IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE CHESTER ARTHUR A/K/A CHESTER GEORGE ARTHUR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52046

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary and first-degree murder with the use of a deadly weapon and, pursuant to a guilty plea, of failure to stop on signal of a police officer. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The district court sentenced appellant George Chester Arthur to 48 to 120 months for burglary; life in prison with the possibility of parole after 20 years for first-degree murder, plus an equal and consecutive term for the use of a deadly weapon; and 24 to 60 months for failure to stop on signal of a police officer.[1] Arthur appeals his conviction on multiple grounds: (1) the district court improperly refused to excuse two potential jurors for cause; (2) a jailhouse phone call was inadmissible; (3) the district court erred by admitting the 911 call; (4) the district court erred by admitting evidence of Arthur's character and prior bad acts; (5) a reference that Arthur was previously incarcerated was prejudicial; (6) the prosecutor improperly cross-examined Arthur; (7) the State improperly

[1]The State also charged Arthur with battery with the use of a deadly weapon; however, he was acquitted of this charge by the jury.

noticed a prospective witness; (8) the prosecutor committed misconduct; (9) first-degree murder cannot be based on an improper theory of felony murder; (10) the jury instructions were confusing, misleading, or a misstatement of the law; (11) there was insufficient evidence to support the convictions; and (12) cumulative error was prejudicial. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction.

Refusal to excuse two potential jurors for cause

Arthur argues that the district court erred by failing to excuse two prospective jurors for cause. A decision to remove a prospective juror for cause remains within the district court's broad discretion. Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005).

Either party may challenge a juror for cause if it is believed that the juror cannot adjudicate the facts fairly, NRS 175.036(1); however, "[t]he test for evaluating whether a juror should have been removed for cause is 'whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Weber, 121 Nev. at 580, 119 P.3d at 125 (quoting Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001) (internal quotation omitted)).

Here, Arthur contends that he was prejudiced by the district court's error in failing to excuse two prospective jurors. Although one of those prospective jurors represented that she had past experiences with domestic abuse, and the other prospective juror expressed anxiety that he could not manage his business while sitting on the jury, both prospective jurors unconditionally represented that they would be fair and impartial in performing their duties. The district court refused Arthur's request to excuse these prospective jurors for cause, which Arthur claims resulted in

prejudice because he then had to exhaust his preemptory challenges and was precluded from later removing two other ultimately impaneled jurors.

Prejudice is derived from the impaneled jury

Claims of prejudice "based on [] 'wasted' preemptory challenge[s] . . . must focus on whether the impaneled jury was impartial." Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996). On appeal, Arthur requests that we retreat from this standard, but we decline to do so.

Arthur argues that had he not exhausted his preemptory challenges on the two prospective jurors described above, he would have challenged two other specific jurors. Our review of the record indicates that, although one of those other jurors was impaneled initially, she was subsequently removed for health reasons and did not participate in the jury's deliberations. As such, Arthur has failed to demonstrate partiality attributable to this juror. During voir dire, the other juror Arthur indicates he would have challenged if he had not exhausted his preemptory challenges represented that his father had been a victim of a murder but unhesitantly expressed that, despite the potential similarities of the current case with his father's murder, he would be fair and impartial. Because Arthur has failed to establish how this juror's participation on the jury panel created a partial jury, we conclude that the district court did not abuse its discretion by refusing to remove the previously described prospective jurors for cause and that Arthur was not prejudiced by exhausting his preemptory challenges on those jurors.

Jailhouse phone conversation

Arthur asserts that the district court committed error when it admitted a recorded jailhouse phone conversation between Arthur and a woman who eventually became a witness at trial because (1) the State did

not produce this recording for discovery until the first day of trial, (2) comments made during the phone conversation were irrelevant or improper, (3) the phone conversation revealed Arthur's custodial status, and (4) the conversation was improperly recorded. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Ramet v. State, 125 Nev. ___, ___, 209 P.3d 268, 269 (2009).

