IN THE SUPREME COURT OF THE STATE OF NEVADA

GLADYS PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53114

FILED

SEP 29 2011

TRACIE K. LINDEMAN
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 child neglect resulting in substantial bodily harm, child abuse resulting in substantial bodily harm, and first-degree murder. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In this case, the charges brought against appellant Gladys Perez and her boyfriend, Marc Colon, stemmed from the neglect, abuse, and murder of Perez's three-year-old daughter, C.F. A jury convicted Perez on all three charges. Perez now appeals the judgment of conviction.

On appeal, Perez assigns the following errors: (1) the district court abused its discretion in denying severance; (2) the district court abused its discretion in excluding Colon's statements against interest; (3) the district court abused its discretion in admitting letters from Perez to Colon and autopsy photographs of C.F.; (4) the State and Colon's counsel committed misconduct; (5) the jury instructions were erroneous; (6) there was insufficient evidence to support her convictions; and (7) cumulative error warrants reversal of her convictions.[1]

---

[1]Perez also asserts that the second amended superseding indictment was flawed; we disagree and conclude that the document provided adequate notice to Perez of the offenses she was charged with. See NRS

continued on next page . . .

For the reasons set forth below, we conclude that all of Perez's contentions are without merit. We therefore affirm the judgment of conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

DISCUSSION

The district court did not abuse its discretion in denying severance

Perez argues that the district court abused its discretion in denying severance of her trial from that of Colon. She asserts that joinder was prejudicial because she and Colon presented antagonistic defenses and she was unable to present a full defense. In support of her argument, Perez raises a host of contentions related to different pieces of evidence, asserting that certain evidentiary decisions would have been different if severance would have been granted. She attempts to demonstrate that her trial rights were compromised or that the jury was prevented from making a reliable judgment about her guilt or innocence.

We review a district court's decision to deny severance for an abuse of discretion. Marshall v. State, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). If two or more defendants participated in the same unlawful act or transaction, the State may charge the defendants in the same indictment or information. NRS 173.135. But "[i]f it appears that a

---

. . . *continued*

173.075(1) (a charging document "must be a plain, concise and definite written statement of the essential facts constituting the offense charged"); Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979) (the inquiry is not "whether the information could have been more artfully drafted, but only whether as a practical matter, the information provides adequate notice to the accused").

defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." NRS 174.165(1).

"[C]o-defendants jointly charged are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir. 1978). "Joinder promotes judicial economy and efficiency" and avoids inconsistent verdicts. Marshall, 118 Nev. at 646, 56 P.3d at 379. Joinder is therefore "prefer[able] as long as it does not compromise a defendant's right to a fair trial." Id. "The decisive factor in any severance analysis remains prejudice to the defendant." Id. at 646, 56 P.3d at 378. Some form of prejudice typically exists in a joint trial; therefore, establishing that "joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Id. at 647, 56 P.3d at 379. More specifically, severance should be granted "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" Id. (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Antagonistic defenses

Perez contends that she was entitled to severance because she and Colon presented antagonistic defenses. She argues that because each sought to cast blame on the other, the jury's acceptance of one defense precluded acceptance of the other.

Antagonistic or irreconcilable defenses arise when the jury's acceptance of one defendant's defense precludes acceptance of a co-defendant's defense. Marshall, 118 Nev. at 646, 56 P.3d at 378. Defenses

are mutually exclusive "'if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.'" State v. Kinkade, 680 P.2d 801, 803 (Ariz. 1984) (quoting State v. Cruz, 672 P.2d 470, 474 (Ariz. 1983)). "'[M]utually antagonistic defenses are not prejudicial per se.'" Marshall, 118 Nev. at 647, 56 P.3d at 379 (quoting Zafiro, 506 U.S. at 538). Rather, such defenses are a relevant consideration in a severance analysis "but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial." Id. at 648, 56 P.3d at 379.

Colon tendered a defense that sought to cast blame on Perez. His defense was that Perez physically abused C.F. and ultimately caused the injuries that killed her. On the other hand, Perez's defense was that Colon abused C.F., causing her death, and that Perez was prevented from intervening to render aid due to Colon's prior and contemporaneous physical abuse. It is fair to suggest that Colon's and Perez's defenses were antagonistic because acceptance of Colon's defense tended to preclude the jury from accepting Perez's; likewise, acceptance of Perez's defense tended to preclude the jury from accepting Colon's. Although the defenses were antagonistic, such defenses are, in themselves, insufficient to establish prejudice. Zafiro, 506 U.S. at 538-39; Marshall, 118 Nev. at 648, 56 P.3d at 379. Moreover, the district court instructed the jury that the State had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged, that "[e]ach charge and the evidence pertaining to it should be considered separately," that "[t]he fact that [the jury] may find a defendant guilty or not guilty as to one of the offenses charged should not control [its] verdict as to any other offense charged," and that "[s]tatements, arguments and opinions of

counsel are not evidence." These instructions were appropriate and sufficient to cure the possibility of prejudice. See Zafiro, 506 U.S. at 540-41 (the risk of prejudice due to antagonistic defenses can be cured with proper instructions nearly identical to the three identified above).

