

IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL GATES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55788

FILED

SEP 12 2012

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a minor under the age of 14 years and eight counts of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

First, appellant Russell Gates contends that the district court abused its discretion by limiting his potential trial testimony and precluding him from discussing his bladder cancer. Gates claims that his bladder cancer rendered him incapable of committing the various acts of lewdness he was charged with. And as a result of the district court's allegedly arbitrary application of NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice"), Gates now claims for the first time that the district court violated his constitutional right to testify on his own behalf. See Rock v. Arkansas, 483 U.S. 44, 49 (1987) (a criminal defendant has a constitutional right to testify on his own behalf). We disagree.

"We review a district court's decision to admit or exclude evidence for an abuse of discretion." McClellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Here, the district court "engaged in a process of

weighing . . . the probative value as opposed to the prejudice,” found “no connection between [Gates’] cancer of the bladder and a lack of sexual desire,” and prohibited any mention of it. The district court believed the cancer evidence would improperly “have the effect of engendering some sympathy on behalf of the defendant with some of the jurors.” The district court also stated that it would revisit the issue if Gates sought to present expert medical testimony in order to draw a correlation between his bladder cancer and a lack of sexual desire, but in the absence of such testimony and in the event he wished to testify on his own behalf, “he could say that he lacks sexual desire” without referring to the cancer. We conclude that Gates fails to demonstrate that the district court abused its discretion by excluding evidence of his bladder cancer.

Additionally, the district court properly admonished Gates about his right to testify on his own behalf and he chose not to. Gates did not argue below that the limitation placed on his potential testimony by the district court’s evidentiary ruling violated his constitutional right to testify and we conclude that he fails to demonstrate reversible plain error. See Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (“Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error sua sponte.” (internal quotation marks omitted)); see also Rock, 483 U.S. at 55 & n.11 (procedural and evidentiary limitations placed on the right to present relevant testimony do not necessarily offend the right to testify on one’s own behalf).

Second, Gates contends that the district court erred by denying his motion for a mistrial because the presumption of innocence was violated after some members of the jury saw him escorted from the

courtroom and led into an adjoining holding cell by a uniformed correctional officer during a bathroom break. See Estelle v. Williams, 425 U.S. 501, 503 (1976) (holding that the presumption of innocence is a basic component of a fair trial). We disagree.

“Central to the right to a fair trial . . . is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial.” Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (internal quotation marks omitted). Here, after hearing arguments from counsel, including the State’s assertion that the jury could not see that Gates was being led into a holding cell, the district court denied Gates’ motion for a mistrial. The district court stated that the jury would be excused before every bathroom break and that Gates would not be escorted by a uniformed officer. The district court subsequently instructed the jury that Gates had a bladder problem, “so we will be taking some of our breaks a little bit out of order . . . and the closest bathroom is right through that door.” The district court further admonished the jury “not to make any mention or consider that in one way or the other” in their deliberations. We conclude that any possible prejudice Gates may have suffered was cured by the district court’s instructions, see Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001), and he failed to demonstrate that the presumption of innocence was violated, Holbrook, 475 U.S. at 567-68, 572; see generally McKenna v. State, 114 Nev. 1044, 1050-51, 968 P.2d 739, 743-44 (1998). Therefore, we conclude that the district court did not abuse its discretion by denying Gates’ motion for a mistrial. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007).

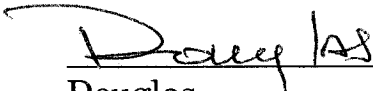
Third, Gates contends that the prosecutor committed misconduct during the State's rebuttal closing argument by improperly commenting about his failure to testify. See Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (holding that a direct or indirect reference to a defendant's right not to testify is constitutionally impermissible). We disagree. The prosecutor's challenged statement corrected a misrepresentation made during Gates' closing argument, where defense counsel referred to his police statement as testimony. The prosecutor explained to the jury that Gates' police statement was "not testimony because it was not under oath, and it was not cross-examined." The district court overruled Gates' objection and denied his motion for a mistrial, finding that the prosecutor's statement, taken in context, was a fair response to defense counsel's argument. We agree and conclude there was no prosecutorial misconduct requiring the reversal of Gates' conviction. See Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 70-71 (2000).


Fourth, Gates contends for the first time in his reply brief that the sexual assault and lewdness convictions are impermissibly redundant. This argument is improperly raised—a reply brief is limited to answering any new matter in the opposing brief, NRAP 28(c), and therefore we need not address it, City of Elko v. Zillich, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984). Nevertheless, we conclude that Gates' contention is without merit. See Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003).

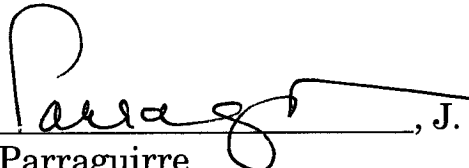
Finally, Gates contends that cumulative error denied him a fair trial and warrants the reversal of his conviction. Because Gates failed to demonstrate any error, we conclude that his contention lacks merit.

See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006). Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 14
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk