that these cases are distinguishable for two reasons. First, both statements specifically referred to the defendant in a prejudicial manner. By contrast, the declaration in this case referred to Demas's previous arrest record. Second, both cases involved appeals from motions for mistrials. In this case, however, Gray failed to object at trial; thus, the more rigorous plain error standard of review applies.

the extent that she gave legitimate reasons for the absence of evidence of sexual abuse in this case, we conclude that the district court did not commit plain error in failing to strike her testimony.[7]

Jury instructions

Gray raises two arguments related to jury instructions. First, Gray contends that the district court committed plain error in instructing the jury that it was to determine whether Gray's "confession" (i.e., his statement to the police) was voluntary. Second, Gray asserts that the district court erred in denying Gray's request for an instruction regarding the State's loss of the victim's green skirt.

With respect to Gray's first argument, we agree that the use of the term "confession" in the instruction at issue was problematic. The court probably should have left the issue of how to interpret the substance of Gray's statement to the jury as the ultimate trier of fact. In addition, the instruction improperly abdicated the responsibility of determining voluntariness to the jury and failed to instruct the jury as to what it should do if it found the statement to be involuntary[8]. However, neither party discussed the voluntariness of Gray's statement at trial. Furthermore, Gray's counsel did not challenge the voluntariness of the

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[7]In fact, the district court attempted to shorten the nurse's answers to the prosecutor's questions. Given that Gray's counsel did not object to the testimony, this was an appropriate response. Accordingly, we conclude that no actual prejudice or miscarriage of justice occurred as a result of the nurse's testimony.

[8]See Jackson v. Denno, 378 U.S. 368, 390-91 (1964) (concluding that the jury may only decide the weight to give a confession not whether it was voluntary).

statement in a pretrial motion to suppress, nor did he object to the instruction at trial. In addition, the instruction used the words "statement" and "confession" interchangeably, thereby downplaying the significance of the term "confession." Finally, the jury heard the testimony and knew that there was a dispute regarding how best to interpret the substance (and not voluntariness) of Gray's statement. Thus, we conclude that the district court did not commit plain error when it read the instruction in question.

With respect to Gray's second argument, we reiterate that district courts have broad discretion in settling jury instructions and this court reviews their decisions for an abuse of discretion or judicial error.[9] Moreover, a violation of due process resulting from the State's loss of evidence requires a showing that (1) the State lost the evidence in bad faith or (2) the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was lost.[10] A defendant is only entitled to an instruction creating a presumption against the State if the defendant demonstrates that the loss was willful.[11]

In this case, all parties agreed at trial that the victim's green skirt held no scientific evidentiary value. Thus, the relevance of the skirt,

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[9]Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

[10]Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996).

[11]Langford v. State, 95 Nev. 631, 636-37, 600 P.2d 231, 235 (1979).

if any, appears to have been purely visual.[12] Moreover, because the State conceded that no DNA evidence would be present on the skirt, it is highly unlikely that the skirt held any exculpatory value. As noted by the district court, the skirt was immaterial.

Separately, Gray fails to present convincing evidence that the State willfully lost the green skirt. Thus, Gray's proposed instruction was unnecessary and we conclude that the district court did not abuse its discretion in refusing to read it to the jury.[13]

Improper vouching for witnesses

Gray argues that the State improperly vouched for witnesses during its rebuttal closing argument. With respect to the victim's veracity, the prosecutor stated that (1) she "is not a sophisticated liar," (2) "[s]he was truthful when we asked questions, and she was truthful when defense counsel asked questions," and (3) "she told all of you the truth . . . [s]he told you the truth about everything . . . [s]he's not a person who makes up elaborate stories." Separately, with respect to Gray, the

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[12]On appeal, Gray argues that the skirt might have demonstrated his innocence if it had been tested for DNA because no DNA would have been found. However, the victim testified that none of Gray's fluids got onto the skirt and the State never suggested that the skirt would hold value as DNA evidence.

[13]Notably, Gray contends that we should extend our recent decision in Bass-Davis v. Bass, 122 Nev. 442, 134 P.3d 103 (2006), to criminal cases. In Bass, we concluded that when evidence is negligently lost or destroyed, a permissible inference that the missing evidence would be adverse applies. Id. We decline to extend this principle to the criminal context. Even if we were to apply Bass to the instant case, however, the exculpatory value of the skirt is so slight that there was probably no abuse of discretion in failing to provide such an instruction.

prosecutor stated that he "twists everything around." In addition, the prosecutor commented, "[m]aybe [Gray] can't even admit it to himself, but he has to explain away what [the victim] is saying, so he admits to the things that happened, but twists them around, makes them his own version." Finally, the prosecutor stated, "the State has met [the burden of proof] here because you have every reason to believe what [the victim] testified to and every reason not to believe the version in the defendant's statement."

