IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS RICHARDSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54951

FILED

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Thomas Richardson was convicted of multiple offenses related to the robbery and murder of Steve Folker and Estelle Feldman at Feldman's home in Las Vegas. The State presented evidence that Richardson and his girlfriend's 18-year-old son, Robert Dehnart, agreed to murder the victims as part of a scheme to rob Folker and that Richardson struck the victims repeatedly with a hammer. A jury convicted Richardson of conspiracy to commit murder, two counts of first-degree murder with the use of a deadly weapon, burglary while in possession of a deadly weapon, conspiracy to commit robbery, and robbery with the use of a deadly weapon and sentenced him to death for each murder. On appeal, Richardson raises issues related to the guilt and penalty phases of trial.

Guilt-phase issues

Richardson argues that the State presented insufficient evidence to the grand jury to sustain his indictment and that there was

insufficient evidence adduced at trial to sustain his convictions. He also contends that the district court ruled erroneously on matters related to (1) the defense's closing arguments, (2) the admission of evidence, (3) jury instructions, and (4) prosecutorial misconduct.

Sufficiency of the indictment

Richardson argues that the State presented insufficient evidence to the grand jury to sustain his indictment as evidenced by the failure of the justice court to bind him over for trial at his preliminary hearing. He further contends that the State improperly presented the case against both he and his codefendant, who had already been bound over, in order to elicit evidence that would have been inadmissible hearsay against only Richardson. We conclude that these arguments lack merit. The fact that the jury found Richardson guilty beyond a reasonable doubt belies his claim that there was insufficient evidence to support the indictment. See United States v. Mechanik, 475 U.S. 66, 70 (1986) (any error in grand jury proceedings harmless where defendants found guilty beyond a reasonable doubt at trial); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-77 (1998) (citing Mechanik). Contrary to Richardson's assertions, the fact that a justice of the peace found that the evidence was insufficient to bind him over to the district court is not de facto proof that the evidence later presented to the grand jury was insufficient to support the indictment. See NRS 178.562(2) (authorizing prosecutor to seek indictment after dismissal of prior complaint). Further, the State was not barred from seeking an indictment against Dehnart merely because it had already succeeded in having him bound over. See Sheriff v. Dhadda, 115 Nev. 175, 183-84, 980 P.2d 1062, 1067 (1999). Therefore, the district court

did not abuse its discretion in denying Richardson's motion to dismiss the indictment. See Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008).

Sufficiency of the evidence

Richardson argues that there was insufficient evidence produced at trial to sustain his convictions. He asserts that the State failed to produce sufficient evidence to corroborate Dehnart's testimony about Richardson's involvement in the crime. We disagree.

At trial, Dehnart testified that he and Richardson traveled to Las Vegas to murder and rob Folker. When they realized that Folker was staying with Feldman, they agreed to kill her as well. Dehnart testified that after arriving in Las Vegas, he, Richardson, and Folker ran several errands, which included trips to Bank of America, Home Depot, and Taco Bell. To corroborate this testimony, the State introduced a receipt and surveillance video from Taco Bell, where the three men ate dinner, and a sales record from Home Depot, where Dehnart purchased the murder weapon. Investigators also recovered Dehnart's prints at Feldman's home and identified Richardson's hat in the room in which Folker was beaten to death. Other evidence showed that Richardson had given $275 to his girlfriend, Kim Ross, to deposit shortly after the murders. When he and Dehnart were questioned, Richardson denied ever going to Las Vegas and discouraged Dehnart from talking to the police. In addition, recorded calls from the jail indicated that Richardson attempted to establish an alibi for the day of the murders and had some knowledge of the contents of Folker's truck. We conclude that Dehnart's testimony is sufficiently corroborated pursuant to NRS 175.291(1), see Cheatam v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988) (concluding that corroborating evidence "need not in itself be sufficient to establish guilt, and it will satisfy [NRS 175.291] if

it merely tends to connect the accused to the offense"), and that substantial evidence supports the jury's verdict; therefore, we will not disturb the jury's verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Closing argument

Richardson argues that the district court improperly prevented defense counsel from arguing that, aside from Dehnart's testimony, the evidence did not place him at the home during the murders. He contends that the argument was consistent with the physical evidence and a theory that Dehnart was lying about Richardson's involvement in order to secure favorable treatment from the State.[1]

We conclude that the district court abused its discretion. See Glover v. Dist. Ct., 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (providing that this court reviews the latitude allowed counsel in closing arguments for abuse of discretion). As forensic evidence did not contradict the argument and Richardson's statements to the police supported the argument, he should have been allowed to argue that he left for home after parting with Folker and Dehnart at the trailer. See id. at 705, 220 P.3d at 694 ("'[D]efense attorneys must be permitted to argue all reasonable inferences from the facts in the record.'" (quoting U.S. v.

[1]Richardson asserts that the State was permitted to make similar inferential leaps in its arguments. We conclude that the State did not benefit from more latitude in its argument or respond to arguments that Richardson was prevented from making. The State's argument merely responded to his general argument that Richardson did not participate in the murders. Further, the State's argument was supported by the evidence.

