IN THE SUPREME COURT OF THE STATE OF NEVADA

ANKINA NICOLE MYLES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56663

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of involuntary manslaughter. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Sufficiency of the evidence

Appellant Ankina Nicole Myles contends that insufficient evidence supports her conviction because the evidence did not prove that she intended to harm the victim, engaged in an unlawful act, or was driving the rental car involved in the incident. We conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to support Myles's conviction beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

The jury heard testimony that Myles and the victim were dating the same man and did not like each other. Myles called the victim's cell phone 31 times during the two days before the incident. On the date of the incident, Myles and victim arranged to fight. Myles followed the

victim to a gas station, and the two got out of their cars and exchanged heated words. Myles then got into her car, drove past an exit, passed by the victim, and exchanged additional words with her. Myles turned her car around, passed another exit, sped up her car, and hit the victim with the right front portion of her car. Witnesses heard the tires on Myles's car squealing as she sped up. The victim flew backwards and hit her head on the concrete. Although Myles's car windows were down and witnesses screamed when the impact occurred, Myles "sped off" from the gas station and did not return. The victim fell into a persistent vegetative state due to her head hitting the concrete, from which she eventually died. From this evidence a rational juror could reasonably infer that Myles committed involuntary manslaughter. See NRS 200.070(1) (defining involuntary manslaughter). It is for the trier of fact to determine the weight and credibility to give to conflicting testimony and the jury's verdict will not be disturbed where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Batson challenges

Myles asserts structural error occurred when the district court denied her Batson challenges to the State's peremptory challenge of two African-American females from the jury venire. See Batson v. Kentucky, 476 U.S. 79 (1986). The 12-person jury empaneled included four African-Americans. The voir dire record supports the district court's determination that the reasons given were non-pretextual and that Myles did not prove purposeful discrimination. See id. at 96-98; Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (the district court's determination regarding discriminatory intent is given great deference on appeal); Ford v. State, 122 Nev. 398, 403-05, 132 P.3d 574,

577-79 (2006) (describing the 3-part analysis for evaluating Batson challenges and the factors to be considered when determining whether a prosecutor's reasons for a peremptory challenge are pretextual).

Evidentiary issues

Pre-mortem photograph of victim

Myles contends that the district court erred by admitting a photograph of the victim before her death, depicting her as "young and beautiful." We review the district court's decision to exclude or admit evidence for an abuse of discretion. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 487 (2009). Myles asserts that the photograph should have been excluded because it was irrelevant in light of the parties' stipulation to the identity of the victim; its probative value was substantially outweighed by the danger of unfair prejudice, misleading the jury, or confusion of the issues; and was not produced during pretrial discovery as required by NRS 174.235(1)(c).

We conclude that the photograph was relevant, see NRS 48.015; Castillo v. State, 114 Nev. 271, 278, 956 P.2d 103, 108 (1998) (family photograph of victim relevant to establish victim's identity), corrected on other grounds by McKenna v. State, 114 Nev. 1044, 1058 n.4, 968 P.2d 739, 748 n.4 (1998); cf. Doyle v. State, 116 Nev. 148, 161, 995 P.2d 465, 473 (2000) (autopsy photograph admissible to prove cause of death even where defendant does not dispute the cause of death); its probative value was not substantially outweighed by the danger of unfair prejudice, and it did not present a risk of misleading the jury or confusing the issues, see NRS 48.035(1). Accordingly, Myles has failed to demonstrate that the district court abused its discretion by admitting the photograph.

Further, we conclude that the State did not commit a discovery violation. Although NRS 174.235(1)(c) allows the defense to request the inspection of tangible objects which the State intends to introduce at trial, the statute does not contemplate voluntary disclosure, Thompson v. State, 93 Nev. 342, 343, 565 P.2d 1011, 1012 (1977), Myles's discovery motion requested only exculpatory material, and the photograph was not exculpatory.

Myles also contends that the district court erred by denying her motion for a mistrial after a State's witness had an emotional reaction upon seeing the picture. We review the district court's denial of a motion for a mistrial for an abuse of discretion. See Chavez, 125 Nev. at ___, 213 P.3d at 489. The district court denied Myles's motion after determining that, although the witness had an emotional reaction to the picture, she was not hysterical and the court had previously allowed the State permission to introduce and publish the picture. We conclude that Myles has failed to demonstrate that the district court's determination was arbitrary or capricious or exceeded "'the bounds of law or reason,'" Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)), and this contention lacks merit.