Jury selection

Perez makes a broad assertion that she was prejudiced because of the tactical differences she and Colon exhibited during jury selection. She argues that Colon focused on selecting jurors less favorable to the death penalty, while she focused on jurors' fitness for the guilt phase of the trial. Despite this, Perez does not contend, for example, that the district court erred in ruling on a for-cause challenge, that she lost a peremptory challenge to cure an erroneous for-cause challenge, or that the empanelled jury was unfair and partial. Rather, she asserts that she would have kept certain prospective jurors, despite their views of the death penalty. Perez's contention is, in itself, insufficient to establish prejudice or that her right to a fair and impartial jury was violated. See Ross v. Oklahoma, 487 U.S. 81, 88-89 (1988) (a claim of prejudice must focus on whether a member of the jury was unfair or partial); Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125-26 (2005) (appellant must establish that "the jurors who sat in judgment against him were not fair and impartial"; if he cannot, "his claim warrants no relief"); Marshall, 118 Nev. at 647, 56 P.3d at 379 ("To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more

likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict.").[2]

Redacted statements

Perez asserts that the district court's redaction of several statements she made in correspondence with Colon placed additional culpability on her and misled the jury about her role in C.F.'s death. The district court redacted the statements because certain portions implicated Colon. If the district court would not have done so, Colon's right to confrontation would have been violated because the statement of a non-testifying co-defendant, Perez, would have been admitted against him. Bruton v. United States, 391 U.S. 123, 137 (1968); Davies v. State, 95 Nev. 553, 557-58, 598 P.2d 636, 639 (1979). Consequently, these statements were properly admitted against Perez as party admissions, NRS 51.035(3)(a), and redacted to avoid violating Colon's Sixth Amendment right to confrontation. Perez primarily complains now that the redacted

---

[2]Perez makes a brief argument that the district court erred in denying a mistrial because of a disruptive prospective juror and in excusing a juror who was sick. Although the prospective juror was disruptive during voir dire, the district court went to great lengths to canvass the other prospective jurors about the situation; all indicated that they were either unaware of the incident or that they would remain fair and impartial. The district court further instructed the jury that neither Colon nor Perez was associated with the incident and that it was to be disregarded, remedying any prejudice associated with the disturbance. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (the jury is presumed to follow the district court's orders and instructions). Also, the ill juror suffered a medical emergency, and the district court's excusal of that juror and the use of an alternate was proper. See NRS 16.080 ("[T]he court may discharge a juror upon a showing of the juror's sickness," and an alternate shall replace that juror.).

statements changed the context of her statements and heightened her culpability. The entire portion of these statements would be admissible against Perez in a separate trial, and therefore, Perez has not shown that severance would have made acquittal more likely, let alone demonstrated that the statements had a substantial and injurious effect on the verdict.[3]

Inadmissible hearsay and the rule of completeness

Perez contends that joinder rendered her unable to present a full defense because she was prevented from admitting her statement to her mother that Colon prohibited her from calling the police while C.F. was dying because, at the time, he was on parole. Perez relied on NRS 47.120, the rule of completeness, in her attempt to admit the statement.

"When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts." NRS 47.120(1). This statute's federal counterpart is Federal Rule of Evidence 106, typically referred to as the "rule of completeness." U.S. v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996). "[T]he rule is limited to writings and recorded statements and does

---

[3]Perez argues that the district court improperly prohibited her from commenting on certain statements made by Colon. The statements, however, were offered by the State against him not her. In fact, the jury was specifically instructed that his statement was not to be construed against her. Also, Colon's statement was redacted to remove the portions that implicated Perez, to her benefit, to avoid violating her Sixth Amendment right to confrontation. In a separate trial, Perez would not be able to admit or comment on Colon's statement because it would be inadmissible hearsay and likely irrelevant. See NRS 51.035; NRS 51.065; NRS 48.035.

not apply to conversations." Patterson v. State, 111 Nev. 1525, 1531, 907 P.2d 984, 988 (1995) (quotations omitted).

