IN THE SUPREME COURT OF THE STATE OF NEVADA

DARIO KUMAL LUNA A/K/A KARIO KUMAL LUNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52868

FILED

MAR 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of battery constituting domestic violence. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

First, Luna contends that there was insufficient evidence to support his conviction. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The jury heard evidence that the victim was Luna's wife; the victim told the police that Luna straddled her after she fell and stuck his fingers into her eyes, nostril, and mouth; and Luna had blood on his hands and clothing at the time of his arrest. The jury also saw crime scene photographs of the victim depicting injuries that were consistent with her description of the battery. We conclude that a rational juror could reasonably infer from the evidence that Luna committed battery constituting domestic violence. See NRS 33.018(1)(a); NRS 200.481(1)(a). It is for the jury to determine the

weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Luna contends that the district court erred by failing to sua sponte correct his proffered instruction and instruct the jury on self-defense. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it." Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and brackets omitted). Luna concedes that his proposed instruction was not an accurate statement of the law and acknowledges that the instructions were settled off the record. Appellant has the burden to make a proper appellate record, Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), and we conclude that Luna has failed to demonstrate that the district court had a duty to provide an instruction on self-defense.

Third, Luna contends that the district court abused its discretion by allowing the prosecutor to question a police officer as to the credibility of a statement Luna made to that officer after he was taken into custody and given his Miranda rights. "A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong." Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999). We conclude that the district court abused its discretion but that the error is harmless.

Fourth, Luna contends that the prosecutor committed misconduct warranting reversal when he asked the jury "to hold him accountant [sic] and not let him get away with it, tell him society is going

to hold you accountable for battering your wife." Arguments that serve no purpose other than to appeal to the passions and emotions of the jury constitute prosecutorial misconduct. See U.S. v. Koon, 34 F.3d 1416, 1443 (9th Cir. 1994) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking." (internal quotation marks omitted)), rev'd in part on other grounds, 518 U.S. 81 (1996). Although the prosecutor's comment was improper, given the overwhelming evidence of Luna's guilt and the nature of the error, we conclude that the prosecutor's comment did not substantially affect the jury's verdict and it does not warrant reversal. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008).

Fifth, Luna contends that the prosecutor committed misconduct warranting reversal by admitting Clark County Detention Center telephone recordings into evidence that contained the detention center's advisement that the caller was in custody. A defendant is entitled to the presumption of innocence and the indicia of innocence. Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). We conclude that this presumption was violated when the district court allowed the telephone recordings containing the in custody advisement to be admitted into evidence over Luna's objection, see id. ("[i]nforming the jury that a defendant is in custody raises an inference of guilt"); however, given the overwhelming evidence of Luna's guilt and the nature of the error, we conclude that the error did not substantially affect the jury's verdict, and it does not warrant reversal, see Valdez, 124 Nev. at ___, 196 P.3d at 476.

Sixth, Luna contends that cumulative error deprived him of a fair trial. Balancing the relevant factors, we conclude that the cumulative effect of the errors did not deprive Luna of a fair trial and that no relief is

warranted. See id. at ___, 196 P.3d at 481 (when evaluating claims of cumulative error, we consider "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged'" (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000))).

Having considered Luna's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

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