Autopsy photographs

Myles contends that the district court erred by admitting two autopsy photographs of the victim—one of her face and the other of her skull—because the pictures were cumulative and gruesome. Myles also asserts that the photographs were irrelevant in light of the fact that she did not dispute the cause or manner of the victim's death. We review the district court's decision to admit autopsy photographs for an abuse of

discretion. Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). We conclude that Myles has failed to demonstrate that the photographs were cumulative or unduly gruesome. See Flores v. State, 121 Nev. 706, 721-22, 120 P.3d 1170, 1180 (2005) (no abuse of discretion to admit gruesome autopsy photos that were necessary to explain autopsy and injuries). And, because Myles pleaded not guilty, the cause of death was relevant notwithstanding her failure to dispute the cause or manner of death. See Doyle, 116 Nev. at 161, 995 P.2d at 473. Accordingly, we conclude that Myles has failed to demonstrate that the district court abused its discretion by admitting the photographs.

Detailing of rental car

Myles alleges that the district court erred by admitting evidence, as res gestae, that days after the victim was hit, a rental car matching the description of the car used in the offense had been returned to the rental agency by a black male adult, and had been cleaned and detailed prior to its return. We agree that this evidence was not part of the res gestae of the offense because the witnesses could describe the offense without referring to the circumstance surrounding the return of the rental car days later. See NRS 48.035(3); Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (explaining the scope of the res gestae statute); Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005) (application of the res gestae statute is extremely narrow). Nevertheless, we conclude that the district court did not err by admitting the evidence because the condition of and the circumstances surrounding the return of the car used in the offense was otherwise relevant evidence of the charged crime. See NRS 48.015; NRS 48.025(1); Wyatt v. State, 86 Nev. 294, 298,

468 P.2d 338, 341 (1970) (this court will affirm the decision of the district court if it reaches the correct result for an incorrect reason).

Relatedly, Myles contends that the district court erred by failing to give the jury her proposed limiting instruction regarding the rental car evidence. This evidence could have been improperly considered by the jury as evidence of Myles's consciousness of guilt. Therefore, the district court should have given a limiting instruction as requested. See NRS 47.110 (the district court shall instruct the jury upon request when evidence is admissible for one purpose but inadmissible for another). We conclude, however, that the error was harmless beyond a reasonable doubt given the overwhelming evidence of guilt. See Fiegehen v. State, 121 Nev. 293, 306, 113 P.3d 305, 313 (2005) (reviewing failure to give a limiting instruction for non-constitutional harmless error).

Myles's statement

Myles contends that the district court violated NRS 47.120(1) by allowing the State to introduce information from her voluntary statement without allowing her to introduce the entirety of the statement. We disagree. The information the State introduced appeared in the pre-booking declaration of arrest and arrest report and in Myles's voluntary statement, but the State specifically sought to introduce the information from the former documents, not the voluntary statement. The State did not seek to or actually elicit any information from the voluntary statement that was not also contained in the declaration of arrest and arrest report. And, the voluntary statement was made in a different location and at a separate time than the other documents. Further, Myles cites no authority in support of her contention that information appearing in two separate documents requires the admission of the entirety of both

documents. Under these circumstances, we conclude that Myles has failed to demonstrate that the district court abused its discretion.

Testimony regarding prior threats

Myles asserts that the district court erred by excluding testimony from Shawneece Deyempert that the victim threatened Myles over the phone on a previous occasion. Deyempert never met the victim or talked to her on the phone, and only believed that the person making the threats was the victim based on Myles's representation. Accordingly, Deyempert lacked personal knowledge that the victim was the person who threatened Myles, see NRS 50.025(1)(a), and the district court did not abuse its discretion by excluding this evidence.