The rule of completeness is inapplicable to the present case because no writing or recorded statement was introduced by Perez—her statement was made during an oral conversation. Second, her statement does not fall within any exception or exemption to the hearsay rule and is therefore inadmissible, regardless of the rule of completeness. Collicott, 92 F.3d at 983 (the rule "does not compel admission of otherwise inadmissible hearsay evidence" (internal quotation omitted)). Likewise, Perez's statement would not have been admissible in a separate trial. Consequently, her trial right was not violated nor was the jury prevented from making a reliable judgment about guilt or innocence.

Bruton violation

Perez argues that the district court favored Colon's rights over her rights. As an example, she complains about a statement that the State offered against Colon—specifically, "if we get caught, it's [Perez's] dumb ass fault." She asserts that this statement violated her Sixth Amendment right to confrontation because it inculpated her.

The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Broadly speaking, the admission of a non-testifying co-defendant's statement against another co-defendant violates the right to confrontation. Bruton, 391 U.S. at 137; Davies, 95 Nev. at 557-58, 598 P.2d at 639. The threshold question is whether the challenged statement is testimonial; if it is not, the Confrontation Clause "has no application." Whorton v. Bockting, 549 U.S. 406, 420 (2007). "Because it is premised on the Confrontation Clause, the Bruton rule, like the Confrontation Clause itself, does not apply to nontestimonial statements." U.S. v. Johnson, 581

F.3d 320, 326 (6th Cir. 2009). To determine whether a statement is testimonial, the court looks at the "totality of the circumstances surrounding . . . the statement," and the inquiry focuses on whether an objective witness would "reasonably . . . believe that the statement would be available for use at a later trial." Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (quotations omitted).

Although Perez did not object to the above statement at trial, it involves an issue of constitutional magnitude and therefore we may consider the issue on appeal. Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997) ("[T]his court may review plain error or issues of constitutional dimension sua sponte despite a party's failure to raise an issue below."); Davies, 95 Nev. at 558, 598 P.2d at 640 ("The Supreme Court did not require a proper motion to preserve the constitutional rights involved in Bruton and neither will we."). Colon made the statement to a minor relative. The statement was spontaneous and made during a private, casual conversation. Colon's statement was not made for the purpose of gathering evidence for possible use at a later trial or as a recount of past events made in a more formal setting. It is clear that Colon's statement, under these circumstances, was nontestimonial; thus, the Bruton rule, like the Confrontation Clause itself, has no application. See Harkins, 122 Nev. at 987, 143 P.3d at 714 (setting forth a non-exhaustive list of factors to be considered in determining whether a statement is testimonial). As such, the joint trial did not compromise Perez's specific trial right of confrontation.

State of mind—prior abuse

Perez contends that joinder was prejudicial because she was unable to introduce certain evidence, such as Colon's prior abuse of other women and of her. In particular, she argues that this evidence was

critical in establishing her state of mind at the time of C.F.'s death. At trial, Perez's defense was that Colon abused C.F., causing her death, and that Perez was prevented from intervening to render aid due to his prior and contemporaneous physical abuse of Perez. In support, Perez sought to admit evidence of Colon's propensity towards being abusive and violent—specifically, evidence of Colon's abuse of other women and of her. But this evidence was impermissible character evidence as it was offered to prove a particular character trait of Colon and that he acted in conformity with that trait prior to and on the night of C.F.'s death. NRS 48.045(2). Also, the evidence was irrelevant absent some showing that the prior abuse of other women affected Perez's state of mind, none of which was offered. NRS 48.015; NRS 48.035(1). The same result would occur in a separate trial. Consequently, joinder did not compromise Perez's specific trial right.[4]

State of mind—subsequent abuse

Perez sought to introduce a statement that she made to Colon's aunt after C.F.'s death. At some point, Colon's aunt observed some bruising around Perez's eyes and inquired about it. In response, Perez said, "Drop it." Perez sought to introduce this statement as evidence of her then-existing state of mind. The statement, however, was properly excluded, because even if it was a statement of Perez's then-existing state

---

[4]Perez also sought to introduce Colon's prior abuse of other non-biological children and of an animal. Again, this evidence was properly excluded on the grounds that it was impermissible character evidence and that its probative value was substantially outweighed by the danger of unfair prejudice. NRS 48.035; NRS 48.045. The same result would occur in a separate trial.

of mind, it was irrelevant as it did not pertain to her state of mind on the night C.F. died. NRS 51.035; NRS 51.065; NRS 51.105. The same result would have occurred in a separate trial and therefore joinder did not compromise Perez's specific trial right.[5]

