IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARENCE ALVIN GAMBLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52521

FILED

MAY 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and aggravated stalking. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The district court sentenced appellant Clarence Gamble to 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 6 to 15 years for aggravated stalking, to run consecutive to the first-degree murder sentence. Gamble appeals his convictions on multiple grounds: (1) the district court's denial of his motion to strike the aggravated stalking count; (2) the district court's overruling of his Batson v. Kentucky objections to two of the State's peremptory challenges; (3) sufficiency of the evidence; (4) prosecutorial misconduct; (5) admission of character and hearsay evidence; (6) admission of evidence related to a temporary protective order; (7) the district court's refusal to give the jury his proffered circumstantial evidence instruction; (8) jury instructions that allegedly minimized the State's burden of proof; and (9) cumulative error. We conclude that all of Gamble's claims lack merit and affirm the judgment of conviction.

The indictment

Gamble argues that the aggravated-stalking charge in the indictment violated his due process rights because it did not satisfy NRS 173.075 and failed to adequately inform him of the charges against him. Gamble contends that the State's use of "and/or" rendered the indictment indefinite. Because Gamble is challenging the legal sufficiency of the indictment, this issue presents a question of law, which we review de novo. See Paige v. State, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000).

The use of "and/or" in an indictment is permissible so long as the indictment is comprehensible and sufficiently notifies the defendant of the nature of the charged crime. See Hidalgo v. Dist. Ct., 124 Nev. ___, ___, 184 P.3d 369, 375 (2008). Here, the indictment closely tracked the language of NRS 200.575, the aggravated-stalking statute, and we conclude that it sufficiently informed Gamble of the nature of the charge against him and the theory upon which the State planned to proceed.

Batson claims

Gamble next contends that the district court erred in denying his objections, pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), to the State's use of peremptory challenges to remove two African-American prospective jurors from the panel because the State exhibited discriminatory motives in doing so. In evaluating a Batson challenge, whether the State exhibited discriminatory intent is a determination of fact for the district court that this court "accord[s] great deference." Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1036-37 (2008). We will not reverse the district court's decision "unless clearly erroneous." Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

The district court denied Gamble's Batson challenges after determining that he failed to demonstrate purposeful discrimination by

the State. Nothing in the record indicates that the State's reasons for excusing the two contested jurors were motivated by racial discrimination. During voir dire, one juror admitted taking medication that caused drowsiness, and the other juror expressed an aversion to judging other people. Such factors would be cause for concern from the State's perspective. Accordingly, we conclude that the district court's decision was not "clearly erroneous" in this instance.

Sufficiency of the evidence

Gamble argues that the State failed to present sufficient evidence to support his convictions of first-degree murder and aggravated stalking. "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998). "[T]he question [on appeal] . . . is not whether there is evidence from which the jury could have reached some other conclusion." People v. Falck, 60 Cal. Rptr. 2d 624, 630 (Ct. App. 1997). It is the jury's task to weigh the evidence and evaluate the credibility of witnesses. See Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). "[C]ircumstantial evidence alone may constitute sufficient evidence for a jury to convict a defendant." State v. Love, 109 Nev. 1136, 1140, 865 P.2d 322, 324 (1993).

First-degree murder conviction[1]

Gamble was convicted of first-degree murder with the use of a deadly weapon in violation of NRS 193.165, NRS 200.010, and NRS

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[1]Gamble does not challenge the deadly weapon enhancement.

200.030. To prove first-degree murder, the State must prove that Gamble acted with "willful[ness], deliberat[ion] and premeditat[ion]." NRS 200.030(1)(a); Byford v. State, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000).

Gamble argues that the evidence (namely, his testimony) indicates that he acted in self-defense and did not act with willfulness, deliberation, and premeditation. However, the record demonstrates that other evidence was presented at trial that could undermine his self-defense argument, such that a "rational trier of fact [could] find the essential elements of the crime beyond a reasonable doubt." Leonard, 114 Nev. at 1209-10, 969 P.2d at 297. Gamble and the victim, Debra Redmond, had been involved in an extramarital relationship for approximately 20 years. The morning after Gamble and Redmond had an argument, Redmond took a sudden and indefinite leave of absence from work and immediately flew from Las Vegas to Texas, where she remained until just before her death. Gamble testified that he helped Redmond buy her house in Las Vegas. Once, while Redmond was in Texas, Gamble saw paperwork from a mortgage company at Redmond's house indicating that, unbeknownst to him, she had taken a second mortgage out on the house. A few weeks later, while looking for Redmond, Gamble went to Redmond's friend's house. Her friend testified that Gamble seemed angry that he could not find Redmond and told her that he would kill Redmond when he found her.

Gamble further testified that he went to Redmond's house after she returned from Texas and an altercation broke out, during which he retrieved a gun. An eyewitness testified that he saw Redmond running away from Gamble and heard her scream for help. Gamble admitted that he chased after Redmond while shooting at her. Redmond suffered four

gunshot wounds, and the medical examiner testified that on one shot, "the gun was extremely close to the [palm] of the hand, if not right on it." Moreover, the eyewitness testified that he saw Gamble try to place the gun in Redmond's hand. We conclude that the State presented overwhelming evidence to support Gamble's first-degree murder conviction.

Aggravated-stalking conviction

Gamble was also convicted of one count of aggravated stalking in violation of NRS 200.575. NRS 200.575(1) provides that a person commits the crime of stalking when he "willfully or maliciously engages in a course of conduct that would cause a reasonable person," and "actually causes" the person, "to feel terrorized, frightened, intimidated or harassed." Aggravated stalking consists of the crime of stalking, plus "threaten[ing] the person with the intent to cause him to be placed in reasonable fear of death or substantial bodily harm." NRS 200.575(2); Green v. State, 119 Nev. 542, 548 n.19, 80 P.3d 93, 97 n.19 (2003).

Gamble testified that after Redmond left Las Vegas, she called him to let him know she was "alive and well." However, he still proceeded to contact Redmond's friends and family members, go to her place of work, go to her neighbor's house, and go to two of her friends' houses. Gamble told one of the friends that he would kill Redmond when he found her. Additionally, while Redmond was in Texas, Gamble called the home where she was staying multiple times each week and indicated that he knew Redmond was there.

In addition, testimony was presented that when Redmond briefly returned to Las Vegas with a friend for one week, they did not stay at Redmond's house or drive Redmond's car, but instead, stayed at a hotel and drove a rental car. Moreover, during that trip, Redmond changed all

the locks on the doors at her house and added a lock to the garage.[2] We conclude that a jury could reasonably infer from the circumstantial evidence presented that Gamble committed the crime of aggravated stalking. See Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (stating that "intent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime, which are capable of proof at trial").

Prosecutorial misconduct

Gamble next argues that prosecutorial misconduct violated his constitutional rights. To determine whether prosecutorial misconduct occurred, we "must determine whether the prosecutor's conduct was improper," and then, "we must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008). Reversal of a conviction is not warranted if the prosecutorial misconduct amounts to harmless error. Id.

For misconduct of a constitutional nature, this court "appl[ies] the Chapman v. California[, 386 U.S. 18, 24 (1967),] standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Valdez, 124 Nev. at ___, 196 P.3d at 476. When the misconduct is not of a constitutional nature, this court "will reverse only if the error substantially affects the jury's verdict." Id.

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[2]Gamble testified that he had a key to Redmond's house and occasionally went there and let himself in while she was gone.

The prosecutor's comment regarding burden of proof

Gamble contends that the prosecutor misstated the element of premeditation, thus minimizing the State's burden of proof. Gamble objected to the prosecutor's comment, and the record reflects that the prosecutor immediately corrected the statement. The record further reflects that the prosecutor had previously discussed premeditation in closing argument without any objection from Gamble and that jury instruction number 11 properly instructed the jury on the correct statement of law. We determine that the prosecutor's statement was simply a "slip of the tongue" that was quickly corrected. White v. State, 95 Nev. 159, 162, 591 P.2d 266, 268 (1979). Thus, we conclude that the prosecutor's statement amounts to harmless error.