In the past, we have made clear that "[a] prosecutor may not vouch for the credibility of a witness or accuse a witness of lying."[14] "Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony."[15] Moreover, we recently reversed a conviction in Anderson v. State because the prosecutor (1) stated, inter alia, that the defendant and his son had "years to 'cook up a story and they did,'" and (2) offered "personal opinions as to the verity of its own witnesses."[16]

In light of Anderson and the strict standard against vouching, the prosecutor's comments about the victim and Gray present the most

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[14]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

[15]Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (quoting United States v. Roberts, 618 F.2d 530, 533 (1980)).

[16]121 Nev. at 517, 118 P.3d at 187. The prosecutor also improperly referred to Anderson's post-arrest silence and wrongly stated that "'[Anderson is] a drunk driver–he needs to be convicted–he's endangering people–he's certainly endangering his child–do his child and all of us a favor–do your duty in this case–find that he's guilty.'" Id.

troubling issue raised on appeal, especially considering that the State's case against Gray consisted almost entirely of the victim's testimony.[17] Still, the burden of demonstrating prejudicial prosecutorial misconduct is particularly high and "the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[18] In addition, "a defendant is entitled to a fair trial, not a perfect one and, accordingly, '[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context.'"[19] Because all of the statements in question here went without objection and were either made in passing or made in response to statements by Gray's counsel, we conclude that reversal is unwarranted under the applicable plain error standard of review.[20]

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[17]The only witnesses of note at trial were the victim, the victim's mother, the examining nurse (who testified that there was no evidence of abuse), and Detective Demas (who testified regarding Gray's statement to the police). Gray did not testify at trial.

[18]Anderson, 121 Nev. at 516, 118 P.3d at 187.

[19]Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004) (quoting Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), overruled in part on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000)).

[20]We reiterate, however, that statements such as those made by the prosecutor in this case are improper and worrisome—even when made in response to statements by defense counsel. See Whitney v. State, 112 Nev. 499, 500-02, 915 P.2d 881, 882-83 (1996) (concluding that it was error for the district court to allow the prosecutor to proceed, over objection, in commenting on the defendant's failure to produce evidence even after defense counsel accused the prosecution of failing to call certain

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Shifting of burden

Gray also challenges a portion of the prosecutor's closing argument during which she commented, "[T]here isn't anything that corroborates the defendant's statement [to Detective Demas]." Gray's counsel objected to this comment at trial, complaining that it improperly shifted the burden to her client. The court overruled Gray's objection but required that the prosecutor limit her discussion to the evidence that was presented to the jury.

Generally, it is improper for a prosecutor to comment on a defendant's failure to call a witness.[21] Burden-shifting in this manner places a responsibility on the defendant to produce proof that explains the absence of a witness or other evidence, which is clearly improper.[22]

In this case, the defendant was not required to explain his statements to the police. Thus, the prosecutor's comment was improper. However, we conclude that reversal is unwarranted because the prosecutor's comment was made in passing and was harmless when viewed in context of the entire trial and closing arguments.

Cumulative error

Gray asserts that cumulative error mandates reversal. Although certain errors occurred during Gray's trial, some of which the

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. . . *continued*

witnesses). Thus, any future transgressions by the prosecutor in this case, Sonia Jimenez, may result in the imposition of sanctions.

[21]Whitney, 112 Nev. at 502, 915 P.2d at 882.

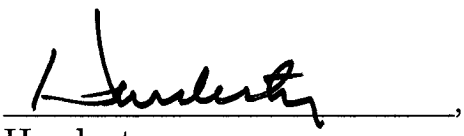
[22]Id.

State concedes, the jury's guilty verdict clearly implies that it believed the victim's detailed testimony, which Gray does not challenge on appeal. Thus, we conclude that the cumulative effect of the errors at trial is insufficient to warrant a new trial.[23]

Conclusion

Gray correctly notes that certain errors occurred during trial in this case. However, none of these errors constitute plain error, nor do they amount to cumulative error when viewed together. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[24]



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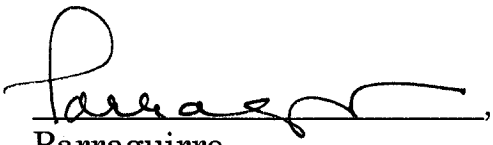

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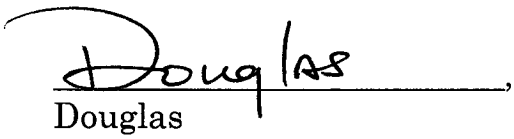

_____, J.
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[23]Cf. Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85-86 (2004) (reversing for a new penalty phase hearing because of the cumulative effect of certain prejudicial jury instructions and inflammatory remarks made by the prosecutor).

[24]Gray's contention that he received ineffective assistance of counsel at trial is not properly raised on direct appeal. Rippo v. State, 122 Nev. ___, ___, 146 P.3d 279, 285-86 (2006).

cc: Hon. Jackie Glass, District Judge
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Eighth District Court Clerk