Witness bias evidence

Perez asserts that joinder was prejudicial because the district court favored Colon's rights over her rights by limiting cross-examination of Colon's sister. Before trial, Colon's sister made a statement to authorities that inculpated Colon. But at trial, she departed from that statement, rendering testimony favorable to Colon. In light of this, Perez believed that Colon's sister was biased and that she was motivated to offer favorable testimony out of fear of Colon. Perez surmised that because Colon had abused his sister on a prior occasion, she was fearful of him. The abuse, however, had occurred ten years prior, and Colon was incarcerated at the time of her testimony; thus, there was no indication that she was fearful of Colon. We perceive no abuse of discretion in the district court's limitation of Colon's sister's cross-examination. See Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) ("[Courts enjoy] wide

---

[5]Perez asserts that she was further prevented from presenting a full defense because of the limitations placed on her examination of Perez's co-worker and Colon's cousin. The district court correctly informed Perez that if she sought to inquire into her work demeanor through her co-worker, that would open the door to impeachment. The district court also properly limited Perez's examination of Colon's cousin, as Perez sought to elicit speculation about her state of mind through his cousin. Both of the limitations that Perez now complains of dealt with the form of examination, not severance. Notably, the same result would have occurred in a separate trial.

discretion to control cross-examination that attacks a witness's general credibility.") It also appears that Perez was attempting to introduce character evidence, as she sought to cross-examine Colon's sister about specific instances of Colon's conduct, not his sister's conduct. See NRS 48.045(2). Again, the district court's decision would have likely been the same in a separate trial. As a result, no specific trial right of Perez's was compromised.

The second statement to authorities

Perez contends that joinder prejudiced her defense because the State disclosed to Colon, under Brady v. Maryland, 373 U.S. 83 (1963), her second statement to authorities.

An immunity agreement is contractual in nature and governed by principles of contract law. U.S. v. Wilson, 392 F.3d 1055, 1059 (9th Cir. 2004). The primary objective in interpreting a contract is to give effect to the intent of the parties. Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007).

Before trial, Perez desired to make a second statement to authorities regarding certain information known to her. In exchange, the State offered her derivative-use immunity, promising that "[n]o statements made by [Perez] . . . will be used against [her] in any criminal case, except for cross-examination or impeachment purposes should [Perez] ever testify contrary to the information she provides during the proffer . . . ." Perez subsequently agreed to make a statement in exchange for derivative-use immunity.

In her statement, Perez said that she did not believe that Colon intended to kill C.F. Because Colon was charged with first-degree murder—requiring premeditation and deliberation—the State believed that Perez's statement was exculpatory to Colon. Consequently, the State

disclosed the statement to Colon under Brady, with the district court's prior approval. See Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996) (the State is required to disclose favorable evidence to an accused criminal defendant if such evidence is material to guilt or punishment). This disclosure does not constitute using the statement against Perez as contemplated in the immunity agreement. Regardless, no part of Perez's statement came into evidence at trial—the type of use that was certainly prohibited by the agreement. Moreover, Perez fails to demonstrate that she was prejudiced or that the statement had a substantial and injurious effect on the verdict when no portion of the statement was used against her at trial.

In short, we conclude that severance was unwarranted and that joinder did not have a substantial and injurious effect on the verdict. More specifically, the joint trial did not compromise any of Perez's specific trial rights or prevent the jury from making a reliable judgment about her guilt or innocence, and therefore, we conclude that the district court did not abuse its discretion in denying severance.[6]

The district court did not abuse its discretion in excluding Colon's statements against interest

Perez argues that the district court abused its discretion in excluding statements that Colon made to a cellmate, N.B., while

[6]We have considered Perez's remaining contentions with respect to severance and conclude that they are without merit.

incarcerated. She contends that the statements should have been admitted as statements against interest under NRS 51.345.[7]

We review a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," NRS 51.035, and is inadmissible unless it falls within an exemption or exception. NRS 51.065. A statement against interest is excepted from the hearsay bar and admissible, provided:

> (1) at the time of its making, the statement tends to subject the declarant to civil or criminal liability; (2) a reasonable person in that position would not have made the statement unless he believed it to be true; and (3) the declarant is unavailable as a witness at the time of trial.

Walker v. State, 116 Nev. 670, 675, 6 P.3d 477, 480 (2000).

"If the statement is offered to exculpate an accused, however, an additional requirement exists: corroborating circumstances must clearly indicate the trustworthiness of the statement." Id. (emphasis added). The test for determining the admissibility of such a statement is "whether the totality of the circumstances indicates the trustworthiness of

---

[7]Perez also asserts that the statements should have been admitted as party admissions. Colon, however, was not a party adverse to Perez and therefore the statements were not exempt from the hearsay bar as party admissions under NRS 51.035(3)(a). See Weber v. State, 121 Nev. 554, 577, 119 P.3d 107, 123 (2005) (explaining that under NRS 51.035(3)(a), "statements by a party opponent" are exempt from the hearsay bar (emphasis added)). Only the State, not Perez, could introduce the statements under the hearsay exemption contained in NRS 51.035(3)(a).

the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." Id. at 676, 6 P.3d at 480.