Late disclosure of recorded phone conversation

Arthur argues that the State violated its duty under NRS 174.235(1)(a) to timely disclose, during discovery, the recording of his jailhouse phone conversation wherein Arthur made statements that contradicted his self-defense theory at trial. Similarly, NRS 174.295(1) requires a party who subsequently discovers additional material that is subject to discovery to "promptly notify the other party or the other party's attorney or the court of the existence of the additional material." A district court, however, has broad discretion to establish a remedy under NRS 174.295. Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). The court "does not abuse its discretion absent a showing that [a party] acted in bad faith or that the nondisclosure caused substantial prejudice." Id.[2]

Here, Arthur concedes that the State's late disclosure of the recorded phone conversation was not in bad faith. A review of the record

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[2]Arthur limits his challenge on appeal to a statutory duty to disclose evidence during discovery and does not specifically invoke a constitutional violation under Brady v. Maryland, 373 U.S. 83 (1963). However, the State appropriately addressed the constitutional violation within its answering brief, and we conclude that the State did not commit a Brady violation.

indicates that Arthur never requested a copy of the recorded phone conversation, as required by NRS 174.235(1), and upon discovery of the recorded conversation, the State promptly notified Arthur's counsel and provided counsel with a copy of it. Furthermore, Arthur was a party to the conversation and had knowledge of the statements he made that contradicted his self-defense theory at trial. He cannot now claim to have been prejudiced by its admission. See Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) (concluding that where a defendant had previously spoken with a witness, the defendant had notice of the potentially incriminating evidence and could have reasonably discovered it). Although the State did not disclose the recorded jailhouse phone conversation until the morning of the first day of trial, we conclude that the district court did not abuse its discretion by admitting the recording.

Comments in the recorded phone conversation

Next, Arthur argues that the recorded phone conversation is inadmissible because it contains inappropriate comments by the other party to the call concerning Arthur's credibility and character, consisting of the repeated statement that Arthur is a liar. Generally, "[e]vidence of a defendant's character is inadmissible to prove that he or she acted in conformity with that character trait on the occasion in question unless certain exceptions apply." Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008) (citing NRS 48.045).

In this case, a careful review of the record surrounding the district court's decision to admit the phone conversation reveals that, after listening to the recording of the jailhouse phone conversation, the district court expressed concern over the comments about Arthur's credibility and character. The court acknowledged that it typically does not allow witnesses to accuse defendants of lying; however, the district court

determined that the phone conversation was relevant and offered Arthur the option of giving a limiting instruction to the jury or redacting the specific comments where he is called a liar. Arthur refused the limiting instruction because he considered it to be ineffective and declined to redact the improper comments because it would draw unnecessary attention to them. Because Arthur made a decision to not redact the comments concerning his credibility or character, we conclude that it was not an abuse of discretion for the district court to admit the recorded jailhouse phone conversation under those circumstances.

Arthur's custodial status

Arthur further challenges the recorded jailhouse phone conversation arguing that it improperly revealed his custodial status. A defendant is "entitled to not only the presumption of innocence, but also to indicia of innocence." Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). This includes the right "to appear before the jury without physical restraints." Id. at 287, 809 P.2d at 1273. Verbal references to a defendant's in-custody status "have the same prejudicial effect as bringing a shackled defendant into the courtroom." Id. at 288, 809 P.2d at 1273.

In this case, the phone conversation was recorded in the days immediately following Arthur's arrest. We conclude that any inference of Arthur's custodial status that can be implied from the phone conversation is limited to Arthur's custodial status at the time of his arrest and not necessarily his custodial status at the time of trial. 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. Additionally, on direct examination, Arthur independently testified that he was in jail at the time the phone conversation was recorded; and defense counsel, while cross-examining

another witness, referenced that Arthur had been in custody for the last year and nine months. Therefore, we conclude that the recorded jailhouse phone conversation was not prejudicial as it did not reveal Arthur's custodial status at the time of trial, and any prejudice that can be attributed to Arthur's custodial status is a direct result of testimony elicited from Arthur and comments made by Arthur's counsel.

Phone conversation was properly recorded

In his final challenge to the recorded phone conversation, Arthur asserts that it was improperly recorded. NRS 209.419 expressly grants detention centers the authority to record phone conversations so long as signs are posted near the telephone giving notice that the conversation may be intercepted. Our review of the record indicates that signs were posted near the telephone at the time of Arthur's phone conversation, and a recording was played at the initiation of the conversation notifying the parties that the conversation would be recorded. Therefore, we conclude that Arthur's argument is without merit.