Hoffman, 964 F.2d 21, 24 (D.C. Cir. 1992)); see also United States v. Sawyer, 443 F.2d 712, 713 (D.C. Cir. 1971) (providing district court abuses discretion when it "prevents defense counsel from making a point essential to the defense"). However, the error was harmless beyond a reasonable doubt for two reasons. See Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (providing that where the error is constitutional, this court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict"). First, Richardson was able to make a general argument that absent Dehnart's testimony, no evidence placed him in the home and no evidence placed him in Las Vegas after the trip to Taco Bell. Second, as discussed above, Dehnart's testimony was corroborated on other matters and Richardson demonstrated consciousness of guilt by trying to fabricate an alibi. Therefore, the error did not affect the outcome of trial.

Failure to preserve evidence

Richardson contends that the State's failure to collect and preserve the "Autoclub 500" hat observed at the crime scene and the district court's refusal to give a negative inference instruction violated his right to due process. He contends that police officers acted in bad faith, and that even if they did not act in bad faith, he is still entitled to relief.

We conclude that Richardson failed to show a due process violation from the State's failure to collect the hat for two reasons. First, he did not demonstrate that, had the hat been available to the defense, the result of the proceedings would have been different. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (providing that defendant must show that evidence that police failed to gather was material). Richardson's contention, that trace evidence may have demonstrated that

the hat belonged to another person, was "'merely a hoped-for conclusion.'" Sheriff v. Warner, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996) (quoting Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)). The hat was found under one victim's bed and did not have any apparent blood on it. Thus, nothing suggested that it was any more likely that the hat had belonged to the perpetrator or victim. Second, while the police may have been negligent in failing to seize the hat after observing surveillance video showing the victim with Richardson, who was wearing a hat, Richardson failed to demonstrate gross negligence or bad faith. See Daniels, 114 Nev. at 267, 956 P.2d at 115 (providing that where defendant demonstrates evidence was material, "the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or . . . bad faith" and imposing no sanction for mere negligence). In particular, the hat could not, at the time it was discovered, be identified as the hat in the surveillance video and it was not until detectives interviewed Ross that the hat's relevance became apparent, but by then the crime scene had been released to the victims' family, cleaned, and material collected by the cleaning company had been destroyed. As Richardson failed to demonstrate bad faith or gross negligence regarding the failure to collect the hat, the district court did not abuse its discretion in declining to instruct the jury that the evidence would have been unfavorable to the State. See id.

Admission of evidence

Richardson contends that the district court abused its discretion in admitting (1) a hammer that was not the murder weapon, (2) a custody report for another possible suspect, (3) testimony about Richardson's custody status, and (4) autopsy photographs. He also

contends that the district court erred in refusing to admit character evidence concerning Folker. We conclude that the district court did not abuse its discretion for the reasons discussed below. See Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (reviewing "a district court's decision to admit or exclude evidence for an abuse of discretion").

First, Richardson argues that the district court abused its discretion in admitting a hammer into evidence that was not the murder weapon. He asserts that the jury should have been given a limiting instruction and should not have been allowed to have the hammer in the jury room during deliberations. We disagree. The hammer was relevant to demonstrate the manner in which the victims died. See NRS 48.015 ("'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); see also Masters v. Dewey, 709 P.2d 149, 152 (Idaho Ct. App. 1985) (providing that demonstrative evidence is used for illustration and clarification). Further, as trial testimony stated that the actual weapon was not recovered and the admitted hammer had been purchased by an investigator, the jury was aware that the hammer was not the actual murder weapon. While the district court issued no specific instructions at the time of its admission or during the final jury charge, no such instruction was requested.

Second, Richardson argues that the district court erred in admitting the custody report for Daniel James, another possible suspect in the killings. Richardson argues that the custody report, which showed that James was in custody at the time of the killings, was entered into evidence without the proper foundation. We disagree. The custody report

from the California Department of Corrections was admitted with an affidavit from the custodian of records. Thus, there was a sufficient showing that the document was what it purported be. See NRS 52.015(1) (providing authentication requirement met by "evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims"); Thomas v. State, 114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998) ("The government need only make a prima facie showing of authenticity so that a reasonable juror could find that the document is what it purports to be."). Further, Detective Vaccaro testified that as a result of his investigation, he was satisfied that James was in custody on the day of the murders. Thus, there was a sufficient showing that it was the custody report for the Daniel James in contention.