Perez sought to admit various statements that Colon made to N.B. while incarcerated[8]—in particular, Colon's statements that (1) he placed C.F. in a dumpster, (2) he punched C.F. in the chest and she began to turn blue, (3) he knew CPR and could have helped her but did not because he was trying to control Perez, (4) he did not want Perez to call authorities because he was in violation of his parole, and (5) it was his decision to place C.F. in the dumpster.

Perez desired to offer these statements to prove the truth of the matters asserted; thus, the statements were hearsay. Colon's statements, however, tended to subject him to criminal liability, and a reasonable person in such a position would not have made such statements unless he believed them to be true. Also, Colon was unavailable as a witness because he exercised his constitutional right not to testify. See Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997) (a defendant who chooses not to testify is considered "unavailable" because the prosecution is constitutionally precluded from compelling him or her to testify).

Perez sought to offer these statements to exculpate herself by blaming Colon for C.F.'s death and therefore such statements were only

---

[8]Perez believes that she should have been allowed to introduce Colon's statements that (1) Perez should not be looking or talking to other men, (2) C.F. was injured from falling, and (3) Colon disliked C.F. because she was the daughter of another man. These statements, however, did not tend to subject Colon to criminal liability and were therefore inadmissible under NRS 51.345, as statements against interest.

admissible if circumstances clearly indicated the trustworthiness of the statements. Colon allegedly made the statements to N.B. while the two were incarcerated together. Colon made certain statements to other inmates, as well. The record reveals that there was some concern that the other inmates and N.B. may have been in contact with one another, making it probable that N.B. may have received information from sources other than Colon himself. Colon was careful in his statements throughout the investigation and it therefore seemed out of character for Colon to confide in and make admissions to N.B., a stranger. Also, N.B. was incarcerated for soliciting someone to commit murder; thus, the circumstances of the statements and N.B.'s character suggest the opposite of trustworthiness. In contrast, N.B. did not come forward with the information voluntarily nor did he receive anything in exchange for it, lending some degree of trustworthiness to the information.

Portions of N.B.'s statement, however, were internally inconsistent with Colon's and Perez's prior confessions, suggesting that it lacked trustworthiness. For example, N.B. stated that Colon and Perez took C.F. to University Medical Center, while Colon and Perez both stated in their confessions that it was Sunrise Hospital. Also, N.B. stated that Colon never gave CPR to C.F., but both Colon and Perez stated that Colon did give her CPR. Critically, N.B. wrote Perez a letter while incarcerated. Although the record is unclear on the precise contents of the correspondence, it reveals that N.B. stated that (1) he had wanted to write her for a long time, (2) he hoped things were working out for her, (3) he had a lot to inform her about, (4) he wanted her to write him back, (5) and he wanted to know if he was helping. The letter, of course, supports the inference that N.B.'s statements lacked trustworthiness. In sum, the

circumstances and inconsistencies surrounding the statement render it suspect; at a minimum, the circumstances did not "clearly indicate the trustworthiness of the statement." Walker, 116 Nev. at 675, 6 P.3d at 480. We therefore conclude that the district court did not abuse its discretion in excluding N.B.'s statement because it was unreliable.

The district court did not abuse its discretion in admitting letters from Perez to Colon and autopsy photographs of C.F.

Perez contends that the district court abused its discretion in admitting evidence that was irrelevant and unfairly prejudicial, including letters that she wrote to Colon and autopsy photographs.[9]

The letters

We review a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas, 122 Nev. at 1370, 148 P.3d at 734. Evidence is relevant if it has "any tendency to make the existence of [a] fact . . . of consequence . . . more or less probable than it would be without the evidence." NRS 48.015. Relevant evidence, however, is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

At trial, Perez's defense was that she was unable to intervene to render aid to C.F. because she was controlled by and fearful of Colon

---

[9]Perez also asserts that the district court abused its discretion in admitting her Mexican identification and expert opinion testimony interpreting C.F.'s appearance in family photographs. We perceive no abuse of discretion. See NRS 48.015; NRS 48.035; Thomas, 122 Nev. at 1370, 148 P.3d at 734 (a district court's decision to admit or exclude evidence is reviewed for an abuse of discretion).

due to his physical abuse. To rebut that defense, the State offered letters that Perez wrote to Colon while incarcerated. As a whole, the letters tended to demonstrate that Perez was not under Colon's control. Although written while incarcerated, the letters spoke to the relevant prior events, such as the events surrounding C.F.'s death. The letters also tended to show that Perez willingly fled with Colon to Oregon and Minnesota, thus, making it less probable that Perez was controlled by and fearful of Colon, rebutting her affirmative defense. Given the strong tendency to rebut her defense, the letters' probative value was not substantially outweighed by the danger of unfair prejudice.