Admission of 911 call

Arthur argues that the district court erred by admitting the recording of the 911 call because the prejudicial impact of the emotional outcries contained within the call outweigh any probative value of the call. A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Ramet, 125 Nev. at ___, 209 P.3d at 269.[3]

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[3]Arthur does not challenge the admissibility of the recording of the 911 call as hearsay; regardless, the State contends that the call is admissible under the excited utterance exception of NRS 51.095. We agree.

At trial, Arthur testified that he did not have a clear recollection of the events in question. Despite the emotional outcries captured on the 911 call, the call provides probative evidence, including an initial description of the crime scene and a timeline of events indicating when the victim was alone at home and when his body was subsequently discovered. Arthur's inability to recall the facts in question limited the State's ability to present a complete account of the events of that evening without offering the 911 call as evidence. Therefore, regardless of the emotional outcries on the 911 call, we conclude that the probative value of the call outweighed any prejudicial effect and the district court did not abuse its discretion in admitting the evidence.

Character evidence—prior bad acts

Next, Arthur argues that the district court improperly admitted evidence of prior bad acts without first conducting a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), or providing a limiting jury instruction. The State counters that the evidence was admissible because it was offered to rebut a false impression of Arthur's conduct and character created by defense counsel's cross-examination of a witness.

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). "It will not be reversed absent manifest error." Id. In analyzing the propriety of admitting evidence of prior bad acts, the trial courts are instructed to follow the parameters of NRS 48.045(2) and weigh the probative value of the evidence against the risk of unfair prejudice. Id. at 72-73, 40 P.3d at 416-17. We have previously determined that when a defendant creates an impression of his character, the State may offer

similar evidence as rebuttal so long as the evidence "squarely contradict[s] the . . . false impression" caused by the defendant's evidence. Jezdik v. State, 121 Nev. 129, 140, 110 P.3d 1058, 1065 (2005); see also U.S. v. Beltran-Rios, 878 F.2d 1208, 1212 (9th Cir. 1989) ("We previously have allowed the Government to introduce otherwise excludable testimony when the defendant 'opens the door' by introducing potentially misleading testimony.").

On direct examination of the witness, the State diligently avoided asking questions related to Arthur's prior acts of domestic violence or his character. However, during cross-examination of the witness, Arthur's counsel engaged in a series of questions that portrayed Arthur as acting childlike when he was intoxicated. Prior to the State's rebuttal examination of the witness, the parties sought clarification from the district court as to the proper scope of the State's rebuttal examination. In compliance with the district court's guidelines, the State's rebuttal evidence did not highlight specific instances of domestic violence or convictions but was limited and tailored to evidence rebutting the impression of Arthur's conduct and character while intoxicated. As such, we conclude that the State's rebuttal evidence squarely contradicted Arthur's impression of his character and conduct and that the district court did not abuse its discretion by allowing the State to pursue this line of questioning.

Reference to Arthur's prior incarceration

Arthur contends that the district court improperly denied a motion for a mistrial after a witness testified that Arthur had been previously incarcerated. A district court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). "A witness's spontaneous or

inadvertent reference to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

In this case, the State was questioning the witness about certain family members' living arrangements when the witness made the statement about Arthur's prior incarceration. Arthur immediately approached the bench and requested a mistrial, which the district court addressed outside the presence of the jury. The district court denied Arthur's motion but offered to provide a curative instruction, which Arthur declined because he believed that it would draw more attention to the statement. When the jury returned to the courtroom, the district court did not issue an admonishment and the State immediately moved on to a different line of questioning. Although the district court did not admonish the jury, the witness's statement was isolated and unsolicited by the State. Therefore, we conclude that the district court did not abuse its discretion by denying Arthur's motion for mistrial or by not admonishing the jury.

Cross-examination of Arthur

Arthur argues that the State improperly cross-examined him regarding the veracity of a witness's testimony. We previously adopted a rule prohibiting prosecutors from questioning a defendant about "whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying." Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003). However, a prosecutor may ask about the veracity of other witnesses "where the defendant during direct examination has directly challenged the truthfulness of those witnesses," id., and may "'demonstrate to a jury through inferences from the record that a defense

witness's testimony is palpably untrue.'" Pascua v. State, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006) (quoting Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990)).