The prosecutor's comments about the defense's "story"

Gamble contends that the State committed prosecutorial misconduct by referring to his testimony as a "story" several times during closing argument. However, Gamble concedes that he did not object to any of these references at trial. "Generally, the failure to object [at trial] precludes appellate review absent plain error." Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 71 (2008). To constitute plain error, the "'error must be so unmistakable that 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, 118 Nev. at 655, 56 P.3d at 872 (2002)). In reviewing the record, it is apparent that the State's use of "story" was synonymous with "version" or "account" and was not an implication that Gamble fabricated his version of the events while sitting in the courtroom. See Coleman v. State, 111 Nev. 657, 665, 895 P.2d 653, 658 (1995) (internal quotations omitted) (concluding that it was not

reversible error when the prosecutor stated that "[t]he defendant's story . . . is one that he's had nine months to think of" and noting that this court has found reversible error in cases where a prosecutor has implied that a defendant fabricated his story after hearing other witnesses). Thus, we conclude that this challenge does not rise to the level of plain error and reversal is not warranted.

The prosecutor's comments regarding the evidence

Gamble argues that the prosecutor misstated and mischaracterized evidence during closing argument. A prosecutor may not make statements of fact that exceed the scope of the record. Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). But, "[t]he State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001). Gamble argues that because he testified that Redmond had a gun, the prosecutor incorrectly stated, "Not a single witness saw a gun in Deborah [sic] Redmond's hand, not a single one." Although the prosecutor misstated the evidence, we conclude that, in light of the overwhelming evidence supporting Gamble's conviction, it did not "substantially affect[ ] the jury's verdict." Valdez, 124 Nev. at ___, 196 P.3d at 476. We further conclude that all other statements by the prosecution that Gamble argues are misstatements or mischaracterizations of the evidence are also supported by the evidence and, thus, are a proper "express[ion of] its views on what the evidence shows." See Randolph, 117 Nev. at 984, 36 P.3d at 433.

Admission of character and hearsay evidence

Next, Gamble argues that the district court erred by admitting improper hearsay evidence from two witnesses—Samuel Shaw and Louise Sanders. Gamble failed to object at trial to the admission of this

testimony; thus, plain error review applies. See Browning, 124 Nev. at ___, 188 P.3d at 74. "A witness's spontaneous or inadvertent references 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).

Samuel Shaw

At trial, Samuel Shaw testified that on the day of the altercation between Gamble and Redmond, Redmond was talking to him on her cell phone when Gamble arrived. During Shaw's trial testimony, the prosecution asked him what he heard last. In response, Shaw testified as follows:

> After that, you know, it was some scuffling. I could hear some tussling, you know, and then all of a sudden, you know, "Bitch, you think it's a game?"
>
> And that was the first blast. And, you know, that's when I, you know, I knew she had bought her a piece, after she told me the violent stuff.

The prosecution instructed Shaw not to discuss what Redmond told him and then further questioned him regarding what he heard on the phone. Because it is clear from the prosecution's question that the State was not attempting to elicit testimony regarding "violent stuff," we conclude that admission of Shaw's testimony did not rise to the level of plain error. See Richmond v. State 118 Nev. 924, 935, 59 P.3d 1249, 1256 (2002) (concluding that improper witness testimony was not plain error because

"the remarks were brief, . . . [and] the attorneys did not purposefully solicit them").[3]

Louise Sanders

On direct examination, Louise Sanders testified that Gamble came to her house asking about Redmond and that she lied about Redmond's whereabouts. On cross-examination, the defense inquired as to why she lied and asked her, "And it was your belief that it was because [Redmond] was afraid of [Gamble]?" Sanders responded, "I knew she was afraid of him because she had told me so."

Under the doctrine of invited error, "a party will not be heard to complain on appeal of errors which he himself induced." Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (internal quotations omitted). Sanders' statement was in response to a question from defense counsel. Defense counsel failed to object at trial or request a limiting instruction but now requests that this court deem the statement error. We decline to do so and conclude that the doctrine of invited error precludes Gamble from raising this argument on appeal. See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002); Pearson, 110 Nev. at 297, 871 P.2d at 345.

Redmond's application for a temporary protective order

Various witnesses testified that Redmond had filed an application for a temporary protective order (TPO) against Gamble.

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[3]Gamble argues that Shaw's statement constitutes "[e]vidence of other crimes, wrongs or acts" under NRS 48.045(2) and that it was improper hearsay. We conclude that any error in admitting such evidence was harmless beyond a reasonable doubt. See Weber v. State, 121 Nev. 554, 579, 119 P.3d 107, 124 (2005).

However, the record demonstrates that Redmond did not appear at the hearing, so the TPO was never issued. Prior to the commencement of trial, Gamble moved to exclude any evidence of or reference to Redmond's TPO application based on relevance. The district court denied the motion, determining that the fact that Redmond filed the application was admissible because it was relevant to the issue of self-defense but that the actual application and the text contained therein was inadmissible hearsay. Gamble contends that the district court erred in admitting the bad act evidence.