Autopsy photographs

Despite gruesomeness, photographic evidence is admissible if it aids in ascertaining the truth. Castillo v. State, 114 Nev. 271, 278, 956 P.2d 103, 108 (1998). Such evidence is admissible to show the cause of death, the severity of the injuries, and the manner of their infliction. Id.

The record reveals that 22 photographs from the autopsy were admitted. The photographs were relevant to the underlying charges, including child neglect, child abuse, and murder. In particular, the photographs were relevant to show the cause and manner of the neglect, abuse, and murder of C.F. Also, the district court thoroughly reviewed the photographs on multiple occasions and stated that none were duplicative. The photographs' probative value was strong, and the value was not substantially outweighed by the danger of unfair prejudice. Consequently, we conclude that the district court did not abuse its discretion in admitting the photographs.

Neither the State nor Colon's counsel committed misconduct warranting reversal

Perez asserts that the State and Colon's counsel committed misconduct warranting reversal of her convictions.

We consider two factors in evaluating prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We first determine whether the conduct was improper. Id. If it was, we next consider whether the improper conduct warrants reversal. Id. "With respect to the second step of this analysis, [we] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Id.

Colon's counsel's comments

Perez argues that Colon's counsel committed misconduct during closing argument when he stated, "There should have been evidence that you saw, that you heard the prosecution elicit against . . . Perez that only the prosecution and . . . Perez have to deal with that should show you her conduct, her conduct before and after." It appears that this statement implied to the jury that certain evidence was withheld from them and was therefore improper. Although improper, no prejudice ensued, as the district court sustained Perez's objection and the jury was instructed to disregard any evidence to which an objection was sustained. See Valdez, 124 Nev. at 1192, 196 P.3d at 478 (no prejudice when the district court sustained a defense objection to a prosecutor's improper statement and instructed the jury to disregard the comment).

The State's comments

Perez contends that the State committed misconduct when it commented in its closing argument that Perez had failed to prove her duress defense. The State commented that "[t]here is no evidence

suggesting that she was prevented in any manner from calling the police." Nothing about this statement amounted to improper burden shifting; rather, the State was rebutting Perez's defense—that is, arguing that Perez had failed to prove her affirmative defense by a preponderance of the evidence.[10] See Cook v. Schriro, 538 F.3d 1000, 1020 (9th Cir. 2008) ("Prosecutors may comment on the failure of the defense to produce evidence to support an affirmative defense so long as it does not directly comment on the [defense's] failure to [call witnesses].").

None of the jury instructions warrant reversal

Perez argues that the district court abused its discretion in declining to provide the jury with a proposed instruction on second-degree felony murder.[11]

---

[10]Perez raises a host of other statements that Colon and the State made that she asserts amounted to misconduct. Because Perez failed to preserve such statements for appellate review, she has an affirmative burden to demonstrate that her substantial rights were affected by showing actual prejudice or a miscarriage of justice, which she has not suggested or demonstrated. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[11]Perez also takes issue with Jury Instruction Nos. 11 and 30 because the instructions informed the jury that it did not need to be unanimous on the means or the theory of liability in arriving at the verdict. Such instructions are an accurate statement of Nevada law. See Crawford v. State, 121 Nev. 744, 750, 121 P.3d 582, 586 (2005) ("Where the State proceeds on alternative theories of first-degree felony murder and willful, deliberate, and premeditated first-degree murder, we have consistently held that the jury need not unanimously agree on a single theory of the murder.").

A district court's decision with regard to jury instructions is reviewed for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Jury Instruction No. 31 and the proposed instruction

Perez asserts that Jury Instruction No. 31 was an incorrect statement of the law because it did not contain the elements of second-degree felony murder. She argues that her proposed instruction did contain such elements and that the district court abused its discretion in refusing to give it.

The elements of second-degree felony murder are: (1) "'the [predicate] felony is inherently dangerous,'" (2) "'death or injury is a directly foreseeable consequence of the illegal act,'" and (3) "'there is an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim's death.'" Ramirez v. State, 126 Nev. ___, ___, 235 P.3d 619, 622 (2010) (alteration in original) (quoting Labastida v. State, 115 Nev. 298, 307, 986 P.2d 443, 448-49 (1999)). Such elements are critical to a second-degree felony murder instruction, and without them the instruction will be deemed incomplete and inaccurate. See id. at ___, 235 P.3d at 622 (jury instruction that did not include the "immediate and direct causal connection" element was an incomplete and inaccurate instruction on second-degree felony murder).