On cross-examination, Arthur's counsel questioned the witness at length about a phone conversation between her and Arthur on the day of the murder. The State, on direct examination, asked Arthur a series of questions regarding his version of that phone conversation:

> Mr. Tomsheck: Actually, she testified, "Why is he talking shit," is what she said.
>
> [Mr. Tomsheck]: Do you agree that you said that to her?
>
> [Mr. Arthur]: No. I don't remember that.
>
> [Mr. Tomsheck]: So everything else she testified to is correct, that part is not?
>
> [Mr. Arthur]: I don't remember about that.
>
> Mr. Coffee: Judge, I'm going to object. He's asking this witness to comment on the credibility of another witness. I think that's inappropriate.
>
> Mr. Tomsheck: I'm not asking him to comment on her credibility at all. I'm asking if he agrees with what she said, because it was a phone call between the two of them. Obviously, his perception—
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> The Court: I'll allow that.
>
> [Mr. Tomsheck]: It's your position that you didn't say what's up with—or why is your dad talking shit, because you weren't angry?
>
> [Mr. Arthur]: No. I wasn't angry. I don't even remember saying that.

The State limited its questions to ascertaining Arthur's version of the conversation and whether Arthur agreed with the witness's account but

did not ask Arthur to comment on the witness's credibility. Therefore, we conclude that the State did not improperly cross-examine Arthur.

Notice of a prospective witness

Next, Arthur contends that the district court improperly permitted a witness to testify although she was not properly noticed on the State's witness list. NRS 174.234 requires that the State must provide the name and last known address of each witness that it intends to call at trial. The State acknowledges that NRS 174.234 also imposes a continuing duty to supplement its witness list. "[F]ailure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission." Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997). In Dossey v. State, we determined that an endorsement disclosing the witness's place of employment but not the witness's name was sufficient because the defense could have discovered the witness's identity with "minimal and reasonable efforts." 114 Nev. 904, 907, 964 P.2d 782, 784 (1998). And, even if a witness is erroneously endorsed, "the proper remedy is a continuance, not exclusion of the witness's testimony." Id. at 908, 964 P.2d at 784.

Here, the State noticed the witness on its witness list but listed the witness's address as unknown. The State represented that it never knew the witness's address and therefore could not supplement its witness list. Arthur likewise included the witness on his witness list that he provided to the State. Despite including the witness on his own witness list, Arthur argues that, without the witness's contact information, he did not have an opportunity to interview the witness prior to trial and discover the content of her testimony. The district court permitted the witness to testify, finding that the State did not act in bad

faith when it failed to ascertain contact information for the witness and then supplement its witness list.

At trial, the witness, a relative and neighbor of the victim, testified that one month prior to the murder, Arthur commented to her that he was sent to kill the victim. Notwithstanding the witness's condemning testimony, Arthur was able to conduct a thorough cross-examination of the witness. Furthermore, once the district court permitted the State to call the witness to testify at trial, Arthur did not request a continuance in order to interview the witness and discover the content of her testimony.

We conclude that, with reasonable efforts, Arthur could have discovered the witness's contact information. And, because Arthur included the witness on his witness list, Arthur cannot now complain that he did not have proper notice or knowledge of the witness's testimony prior to trial. Additionally, Arthur was able to adequately challenge the witness's testimony on cross-examination. Under these circumstances, we conclude that Arthur was not prejudiced by the State's failure to provide the witness's contact information and reversal is not warranted.

Prosecutorial misconduct

Arthur asserts that the State committed two instances of prosecutorial misconduct: (1) he was disparaged by the State in its attacks on his self-defense theory, and (2) the State made improper comments to the jury. Prejudicial prosecutorial misconduct occurs when "a prosecutor's statements so infect[ ] the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). We examine the context in which a prosecutor's statements were made and will not overturn a conviction "unless the misconduct is 'clearly demonstrated to be substantial and prejudicial.'"

Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)).

Disparaging comments on self-defense theory

Arthur argues that the State inappropriately undermined and disparaged his self-defense theory by suggesting that the defense concocted this theory to fit the evidence. In particular, Arthur contends that he was disparaged by the prosecutor's comments during closing argument that self-defense "has not always been [Arthur's] defense" and "[Arthur] says self-defense now because he can no longer say he wasn't there." Defense counsel objected to the latter comment.