Prosecutorial misconduct

Myles contends that the prosecutor committed misconduct by implying that she had a burden to elicit evidence. Generally, it is "improper for a prosecutor to comment on the defense's failure to produce evidence" because such comments shift the burden of proof to the defense. Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). However, so long as the prosecutor does not comment on the defendant's decision not to testify, it is permissible for the prosecutor to comment on the fact that the defendant failed to substantiate the defense theory of the case with supporting evidence, Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); see also Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001). We conclude that the prosecutor's statement attempted to show that Myles did not substantiate her allegation that the victim ran into Myles's car, and therefore did not constitute misconduct.

Jury questionnaire

Myles alleges that the district court erred by denying her request for a jury questionnaire. The district court determined that a jury questionnaire was not warranted because the State was not seeking the death penalty, the trial was not projected to be extraordinarily long, and questionnaires are time-consuming and expensive. We conclude that Myles has failed to demonstrate that the district court abused its discretion.[1] See NRS 175.031; Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) ("Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion.").

Flight instruction

Myles alleges that the district court erred by giving the jury a flight instruction. We disagree. The jury heard testimony that the windows in Myles's car were down at the time of the impact, the impact made an audible "thump," multiple witnesses were screaming and yelling, and Myles did not stop her car or come back to the scene. From this evidence, it was reasonable to infer flight, and the district court did not abuse its discretion by so instructing the jury. See Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005); Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005).

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[1]To the extent Myles contends that the district court limited her ability to submit "reasonable and relevant" questions to the jury, this argument is not supported by any cogent argument, citation to the record, or citation to authority. Accordingly, we decline to address it. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Myles also asserts that the flight instruction shifted the burden of proof because it stated that the jury must determine her "guilt or innocence" rather than whether the State has proven her guilt beyond a reasonable doubt. Myles did not object to the substance of the instruction and we conclude that she has not demonstrated plain error. See Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1097 (2009) (reviewing adequacy of jury instruction in the absence of an objection for plain error), overruled on other grounds by State v. Castaneda, 126 Nev. ___, 245 P.3d 550 (2010); Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (defining plain error).

Restriction of closing argument

Myles contends that the district court improperly restricted her closing argument by sustaining an objection to her argument that the State would have presented evidence of her violent character if it had any such evidence. The record is somewhat unclear on this point but it appears that the objection that was sustained did not go to the State's failure to produce evidence of prior violence by Myles; rather, it was sustained as to the defense argument that Myles's "character, her reputation [are] above reproach." While Myles had introduced evidence that she was non-violent, evidence of her character and reputation being above approach was not introduced. This reading of the record is confirmed by the fact that, after the objection was sustained, the defense continued without objection as follows: "You didn't hear any evidence from any witness of any bad act, of any violence that Ms. Myles did. You didn't hear any of that evidence." We thus reject Myles's argument that she was unfairly prevented from making legitimate negative inference argument. A lawyer may not argue facts not in evidence and, there being no evidence

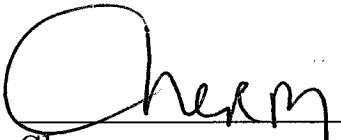
that Myles' "character, her reputation [are] above approach," the district court did not abuse its discretion in restricting argument on this point. See Daniel v. State, 119 Nev. 498, 521-22, 78 P.3d 890, 905-06 (2003) (reviewing the district court's decision to limit argument by counsel for an abuse of discretion). Moreover, we conclude that any erroneous restriction was harmless beyond a reasonable doubt. See Valdez, 124 Nev. at 1189, 196 P.3d at 477 (defining non-constitutional harmless error).

Cumulative error

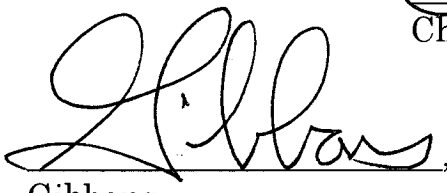
Finally, Myles alleges that cumulative error warrants reversal of her conviction. Balancing the relevant factors, we conclude that the cumulative effect of the alleged errors did not deny Myles a fair trial and no relief is warranted. See id. at 1195, 196 P.3d at 481 (three factors are relevant to a cumulative error analysis: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000))).

Having considered Myles's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



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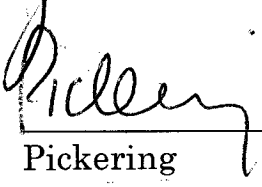

_____, J.
Pickering

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