Instruction No. 31 informed the jury that:

> All murder which is not murder of the first degree is murder of the second degree. Murder of the second degree is murder which is:
>
> (1) An unlawful killing of a human being with malice aforethought, but without deliberation and premeditation, or

> (2) Where an involuntary killing occurs in the commission of an unlawful act, which in its consequences, naturally tends to take the life of a human being.

Perez proposed additional language that she believed was necessary to supplement this instruction. Her proposed instruction stated:

> Under the second degree felony murder rule, death or injury must be a directly foreseeable consequence of the illegal act and there must be an immediate and direct causal relationship, without the intervention of some other source or agency, between the actions of the defendant and the victim's death.

While Jury Instruction No. 31 sufficiently covered the inherently dangerous and forseeability requirements, it did not instruct the jury on the causal element. More specifically, Jury Instruction No. 31 did not inform the jury that it must find "an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim's death." Ramirez, 126 Nev. at ___, 235 P.3d at 622 (quoting Labastida, 115 Nev. at 307, 986 P.2d at 449). On the other hand, the proposed instruction covered all of the critical elements of second-degree felony murder and was precisely the instruction urged in Ramirez and Labastida. In particular, the proposed instruction covered the causal element missing in Jury Instruction No. 31. Because the instruction was incomplete and inaccurate and the proposed instruction was not, the district court abused its discretion in refusing to give it.

Even though the district court abused its discretion in refusing to give the instruction, the error was harmless because the jury convicted Perez of first-degree murder; it was properly instructed on first-degree

murder—in fact, Perez raises no issues associated with such instructions; and, as discussed below, there was substantial evidence supporting the conviction. See Cortinas v. State, 124 Nev. 1013, 1024-25, 195 P.3d 315, 323 (2008) (jury instructions are subject to harmless error review). As such, any error with respect to the second-degree felony murder instruction would not have contributed to the jury's verdict of first-degree murder. See Chapman v. California, 386 U.S. 18, 24 (1967) (an error is harmless if the court can determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

There was sufficient evidence to support Perez's convictions

Perez argues that there was insufficient evidence to support her convictions.[12]

In reviewing if there is sufficient evidence to support a jury's verdict, we inquire "'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.'" Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). Where substantial evidence supports the jury's verdict, it will not be overturned on appeal. Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

---

[12]Perez makes a brief argument that her convictions are redundant. We disagree. Her convictions punish separate criminal acts. See NRS 195.020; NRS 200.030(1); NRS 200.508(1)-(2); Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005) ("[A] claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur close in time and make up one course of criminal conduct.").

Child neglect

The evidence at trial demonstrated that Colon abused C.F. prior to her death. Both of Colon's daughters, M.X. and M.C., testified that Colon abused C.F. Likewise, M.C. indicated that Perez also abused C.F. The autopsy corroborated this. C.F. had numerous bruises on her body, including her back, chest, armpits, face, pubic area, buttocks, left hip, and left leg. The coroner opined that the bruises were in various stages of healing and were no older than three or four days and that C.F. was abused in the days and weeks preceding her death. Perez never contacted authorities, sought medical treatment, or removed C.F. from the abusive environment.

Moreover, the autopsy revealed that C.F. was malnourished and weighed 23 pounds at the time of her death. C.F.'s medical records from four months prior indicated that she weighed 25 pounds, revealing that C.F. had recently lost weight, something abnormal for a child that age. Based on the autopsy and the condition of C.F., the coroner opined that before her death, C.F. was in the beginning stages of cachexia, a general term for wasting due to malnourishment. The above evidence, viewed in the light most favorable to the prosecution, sufficiently established that Perez committed child neglect resulting in substantial bodily harm. See NRS 200.508(2).

Child abuse

The evidence at trial showed that both Colon and Perez abused C.F. M.X. indicated that Perez would sometimes abuse C.F. In particular, M.X. believed that Perez had hit C.F. on her buttocks, and other evidence suggested that this was true. The autopsy revealed bruises and finger mark impressions on C.F.'s buttocks. Also, a housekeeper at the motel, overheard a young child crying, coupled with a female voice

yelling in an angry tone, in the room that Perez and C.F. were staying in while at the motel.