Our review of the record illustrates that the prosecutor focused his attention on the testimonial evidence adduced at trial and properly depicted the deficiencies in Arthur's defense. The prosecutor later acknowledged the elementary standards for self-defense and demonstrated that the evidence presented did not support the defense. We conclude that the prosecutor's comments did not unfairly result in a denial of due process nor were they prejudicial to Arthur.

Final comment to the jury

The prosecutor concluded his closing argument by imploring the jury to "strike a blow for justice." Arthur failed to object to the prosecutor's final comment but now argues that it was inappropriate. "Generally, the failure to object [at trial] precludes appellate review absent plain error." Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 71 (2008). To constitute plain error, the "'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Nelson v. State, 123 Nev. 534, 543, 170 P3d. 517, 524 (2007) (quoting Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002)).

In support of his argument, Arthur relies on U.S. v. Beasley where the prosecutor invoked the jury to be part of the "war on drugs." 2 F.3d 1551, 1559-60 (11th Cir. 1993). The Beasley court determined that the comments were improper and were an "appeal by the prosecutor for the jury to act as 'the conscience of the community,'" and "were 'calculated to inflame.'" Id. at 1560 (quoting United States v. Bascaro, 742 F.2d 1335, 1354 (11th Cir. 1984), abrogated on other grounds by U.S. v. Lewis, 492 F.3d 1219, 1221-22 (11th Cir. 2007)). Notably, however, the court concluded that the comments did not amount to reversible error. Id.

We similarly conclude here that the prosecutor's comment for the jury to "strike a blow for justice" was inappropriate and calculated to inflame the jury. However, when viewed in context of the entire record and the substantial evidence of guilt, the prosecutor's final comment did not affect Arthur's substantial rights, and therefore, did not amount to plain error. See Nelson, 123 Nev. at 543, 170 P.3d at 524.

First-degree murder based on felony murder

The State charged Arthur with burglary and murder, among other charges, and specified in the indictment that the murder charge rested on alternative theories of liability, including felony murder—"killing . . . during the perpetration or attempted perpetration of burglary." In the burglary charge, the State alleged that Arthur entered the victim's home with the "intent to commit an assault and/or battery and/or a felony." Arthur extrapolates that the use of the terms "and/or a felony" is a disguise for homicide or murder and that the felony murder doctrine should not be applied when, as here, the predicate felony of burglary is based upon entering the residence with the intent to commit murder.

In State v. Contreras, this court held that Nevada's statutory scheme allows for a felony murder charge where the predicate felony is burglary. 118 Nev. 332, 336-37, 46 P.3d 661, 664 (2002).[4] In reaching this conclusion, we adopted the rationale in People v. Miller, 297 N.E.2d 85 (N.Y. 1973), that any burglary, including one based on intent to assault, justifies application of the felony-murder rule, and stated that "[w]e do not believe it is appropriate to apply the merger doctrine to felony murder when the underlying felony is burglary, regardless of the intent of the burglary." 118 Nev. at 336-37, 46 P.3d at 663-64. Arthur argues, however, that in People v. Cahill, 809 N.E.2d 561 (N.Y. 2003), the New York Court of Appeals "retreated from an overly-expansive interpretation of the felony-murder doctrine" in Miller, thus undermining our decision in Contreras.

In Cahill, the court determined that the New York statute that "elevates intentional murder [committed during a burglary] to capital-eligible murder" requires that the defendant's intent underlying the burglary be independent of the intent to murder. 809 N.E.2d at 587. Otherwise, "the class of those eligible for the death penalty . . . would widen." Id. at 589. Understandably, the Cahill court emphasized that because Miller interpreted New York's felony-murder statute, not its capital-punishment statute, "Miller is distinguishable on the facts and in its legal premise." Id. The court further stated that "we leave our body of

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[4]Nevada's felony-murder statute provides, in pertinent part, that "[m]urder of the first degree is murder which is . . . [c]omitted in the perpetration or attempted perpetration of . . . burglary." NRS 200.030(1)(b).

felony murder jurisprudence intact." Id. However, even if Cahill modified or overruled Miller, that case is not binding on this court and, thus, we conclude that Arthur's argument lacks merit[5] and we need not revisit our holding in Contreras.[6]

Jury instructions

Arthur contends that several jury instructions were confusing, misleading, or misstatements of the law. "[W]hether a jury instruction [is] an accurate statement of the law is a legal question subject to de novo review." Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1097 (2009). At trial, Arthur objected to only one jury instruction but failed to object to any of the jury instructions he now challenges on appeal. Because Arthur failed to object, we will review the adequacy of the challenged instructions for plain error. See id.