Third, Richardson argues that the district court erred in admitting testimony about his custody status when he was interviewed by detectives and in failing to grant a mistrial based on the testimony. We disagree. While some testimony concerning Richardson and Dehnart's interaction and behavior after their arrest referenced a penal setting, the statements did not allude to any prior crimes. See Collman v. State, 116 Nev. 687, 705, 7 P.3d 426, 437 (2000) ("Reference to a defendant's prior criminal history may be reversible error."); see also NRS 48.045(2) (providing that evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question). No information was presented that suggested that Richardson was being held for questioning on charges other than the instant case. See Collman, 116 Nev. at 705, 7 P.3d at 437 (providing that a reference to a defendant's prior criminal activity occurs where the jury can reasonably

infer from the evidence presented that the defendant engaged in prior criminal activity). Therefore, the district court did not abuse its discretion in denying Richardson's motion for a mistrial. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007).

Fourth, Richardson argues that the district court erred in admitting autopsy photographs. He contends that the probative value for the additional photographs was slight as the pictures were repetitive and unnecessary in light of the medical examiner's testimony. We disagree. Although the photographs are gruesome, the evidence was relevant because it assisted the medical examiner in testifying about the victims' cause of death and the manner in which they received the injuries, and was not unfairly prejudicial. See Libby v. State, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993) ("The district court has discretion to admit photographs into evidence, as long as their probative value is not substantially outweighed by their prejudicial effect."), vacated on other grounds, 516 U.S. 1037 (1996).

Fifth, Richardson contends that the district court erred in excluding testimony about Folker's erratic behavior. He contends that this testimony would have supported his theory that Dehnart killed Folker after a violent altercation. We conclude that this argument lacks merit. Generally, character evidence is not admissible to show an individual acted in conformity with his character, however, a defendant may "present evidence of a victim's character when it tends to prove that the victim was the likely aggressor." Daniel v. State, 119 Nev. 498, 514, 78 P.3d 890, 901 (2003). While "evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense and was aware of those acts," id. at 515, 78 P.3d at 902, such a defense is

not applicable here. Richardson asserts that he was not at the home during the murders. Dehnart's testimony does not indicate that the murders occurred in self-defense. While Richardson contends that Dehnart is lying, the proffered character evidence remains inadmissible because he did not establish that Dehnart was aware of the prior acts of violence.

Sixth, Richardson contends that the district court erred in excluding testimony about Folker's financial condition, in particular, details concerning the sale of his home. He asserts that the testimony would have refuted the evidence concerning Dehnart's motive to commit the crime. We discern no abuse of discretion. The district court permitted Richardson to inquire as to Folker's financial condition and how much money Folker made from the sale of his home, provided that he could demonstrate a foundation for the witness's knowledge. Richardson declined to question the witness further and offered no evidence to demonstrate a foundation for the witness's knowledge. See NRS 50.025 (providing that witness may not testify unless sufficient evidence is presented to establish witness's personal knowledge of the matter or witness is testifying to opinion as an expert).

Guilt-phase instructions

Richardson challenges the district court's refusal to give his proposed instruction regarding: (1) accomplice testimony, (2) circumstantial evidence, and (3) aiding and abetting after the murder. We conclude that the district court did not abuse its discretion in declining to give any of these instructions. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle

jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error.").

First, Richardson argues that the district court abused its discretion in refusing to give his proposed instruction on the consideration of accomplice testimony. We disagree. While Richardson "has the right to have the jury instructed on [his] theory of the case . . . no matter how weak or incredible [the] evidence [of that theory] may be," Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991), the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by other instructions given to the jury, Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). The jury was instructed that it could consider the fact that a witness was given an inducement to testify in determining that witness's credibility. Because that instruction adequately covered the substance of Richardson's requested instruction, the district court did not abuse its discretion in refusing to give Richardson's instruction.

Second, Richardson contends that the district court abused its discretion in failing to give his requested instruction concerning the interpretation of circumstantial evidence. He acknowledges that in Deveroux v. State, 96 Nev. 388, 391-92, 610 P.2d 722, 724 (1980), this court held that it is not error to refuse such an instruction when the jury is properly instructed regarding reasonable doubt, but he nonetheless argues that he was entitled to the instruction and urges this court to overrule Deveroux. We decline Richardson's invitation to overrule Deveroux as Richardson has not cited any precedent that undermines this court's prior reasoning and therefore he has failed to articulate a novel argument for this court's departure from Deveroux. Because the district court

instructed the jury on the State's burden of proof and gave the statutory reasonable doubt instruction, it could properly refuse to give the requested instruction. See id.

Third, Richardson contends that the district court abused its discretion in refusing to give a proposed instruction regarding aiding and abetting after the killing. We discern no abuse of discretion. At trial, the district court gave a general aiding and abetting instruction and the statutory reasonable doubt instruction. These instructions substantially covered the subject matter of the requested instruction. The language used to describe aiding and abetting contemplates actions taken before or at the time of the actual crime and does not include actions solely taken after the commission of the crime. Read in conjunction with the reasonable doubt instruction, the jury was informed of its duty to acquit if it had reasonable doubt as to whether Richardson aided and abetted Dehnart before the killings.