While this evidence suggested that Perez abused C.F., the majority of the evidence indicated that Colon was the primary abuser. Both, M.X. and M.C. indicated that Colon would abuse C.F. and both stated that they had observed bruises on C.F.'s arms and back. The autopsy confirmed this as it revealed that C.F. had numerous bruises on her body, including her back, chest, armpits, face, pubic area, buttocks, left hip, and left leg. Also, the autopsy indicated that C.F. had chewed her fingernails and toenails, suggesting that she was under significant stress prior to her death. The above evidence, viewed in the light most favorable to the prosecution, sufficiently established that Perez committed child abuse resulting in substantial bodily harm. See NRS 200.508(1).

First-degree murder

"Murder of the first degree is murder which is . . . [c]ommitted in the perpetration or attempted perpetration of . . . child abuse." NRS 200.030(1)(b). A person is guilty of child abuse if he or she

> willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect.

NRS 200.508(1). One who aids and abets in the commission of a crime is liable as a principal. NRS 195.020. A person aids and abets the commission of a crime if he or she aids, promotes, or encourages the commission of such crime with the intention that the crime be committed. Id.

The evidence at trial demonstrated that Colon and Perez were in a heated argument on the night of C.F.'s death. Colon was quite upset because "[C.F.] made too much drama in their lives." C.F. had also defecated on herself that night. At some point, Colon abused C.F. M.X. stated that "[Colon] made the bruise on [C.F.'s] back" and that "[C.F.] started puking after [Colon] hit her." Because C.F. was vomiting, Colon gave her a bath to clean her up. M.X. indicated that she overheard C.F. crying in the bathroom and that "[Colon] punched [C.F.]." M.X. knew that Colon had punched C.F. because she saw his hand in a fist.

The evidence also showed that, at some point, Perez, Colon, and C.F. were together in a bedroom in the motel room, and C.F. began to have seizures. M.X. sensed that something was wrong with her. That night, Perez went to a Walgreens to get Motrin and Pedialyte "for a sick baby." Perez appeared confused, disoriented, and had a bruise on the side of her face. Because of her behavior and appearance, the security guard inquired if she needed help, which she refused. Perez then returned to the motel and gave C.F. some of the Pedialyte. Either at this point or sometime prior, Perez heard "a sound coming from [C.F.'s] lungs that sounded like running water." Perez claimed that she took C.F. to the hospital, but no evidence indicated that she did so nor was there any evidence that she involved authorities. C.F.'s body was ultimately discovered in a trash dumpster.

The evidence at trial demonstrated that the next morning, the same morning that C.F.'s body was discovered, Colon, Perez, and the three girls left Las Vegas, and Perez told M.X. that Perez's mother picked up C.F. in the middle of the night. M.C. was under the same impression. Over the course of the next couple of months, Colon, Perez, and the girls

traveled to Oregon and then to Minnesota. During this period, both Colon and Perez changed their names. Perez also gave several conflicting accounts as to C.F.'s whereabouts. Perez and Colon were ultimately apprehended and incarcerated. After the arrest, Perez wrote Colon several letters indicating that (1) she needed to accept responsibility for placing C.F. in that environment, (2) she could have handled herself differently but did not, and (3) she might be too late in putting him before her children. The above evidence, viewed in the light most favorable to the prosecution, sufficiently established that Perez either directly committed child abuse or aided and abetted Colon in committing child abuse and that C.F.'s death was a reasonable and foreseeable consequence of that abuse. Consequently, there was sufficient evidence to convict Perez of first-degree felony murder.

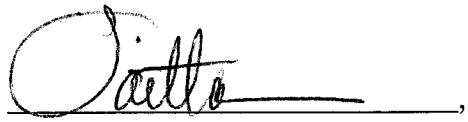
Cumulative error does not warrant reversal of Perez's convictions

Perez argues that cumulative error warrants reversal of her convictions.

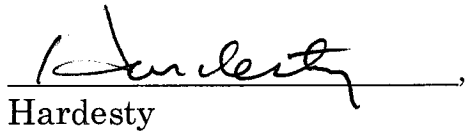
A cumulative error analysis requires us to consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Perez was charged with serious crimes—child neglect, child abuse, and first-degree murder. There was substantial evidence supporting the convictions on those charges and therefore the issue of guilt was not close. Also, the quantity and character of the error was minimal; the error was singular, not cumulative, and, as

discussed above, harmless. Consequently, cumulative error does not warrant reversal of Perez's convictions.[13] For the foregoing reasons, we

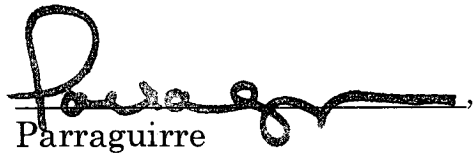
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[13]We have reviewed all of Perez's remaining contentions and conclude that they are without merit.