Jury instruction no. 16

Arthur argues that the district court erred when instructing the jury on premeditation because the instruction "improperly emphasized the rapidity with which premeditation can be formed." Jury instruction no. 16 provides, in pertinent part:

> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and

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[5]Arthur argues that our decision in Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007), dictates that felony murder may not be based upon burglary with the intent to murder. We disagree and conclude that Nay is inapposite to the issue in this case.

[6]Recently, the California Supreme Court cited to Contreras in noting that the majority of states now support the Miller approach to felony murder. See People v. Farley, 210 P.3d 361, 408 n.23 (Cal. 2009).

> against the action and considering the consequences of the actions.
>
> . . . .
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

The language in jury instruction no. 16 tracks verbatim the instructions "we set forth . . . for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000). Arthur acknowledges that this instruction comports with Byford but argues that emphasizing the instantaneous nature of premeditation undermines the requirement of deliberation. We decline to revisit Byford and conclude that Arthur's argument lacks merit and reversal is not warranted on this issue.

Jury instruction no. 19

Jury instruction no. 19 instructed jurors that felony murder presumes premeditation and malice aforethought; however, Arthur argues that the instruction may have been confusing and misleading.

Jury instruction no. 19 provides:

> There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of murder is murder committed in the perpetration or attempted perpetration of burglary. Therefore, a killing which is committed in the perpetration of such a burglary is deemed to be [m]urder of the [f]irst [d]egree, whether the killing was intentional or

> unintentional or accidental. This is called the [f]elony-[m]urder rule.
>
> The intent to perpetrate or attempt to perpetrate the burglary must be proven beyond a reasonable doubt.

Despite arguing that the instruction is confusing and misleading, Arthur acknowledges that it is a correct statement of the law. Because the instruction is a correct statement of the law, we conclude that the jury was properly instructed and that Arthur has failed to demonstrate that his substantial rights were affected.

Jury instruction no. 20

Arthur also asserts that jury instruction no. 20 requires that the jurors unanimously reject first-degree murder before considering second-degree murder.

Jury instruction no. 20 provides as follows:

> You are instructed that if you find that the State has established that the defendant has committed first degree murder you shall select first degree murder as your verdict. The crime of first degree murder includes the crime of second degree murder. You may find the defendant guilty of second degree murder if:
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> (1) some of you are not convinced beyond a reasonable doubt that the defendant is guilty of murder of the first degree, and
>
> (2) all twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.
>
> If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the

> defendant the benefit of that doubt and return a verdict of murder of the second degree.

Arthur contends that this instruction misstated the jury's legal obligations and minimized the State's burden of proof because the jury should have returned a lesser verdict if any juror had reasonable doubt about whether the crime charged was murder in the first degree. Jury instructions that improperly minimize the State's burden of proof can be considered a violation of the defendant's constitutional due process rights. Francis v. Franklin, 471 U.S. 307, 313 (1985). We conclude that jury instruction no. 20 is not a misstatement of the law. When considered in its entirety, the final paragraph of jury instruction no. 20 instructs the jurors that if there is reasonable doubt whether the murder was committed in the first or second degree, then the jury must return a verdict of second-degree murder. Accordingly, we conclude that the instruction did not mislead or confuse the jury and Arthur's due process rights were not violated.

Jury instruction no. 24

Jury instruction no. 24 provides as follows:

> Your verdict must be unanimous as to the charge. You do not have to be unanimous on the principle of criminal liability. It is sufficient that each of you find beyond a reasonable doubt that the murder, under any one of the principles of criminal liability, was murder of the first degree.