"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. It will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). In analyzing the propriety of admitting evidence of prior bad acts, this court has instructed trial courts 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 75, 40 P.3d at 418. Under NRS 48.045(2), such evidence is not admissible to prove the character of a person, but may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The district court hearing regarding the admissibility Redmond's TPO application

Before admitting evidence of a defendant's prior bad act, the district court must conduct a hearing outside the presence of the jury and make the following three determinations on the record: (1) whether the evidence is relevant, (2) whether the prior bad act is proven by clear and convincing evidence, and (3) whether the danger of unfair prejudice substantially outweighs the evidence's probative value. Tinch v. State,

113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 507-08 (1985), superceded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). Failure to conduct a Petrocelli hearing is reversible error, unless "'(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

Here, the district court conducted a hearing outside the presence of the jury to determine whether the TPO application was admissible. After hearing arguments from both sides, the court determined that the TPO application was relevant to Gamble's self-defense claim and to the issue of who was the initial aggressor. However, we conclude that the district court failed to make the necessary findings regarding the second and third requirements under the Tinch test. Nonetheless, we conclude that it was not reversible error because, in light of the overwhelming evidence presented, the jury likely would have reached the same verdict.

The failure to give a limiting instruction

Once evidence of a prior bad act is admitted, the prosecutor has a duty to request a limiting instruction on the use of such evidence, or, if the prosecutor fails to do so, the district court should give the instruction sua sponte. Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001). The failure of the district court to give a limiting instruction is reviewed for harmless error to determine whether the defendant's "substantial rights [are] affected." Id. at 733, 30 P.3d at 1133.

Here, the State did not request a limiting instruction, and the district court failed to give one. However, the State did not rely heavily on Redmond's TPO application in presenting its case, and there was sufficient circumstantial and direct evidence to support Gamble's conviction. Thus, we conclude that the district court's failure to give a limiting instruction did not affect Gamble's substantial rights and therefore the error was harmless.

Gamble's proffered circumstantial evidence instruction

Gamble argues that the district court erred by rejecting his proffered circumstantial evidence instruction. "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).

If "'the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.'" Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976) (quoting Holland v. United States, 348 U.S. 121, 139-40 (1954)). Because we determine that the district court properly instructed the jury regarding reasonable doubt, we conclude that Gamble's argument lacks merit and that the district court did not abuse its discretion in rejecting his proffered circumstantial evidence instruction.

The jury instructions did not minimize the State's burden of proof

Gamble argues that the district court gave jury instructions that minimized the State's burden of proof. Although Gamble failed to object at trial to the admission of any of the jury instructions he now claims were improper, he urges this court to address the error under plain error review. We have reviewed each of Gamble's claims of error and conclude that he has failed to demonstrate that any of the alleged errors

affected his substantial rights by causing "'actual prejudice or a miscarriage of justice.'" Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Cumulative error

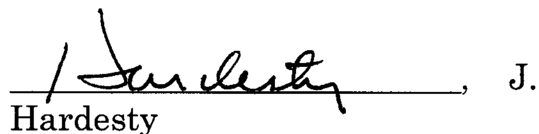
Lastly, Gamble argues that the cumulative effect of the district court's errors caused irreparable harm and sufficient prejudice to warrant reversal. This court will reverse a conviction if the defendant's right to a fair trial was violated by the cumulative effect of errors, even if the individual errors are harmless. Valdez, 124 Nev. at ___, 196 P.3d at 481.

After reviewing the entire record, we determine that Gamble's assignments of error are meritless and that the State established Gamble's guilt by overwhelming evidence. As a result, we conclude that Gamble's cumulative error challenge is unavailing.

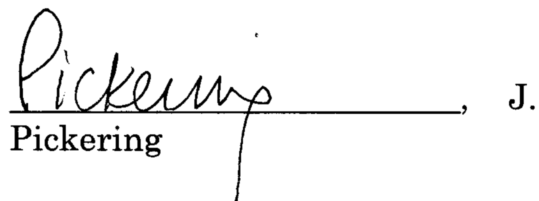
Having considered Gamble's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Parraguirre



_______________, J.
Hardesty



_______________, 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