Prosecutorial misconduct

Richardson argues that the State committed prosecutorial misconduct during the guilt phase of trial by improperly appealing to the emotions and sympathies of the jury. We disagree. Taken in context, the comment, which invited the jury to consider the victims' final moments, did not exceed the bounds of proper advocacy. See Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) (providing prosecutor not forbidden from inviting the jury to consider victim's final moments), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Moreover, looking at the challenged statements in context, the State reaffirmed that the jury was not to act out of anger and sympathy but out of conscience and rectitude. Therefore, Richardson failed to

demonstrate plain error. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), cert. denied, ___ U.S. ___, 80 U.S.L.W. 3690 (June 18, 2012 (No. 11-9433)).

Penalty-phase issues

Richardson argues that the district court made numerous erroneous rulings on matters related to (1) victim impact evidence from prior crimes, (2) emotional outbursts by the victims' family, and (3) prosecutorial misconduct. He also argues that the death penalty is unconstitutional and that cumulative error warrants reversal of his conviction and sentence. We conclude that these arguments lack merit for the reasons discussed below.

Victim impact evidence

Richardson argues that the district court erred by admitting victim impact testimony from his prior offenses during the penalty phase. He further argues that the State repeatedly revisited the irrelevant victim impact testimony in its closing arguments. While Richardson objected to the introduction of the testimony, he did not object to the prosecutor's argument. We conclude that this claim lacks merit. At trial, the victim of Richardson's prior sexual assault testified about the sexual assault to establish the aggravating circumstance for a prior violent felony conviction and to illustrate Richardson's violent character, which is permissible in capital penalty hearings. See Browning v. State, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008). However, she also testified that she was humiliated when specimens were collected for the rape kit and that her son was traumatized by the event. These aspects of the prior offense were not relevant to the penalty hearing. However, both of the witness's

statements were fleeting and not discussed further during questioning. Thus, while Richardson demonstrated that the district court abused its discretion in admitting this part of the testimony, the error did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'" Fields v. State, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009) (providing that erroneous admission of evidence reviewed for harmless error) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Regarding the prosecutor's comments, any references to the impact that Richardson's crimes had on prior victims were fleeting and lost to the larger context of the State's argument—to provide a full account of who Richardson is. Therefore, Richardson failed to demonstrate that the challenged prosecutorial comments amounted to plain error.

Mistrial

Richardson contends that the district court abused its discretion in failing to grant a mistrial during the guilt phase of trial due to multiple emotional outbursts by the victims' family. He further contends that the district court deprived him of a fair penalty hearing when it failed to instruct the victims' family members to avoid emotional outbursts in front of the jury.

We discern no abuse of discretion. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). A review of the record does not reveal that the incident unduly influenced the jury because all those who heard noises from the family indicated that they were hushed tones and it was unclear if the noises were even audible to members of the jury. See Johnson v. State, 122 Nev. 1344, 1358-59, 148 P.3d 767, 777 (2006) (providing that an isolated incident of the victim's brother passing out in response to a crime scene photograph did not render the penalty hearing

fundamentally unfair). Further, the district court thereafter directed the victims' family to sit further from the jury and closer to the court marshal. In addition, we conclude that the district court did not abuse its discretion in declining to admonish the victims' family. Nothing the victims' family is alleged to have done could rightly be considered an "outburst." The family cried during the presentation of some evidence, spoke in hushed tones only audible to those immediately around them, and embraced each other during the presentation of victim impact evidence.

Weighing instruction

Richardson contends that the district court erred when its weighing instruction did not require that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. He asserts such an instruction is required by the United States Supreme Court decisions Blakely v. Washington, 542 U.S. 296, 301-02 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). We disagree.

We recognize that this court's jurisprudence has created confusion regarding whether the weighing of circumstances must be beyond a reasonable doubt. Compare McConnell v. State, 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009) ("[N]othing in the plain language of [the relevant statutory] provisions requires a jury to find, or the State to prove, beyond a reasonable doubt that no mitigating circumstances outweighed the aggravating circumstances in order to impose the death penalty" and that "this court has imposed no such requirement.") with Johnson v. State, 118 Nev. 787, 802, 59 P.3d 450, 460 (2002) (noting that the weighing requirement is part of a factual determination that must be found by a jury beyond a reasonable doubt in accordance with Ring v. Arizona, 536

U.S. 584 (2002)), overruled by Nunnery, 127 Nev. ___, 263 P.3d 235. However, we recently resolved this conflict in Nunnery, 127 Nev. at ___, 263 P.3d at 250-53, concluding that the weighing of aggravating and mitigating circumstances is not a factual determination and thus it is not subject to the proof-beyond-a-reasonable-doubt standard mandated by Apprendi and Ring. Therefore, the district court did not abuse its discretion in refusing to give such an instruction.[2]

Failure to find mitigating circumstances

Richardson contends that the State misstated the role of mitigating circumstances by arguing that they did not mitigate against a sentence of death but instead only mitigated against the offenses that Richardson committed. He contends that the arguments resulted in the jury failing to find mitigating circumstances that were supported by uncontroverted evidence. We conclude that this argument lacks merit. The State's comments merely rebut the significance of the defense's mitigating evidence and constituted fair comment on the evidence. See Thomas v. State, 122 Nev. 1361, 1368, 148 P.3d 727, 732 (2006) (providing that the State is entitled to rebut evidence relating to defendant's "character, childhood, and mental impairments, etc."). Moreover, the jury was properly instructed on the role of mitigating evidence. In addition, jurors are not required to find proffered mitigating circumstances simply

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[2]In addition, Richardson argues that the instruction given in his case violates equal protection because it placed a heavier burden on him than it had on other capital defendants. We conclude that this claim lacks merit. The given instruction was consistent with NRS 175.554. The fact that this court employed imprecise language in describing the weighing equation in prior cases does not entitle Richardson to an instruction inconsistent with NRS 175.554.

because there is unrebutted evidence to support them. Gallego, 117 Nev. at 366-67, 23 P.3d at 240, abrogated on other grounds by Nunnery, 127 Nev. ___, 263 P.3d 235; Thomas v. State, 114 Nev. 1127, 1149, 967 P.2d 1111, 1125 (1998); see also Thomas, 122 Nev. at 1370, 148 P.3d at 733; Hollaway v. State, 116 Nev. 732, 744, 6 P.3d 987, 996 (2000).

Prosecutorial misconduct

Richardson identifies four statements by the prosecutor during the penalty phase that he contends constitute misconduct. Richardson did not object to any of the comments. We conclude that these arguments lack merit for the reasons discussed below.

First, Richardson argues that the State made improper arguments regarding whether people who commit the type of crimes Richardson was on trial for are capable of feeling remorse. Richardson contends that this argument is not supported by any evidence introduced at trial. We discern no plain error. See Gallego, 117 Nev. at 365, 23 P.3d at 239 (providing that this court reviews claims of prosecutorial misconduct for plain error where defendant fails to object at trial). The comments were not improper as they invited the jury to use its common sense in evaluating the nature of the crime in this case. Further, as Dehnart testified during the guilt phase of trial regarding the casual nature in which they discussed murdering Folker and how Richardson flippantly included Feldman in their plans saying, "she had lived a full life," the State's argument was implicitly supported by this evidence.

Second, Richardson argues that the State improperly argued that the jurors should use the death penalty to make a statement to the community. We discern no plain error. "[A] prosecutor in a death penalty case properly may ask the jury, through its verdict, to set a standard or

make a statement to the community." Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Accordingly, the prosecutor's comments fall within such permissible argument.

Third, Richardson contends that the State made an improper proportionality argument. Specifically, the State noted that a defendant may receive life for a lesser property crime, therefore, the jury should impose a greater penalty for a murderer. We conclude that the argument is improper. The statement referred to matters outside the scope of the jury's charge and seemingly invited the jury to consider the wisdom of the laws it was applying by comparing the punishments that the Legislature has authorized for different crimes. See United States v. Coupez, 603 F.2d 1347, 1352 (9th Cir. 1979) (approving of instruction to jury not to question the wisdom of any rule of law). However, Richardson failed to demonstrate that the comment prejudiced his substantial rights for two reasons. First, the jury was properly instructed on the proper method to determine death eligibility and the factors that it could consider to come to a conclusion. Moreover, it had also been instructed that it was not to consider the wisdom of any of the laws it was applying. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (recognizing that the jury is presumed to follow jury instructions). Second, Richardson failed to demonstrate that there was a reasonable probability of a different result at the penalty hearing had the State not made the comment. See Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (providing that the focus of the prejudice inquiry should be on the penalty proceedings and whether the misconduct "so infected the proceedings with unfairness as to make the results a denial of due process"); Schoels v. State, 114 Nev. 981, 989,

966 P.2d 735, 740 (1998) (providing that in evaluating prosecutorial misconduct during the penalty phase, this court "will reverse the conviction or death penalty where the decision between life or death is a close one or the prosecution's case is weak"), on reh'g, 115 Nev. 33, 975 P.2d 1275 (1999). The jury found all three alleged aggravating circumstances: (1) Richardson had previously been convicted of a felony involving the use or threat of violence to the person of another (attempted sodomy, rape); (2) he had previously been convicted of a felony involving the use or threat of violence to the person of another (second-degree robbery); and (3) he had, in the immediate proceeding, been convicted of more than one count of first-degree murder. These aggravating circumstances are compelling in that they demonstrate Richardson's escalation from a violent sexual assault to a double homicide. In addition, it shows how unresponsive to rehabilitation he is with the relatively brief span of two years between his release from his 15-year prison term and the instant offense. The jury found no mitigating factors, and, as discussed above, even those alleged, which Richardson contends are supported by the evidence, are not particularly compelling. Therefore, Richardson failed to demonstrate that the comment amounted to plain error.

Fourth, Richardson argues that the State improperly appealed to the jurors' emotions with arguments that discussed the toll taken on the victims' family. We discern no plain error. Victim impact testimony from the current crime was relevant to the penalty hearing and admissible. See Sherman v. State, 114 Nev. 998, 1013, 965 P.2d 903, 913-14 (1998). Therefore, as the prosecutor discussed properly admitted evidence during

his closing argument, his comments did not exceed the bounds of proper advocacy.

Constitutionality of the death penalty

Richardson contends that the death penalty is unconstitutional on three grounds: (1) the death penalty scheme fails to genuinely narrow death eligibility, a contention we have rejected, see State v. Harte, 124 Nev. 969, 972-73, 194 P.3d 1263, 1265 (2008); (2) the death penalty is cruel and unusual, an argument we have rejected, see Gallego, 117 Nev. at 370, 23 P.3d at 242; and (3) the death penalty is unconstitutional because executive clemency is unavailable, an argument we have rejected, see Colwell v. State, 112 Nev. 807, 812, 919 P.2d 403, 406-07 (1996). Richardson's death sentence is not unconstitutional on any of these grounds.

Cumulative error

Richardson argues that the cumulative effect of the errors committed during his trial warrant reversal of his conviction and sentence. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). However, a defendant is not entitled to a perfect trial, merely a fair one. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Based on the foregoing discussion of Richardson's claims, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief.

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the

aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supported the three aggravating circumstances found—all of which involve either prior or the instant convictions. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice, or any arbitrary factor. And third, considering the calculated nature in which Richardson planned and murdered the victims, his prior rape conviction, and the evidence in mitigation, we conclude that Richardson's death sentence was not excessive.

Having considered Richardson's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Gibbons, J.
Gibbons

Pickering, J.
Pickering

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

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

CHERRY, C.J., with whom SAITTA, J., agrees, dissenting:

I respectfully dissent. I would reverse the judgment of conviction on the grounds that the district court improperly limited the defense's argument, the police were grossly negligent in failing to collect evidence, the district court abused its discretion in admitting several pieces of evidence, and the prosecutor made improper comments during closing argument.

Limiting of defense argument

The district court abused its discretion in limiting Richardson's closing argument. See Glover v. Dist. Ct., 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (providing that this court reviews the latitude allowed counsel in closing arguments for abuse of discretion). Richardson elicited evidence (his statements during recorded phone conversations) that he had left Las Vegas before Dehnart. Therefore, he should have been allowed to argue that he had returned to California before the murders. Id. at 705, 220 P.3d at 694 ("'[D]efense attorneys must be permitted to argue all reasonable inferences from the facts in the record.'") (quoting U.S. v. Hoffman, 964 F.2d 21, 24 (D.C. Cir. 1992). As there was conflicting evidence of this crucial fact and no physical evidence placing Richardson in the home or even in the state at the time of the murders, counsel's argument became that much more vital to the defense. See United States v. Sawyer, 443 F.2d 712, 713 (D.C. Cir. 1971) (providing that a district court abuses its discretion when it "prevents defense counsel from making a point essential to the defense").

I further disagree with the majority's conclusion that this error was harmless beyond a reasonable doubt. Being able to argue that

physical evidence did not place him at the scene was not as powerful as being able to point to a plausible alternate theory that Richardson had returned to California. Further, the evidence against Richardson was not overwhelming. It consisted chiefly of accomplice testimony that was supplemented by a video from Taco Bell, a $275 deposit, and testimony about a hat that police neglected to recover. Based on this evidence, I cannot say beyond a reasonable doubt that the error did not contribute to the verdict. See Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (providing that where the error is constitutional, this court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict"); see also Gerlaugh v. Stewart, 129 F.3d 1027, 1050 (9th Cir. 1997) ("[T]he Sixth Amendment right to counsel encompasses the right to have defense counsel present a closing summation.").

Failure to gather evidence

I disagree with the majority's conclusion that Richardson failed to show a due process violation concerning the police's failure to collect the hat that the State relied on to place him at the scene. The hat was found under Folker's bed and did not appear to have any blood on it. Thus, it was just as likely that the hat belonged to someone who lived at the home as it was that it belonged to Richardson, was knocked under the bed, and escaped any blood spatter that resulted from what the evidence shows was a vicious beating. The hat therefore was as material to Richardson's defense as it was to the State's case against him.

The failure to collect the hat was grossly negligent. The record indicates that detectives observed surveillance video at Taco Bell showing one of the victims interacting with two men, one of whom was

wearing a hat with similar shading. The detectives then returned to the crime scene where they picked up the hat, passed it around to each other, and even joked about it. Despite the amount of discussion that the hat generated, it was not collected. I acknowledge that "'police officers generally have no duty to collect all potential evidence from a crime scene,'" Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (quoting State v. Ware, 881 P.2d 679, 684 (N.M. 1994)), but this piece of evidence obviously generated enough interest that it should have been collected. Further, the police released the scene, allowing for any remaining evidence in it to be destroyed, within a relatively short period of time after the murders and before they had positively identified a suspect. In addition, the State was allowed to capitalize on the fact that the hat was just as likely to have belonged to Folker as Richardson, but Richardson was not. In a pretrial hearing, the State introduced evidence justifying the failure to collect the hat on the grounds that the lack of apparent blood and location of the hat made it appear that the hat belonged to Folker, but then later argued to the jury that the hat indeed belonged to Richardson and placed him at the scene without needing to produce it. Under the circumstances, Richardson was entitled to a presumption that the evidence would have been unfavorable to the State. Such an instruction would have put him on fair footing to contest the testimony that the hat belonged to him.

Admission of evidence

Richardson contends that the district court abused its discretion in admitting several pieces of evidence. I agree with his contentions that the district court abused its discretion in admitting an example of the murder weapon and several autopsy photographs.

Hammer

The district court abused its discretion in admitting the hammer as an example of the murder weapon. See Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (providing that this court reviews "a district court's decision to admit or exclude evidence for an abuse of discretion"). The hammer, as demonstrative evidence, had little probative value. Dehnart's testimony about purchasing the hammer for the crimes and the medical examiner's testimony were sufficient to establish that a hammer was used to kill the victims. It can further be assumed that the jurors brought with them the common knowledge of how a hammer can be used. The record does not indicate that there was anything extraordinary about this hammer that required its presence to explain the wounds or manner in which they were inflicted. Cf. State v. Carter, 955 S.W.2d 548, 561 (Mo. 1997) (concluding demonstrative gun probative where used to show how shell casings would eject from it); Lynn v. State, 860 S.W.2d 599, 603-04 (Tex. Ct. App. 1993) (holding that demonstrative weapon was probative when there was issue as to force required to pull the trigger); see also Wade v. State, 204 So. 2d 235, 238-39 (Fla. Dist. Ct. App. 1967) (admitting master brake cylinder).

As the probative value of the hammer was not significant, not much in the way of unfair prejudice is necessary to conclude that the district court abused its discretion in admitting it. See NRS 48.035(1) (providing that relevant evidence 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"). Demonstrative evidence of murder weapons carries a unique potential for unfair prejudice:

> A great deal of demonstrative evidence has the capacity to generate emotional responses such as

> pity, revulsion, or contempt, and where this capacity outweighs the value of the evidence on the issues in litigation, exclusion is appropriate. . . . [E]ven if no essentially emotional response is likely to result, demonstrative evidence may convey an impression of objective reality to the trier.

2 John William Strong, McCormick on Evidence, § 212, at 4 (4th ed. 1992); see also 2 Kenneth S. Brown, McCormick on Evidence, § 212, at 7 (6th ed. 2006) ("Since 'seeing is believing,' it is today often felt that this kind of evidence possesses an immediacy and apparent reality which endow it with particularly persuasive effect."). The exhibit permitted the State to capitalize on the gravity that introducing a physical weapon might exert on the jury without producing the actual weapon. While such a latent emotional effect would be tolerated where the evidence had more probative value, I conclude that the danger of unfair prejudice far outweighs the probative value of the hammer in this instance. See Elder on Behalf of Finney v. Finney, 628 N.E.2d 393, 395 (Ill. App. Ct. 2003) ("If it appears that demonstrative evidence was used for dramatic effect, or emotional appeal, rather than factual explanation useful to the reasoning of the jury, such use should be regarded as reversible error."). Moreover, the district court did not take adequate measures to reduce this danger. Nevada has no published authority concerning the admission of replica murder weapons. However, other jurisdictions have concluded that the best practice for admitting such evidence is to issue a cautionary instruction and prevent the jury from taking it into the jury room during deliberations. See United States v. Cox, 633 F.2d 871, 873-74 (9th Cir. 1980) (recognizing better procedure for admitting replica of explosive device would be to exclude it from the jury room but ruled no abuse of

discretion where district court issued limiting instruction and defense had opportunity to cross-examine); U.S. v. Johnson, 354 F. Supp. 2d 939, 977-78 (N.D. Iowa 2005) ("[P]rejudice can be ameliorated, for example, where the government makes clear in its use of the replica that it is not the actual weapon used or carried by the defendant, the court gives a proper limiting instruction, and the replica is not left on display in the courtroom or given to the jury during deliberations."), aff'd, 495 F.3d 951 (8th Cir. 2007); Berry v. State, 715 N.E.2d 864, 867 (Ind. 1999) (concluding that shotgun had little prejudicial effect where district court instructed the jury that it was an example); Com. v. Stewart, 499 N.E.2d 822, 826-27 (Mass. 1986) (concluding that no error occurred in admission of example of murder weapon where district court gave limiting instruction); State v. Flores, 418 N.W.2d 150, 159-60 (Minn. 1988) (holding no abuse of discretion where replica murder weapon not given to jury during deliberations and district court instructed jury it was a replica); Foster v. State, 714 P.2d 1031, 1036 (Okl. Crim. App. 1986) (holding that replica baseball bat was not unfairly prejudicial where State and district court informed the jury that it was not the actual weapon). Given the lack of binding authority on this subject, it would have been preferable for the district court to proceed cautiously by instructing the jury that the hammer was not the actual murder weapon and prevent the jury from taking it into the jury room during deliberations. Such a course of action would have alleviated much of the unfair prejudice that surrounds its admission.

Autopsy photographs

I agree with Richardson's contention that the district court abused its discretion in admitting certain of the autopsy photographs.

Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000). The record indicates that the photographs were used to assist the medical examiner in explaining the victims' injuries. However, the gruesomeness of the photographs, particularly those that displayed the victims' bare skulls after their scalps were resected during the autopsy, were extremely prejudicial. See Clark v. Com., 833 S.W.2d 793, 794 (Ky. 1991) (noting that photographs become less admissible when the subject has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer"); Hayes v. State, 85 S.W.3d 809, 816 (Tex. Crim. App. 2002) ("[A]utopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself."). Further, several of the photographs merely showed injuries that had been detailed in other photographs from slightly different angles and therefore became less probative. See Driskell v. State, 659 P.2d 343, 354 (Okla. Crim. App. 1983) (concluding that there was "no justification for the incredible duplication" of four color slides of victim's near decapitation). Moreover, as the manner of death was not the subject of great dispute, multiple photographs proving that fact were unnecessary.

Because the evidence introduced against Richardson was not overwhelming, I cannot conclude that the error in introducing either the hammer or the autopsy photographs was harmless.

Prosecutorial misconduct

The State's argument during the guilt phase of trial, which Richardson now challenges, was improper. The prosecutor stated:

> This is not over, but it will be. And you will write the ending to the pain and suffering of

> Estelle and Steven with your verdict. And the unimaginable and lingering death that they both suffered. Besides the pain, the knowledge that [the] one they loved struggled nearby and they could do nothing for each other.

This language was inflammatory and was employed to evoke an emotional response in its audience. The majority may hold that such language was subsequently diffused by the prosecutor's later plea to render a verdict from "conscience and rectitude." However, I conclude that the prosecutor's meek admonition failed to equal the resonance of his initial language. Nevertheless, I do not believe that this single comment, in and of itself, "so infected the proceedings with unfairness as to make the results a denial of due process," Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004), or rose to the level of plain error, see Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) ("Failure to object during trial generally precludes appellate consideration of an issue."), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), cert. denied, 567 U.S. ___, 132 S. Ct. 2774 (2012).

Cumulative error

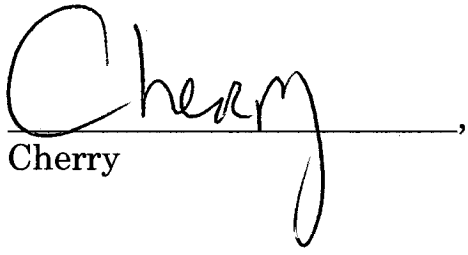
I agree with Richardson's contention that the cumulative effect of the errors committed during his trial warrant reversal of his conviction and sentence. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). There are three factors relevant to a cumulative error analysis: (1) the gravity of the crime, (2) whether the question of guilt is close, and (3) the quantity and character of the error. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

As to the first factor, Richardson was charged with two counts of first-degree murder and the State sought the death penalty. Accordingly, he faced two counts of the most serious crime in Nevada and two sentences of Nevada's harshest punishment.

Second, the question of his guilt was close. The chief evidence against Richardson was the testimony of Dehnart, who testified against Richardson in exchange for a reduced penalty for his own involvement in the murders. Dehnart's testimony was corroborated by testimony about a hat that the police failed to collect, a surveillance video from a restaurant taken the day of the murders, and $275 dollars that Richardson gave to his girlfriend after the murders. Dehnart's fingerprints were found at the murder scene, but the police did not recover any physical evidence that placed Richardson in the victims' home.

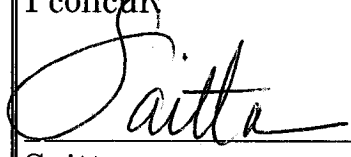
Lastly, the errors in this case worked in conjunction with one another to deprive Richardson of a fair trial. The hat, which the State relied most heavily upon to tie Richardson to the scene and corroborate Dehnart's testimony, was not collected due to gross negligence. The State benefitted from the failure to collect the hat and the district court's decision to not give an instruction that would have put Richardson's arguments concerning the relevance of the hat on equal footing with those of the State. This evidentiary inequity was exacerbated by the State's introduction of evidence (the demonstrative hammer and gruesome autopsy photographs) that was more inclined to influence the passions of the jury than appeal to its reason. The State further stoked the jury's emotion in its closing argument while Richardson was unable to even put forth his most persuasive and permissible argument. While I acknowledge that a defendant is not entitled to a perfect trial, see Ennis v. State, 91

Nev. 530, 533, 539 P.2d 114, 115 (1975), this trial was so far from perfect that it was unfair. Accordingly, I would reverse the judgment of conviction and remand for a new trial.



_____, C.J.
Cherry

I concur:



_____, J.
Saitta