Arthur argues that jurors are required to be unanimous regarding the theory of liability. However, Arthur's argument fails as we have consistently held that "[w]here the State proceeds on alternative theories of first-degree felony murder and willful, deliberate, and premeditated first-degree murder, . . . the jury need not unanimously agree on a single theory of the murder." Crawford v. State, 121 Nev. 744,

750, 121 P.3d 582, 586 (2005); see also Moore v. State, 116 Nev. 302, 304, 997 P.2d 793, 794 (2000); Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773 (1997). Arthur urges this court to revisit its position. We decline to do so and conclude that the district court properly instructed the jury.

Jury instruction no. 33

Arthur next argues that jury instruction no. 33 violates his due process rights because the instruction, not the jury, concludes that a knife is a deadly weapon. Jury instruction no. 33 provides:

> "Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.
>
> You are instructed that a knife is a deadly weapon.

Although the first paragraph of jury instruction no. 33 follows the statutory definition in NRS 193.165(6), it can be argued that the second paragraph improperly displaces the fact-finding duty of the jury to decide whether the knife in question was a deadly weapon. Nonetheless, we conclude that, based on the evidence presented in this case, a rational trier of fact could have found that the knife in question satisfied the statutory definition of a deadly weapon. Accordingly, we conclude that Arthur has failed to demonstrate that any error in the jury instruction violated his due process rights.

Jury instruction no. 38

In Arthur's final challenge to the jury instructions, he contends that the use of the word "until" in jury instruction no. 38

subverts the presumption of innocence and reduces the State's burden of proof. Jury instruction no. 38 reads, in pertinent part:

> The [d]efendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the [d]efendant is the person who committed the offense.

We have previously addressed a challenge to this specific jury instruction in Blake v. State, 121 Nev. 779, 121 P.3d 567 (2005). In Blake, we determined that the challenged instruction followed the express language of NRS 175.191 and did not undermine the State's burden of proof or the presumption of innocence. Id. at 799, 121 P.3d at 580. Here, identical to the challenged jury instruction in Blake, jury instruction no. 38 expressly tracks the language of NRS 175.191, provides NRS 175.211's definition of reasonable doubt, and concludes by instructing the jury that "[i]f you have a reasonable doubt as to the guilt of the [d]efendant, he is entitled to a verdict of not guilty." Therefore, we conclude that the jury was properly instructed and Arthur's argument is without merit.

Sufficient evidence

Arthur argues that the State did not produce sufficient evidence to sustain the conviction for first-degree murder or burglary. To determine whether sufficient evidence supports a conviction, this court evaluates """whether, after 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."""" Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))). "Circumstantial evidence alone can certainly

sustain a criminal conviction." Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). It is the jury's task to weigh the evidence and evaluate witness credibility. Rose v. State, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007).

In this case, the record reflects that, although mostly circumstantial, the State presented evidence that Arthur was angry at the victim for hanging up the phone, that Arthur was banned from the victim's residence because of his drinking, that Arthur had previously stated that he was sent to kill the victim, and that he was seen in the area on the night of the murder. The State also presented evidence that Arthur knew that his children and their mother were not at home that evening, that Arthur's DNA was found throughout the house, that a struggle took place in the home, that the killing was of a violent and gruesome nature, and that Arthur attempted to clean the crime scene. And, finally, the State presented evidence showing that Arthur left the scene of the crime in the victim's vehicle, that he left a bottle of shampoo and latex gloves with blood stains in the trunk of the victim's car when he abandoned it, that he later fled from police, and he never notified anyone of the killing and later denied being involved or being at the victim's residence on the night of the murder. It was the jury's function to weigh the evidence and determine the credibility of the witnesses and decide whether Arthur's self-defense theory was plausible.

Based on the evidence in the record, and viewing that evidence in the light most favorable to the prosecution, we conclude that there is sufficient evidence from which a reasonable jury could reject Arthur's theory of self defense and find him guilty beyond a reasonable doubt.

Cumulative error

Lastly, Arthur argues that the cumulative effect of the district court's errors caused irreparable harm and violated his right to a fair trial. We will reverse a conviction if the defendant's right to a fair trial was violated by the cumulative effect of errors, even if the individual errors are harmless. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

After reviewing the entire record, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief. As a result, we conclude that Arthur's cumulative error challenge is unavailing.

Having considered Arthur's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk