IN THE SUPREME COURT OF THE STATE OF NEVADA

HECTOR MIGUEL GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56726

FILED

FEB 24 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment and amended judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a deadly weapon in violation of a court order, battery constituting domestic violence with the use of a deadly weapon resulting in substantial bodily harm in violation of a court order, battery constituting domestic violence with the use of a deadly weapon in violation of a court order, coercion with the use of a deadly weapon in violation of a court order, and preventing or dissuading a victim or witness from reporting a crime, commencing a prosecution, or causing an arrest. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Hector Gonzalez broke into the house where his wife Ana Gonzalez lived, and attacked Ana and his sister-in-law Elsie Serpas with a knife. Hector stabbed Ana in the neck and Elsie in the hand. He threatened more violence if they called the police but later allowed Elsie to call 911, telling her to only ask for an ambulance, not the police. After Elsie called 911, Hector stayed at the scene until the police responded. At the time of the attack, Ana had an extended protective order against Hector.

At trial, the district court ruled that pursuant to hearsay exceptions, the 911 call was admissible, and Elsie was allowed to testify

that Ana told her Hector hit Ana earlier in the evening. The district court also admitted the protective order. Hector's witnesses testified that Ana was in a relationship with her coworker Charles Campos at the time of the attack even though Ana and Hector were still married. During closing arguments, the prosecutor made statements trying to explain why Ana's and Elsie's stories were slightly different, why Ana reacted the way she did when she awoke to see that Hector had broken into the house, and why Hector acted the way he did.

Hector now appeals, arguing (1) that the district court should have bifurcated the penalty enhancement for violating a court order from the rest of the trial, (2) that the coercion and dissuading a witness convictions violate the Double Jeopardy Clause and are redundant, (3) that the district court erred in admitting the 911 call and allowing Elsie to testify that Ana told her Hector had hit Ana because both were inadmissible hearsay, (4) that the State committed prosecutorial misconduct in closing arguments, and (5) that the district court erred in refusing to issue a reverse flight jury instruction.[1] We affirm the

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[1]Hector also argues that there was insufficient evidence to convict him. When considering a sufficiency of the evidence challenge, we determine "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis omitted)). Hector's attack on the sufficiency of the evidence is that the State relied on the victimization of Ana to obtain the conviction. He fails to point directly to any inconsistencies or flaws in the evidence. The State presented enough evidence to allow a rational juror to convict Hector.

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judgment of conviction. Because the parties are familiar with the facts and procedural history of this case, we do not recount them further except as is necessary for our disposition.

Hearing the penalty enhancement evidence with the rest of the evidence does not amount to plain error

Hector argues that the district court impinged on his federal and state constitutional rights by failing to hear the allegations that he violated a court order separately from the rest of the allegations. We disagree.

Because Hector failed to request that the district court bifurcate the sentence enhancement for violation of a court order, he failed to preserve this issue for appellate review. See Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001). We review unpreserved issues for plain error. Id. Under a plain error review, we will "consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights." Calvin v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006). The defendant must show actual prejudice. Id.

Hector is unable to show actual prejudice by the district court's failure to sua sponte bifurcate the proceedings. Hector argues that the protective order creates an inference that he has committed some prior unspecified act of criminal misconduct. However, an inference is not enough to show actual prejudice. The evidence of the protective order was

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Hector also argues that the cumulative error warrants reversal. As we conclude that there was no error, there can be no cumulative error warranting reversal.

offered to help prove an element of six of Hector's eight charged offenses, and the State has to prove each element of each offense. Thus, the district court's decision not to bifurcate the proceedings does not amount to plain error.[2]

Hector's convictions do not violate the Double Jeopardy Clause and are not redundant

Hector argues that his convictions for coercion and for dissuading a witness violate the Double Jeopardy Clause and are redundant because they were based on the same alleged conduct. We disagree.

The Double Jeopardy Clause of the Fifth Amendment prohibits multiple punishments for the same offense. U.S. Const. amend. V; Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003). Nevada utilizes the test set forth in Blockburger v. United States, 284 U.S. 299 (1932), to determine the constitutionality of multiple convictions for the same act or transaction. Salazar, 119 Nev. at 227, 70 P.3d at 751. Under Blockburger, "'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.'" Id. (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002), cert. denied, 537 U.S. 1031 (2002)). "The general test for

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[2]Hector also contends that the district court should have provided a limiting instruction when admitting the protective order. However, the protective order was not admitted to prove Hector's character, but rather to prove an element of the charges against him. Thus, the district court did not err in failing to provide a limiting instruction. See Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

determining the existence of a lesser included offense is whether the offense in question 'cannot be committed without committing the lesser offense.'" McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)).

Convictions are redundant when "'a defendant is convicted of [multiple] offenses that, as charged, punish the exact same illegal act.'" Salazar, 119 Nev. at 228, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)). In determining if two convictions are redundant, this court must consider "whether the material or significant part of each charge is the same even if the offenses are not the same." Id. at 227-28, 70 P.3d at 751.

NRS 199.305 provides that a person commits the crime of preventing or dissuading a witness when, through intimidation or threats, he or she prevents, dissuades, or delays a victim of a crime, a person acting on behalf of a victim, or a witness from reporting a crime or possible crime. A person is guilty of coercion when, through the use of violence, through the use of threatened violence, or through depriving the person of any tool, implement, or clothing, he or she intentionally compels another to do or abstain from doing an act which another person has the right to do or abstain from doing. NRS 207.190.

Hector's convictions for dissuading a witness and coercion do not violate the Double Jeopardy Clause. Coercion is not a lesser offense of dissuading a witness because one can be guilty of coercion through depriving a "person of any tool, implement or clothing, or hinder[ing] the person in the use thereof," but such deprivation would not necessarily be enough to achieve the intimidation or threat necessary for a person to be guilty of dissuading a witness. See NRS 199.305; NRS 207.190(1)(b).

Dissuading a witness is not a lesser offense of coercion because a person can be guilty of dissuading a witness by delaying the person from acting; whereas, for a person to be guilty of coercion, he or she must intentionally compel another to act or to abstain from acting, not just delay the person from acting. See NRS 199.305; NRS 207.190. As an individual can commit either crime without committing the other, neither is a lesser included offense of the other.

It is not clear whether the two charges stem from one single act of threatening Elsie or if they stem from more than one threat or act of intimidation. The jury could have found that Hector intentionally threatened Elsie so that she would not call the police but also threatened Elsie with the hope that it would delay her reporting the crime. This is especially plausible since he originally would not allow her to call 911 and then allowed her to call 911 but told her to ask for only the paramedics and not the police. However, even if the same conduct is the basis for the conviction it does not mean that the convictions are redundant. Salazar, 119 Nev. at 227, 70 P.3d at 751. Here, the two convictions are not redundant as there is no evidence that the Legislature did not intend to punish them separately. Thus, Hector's convictions for coercion and dissuading a witness do not violate the Double Jeopardy Clause and are not redundant.

The district court did not err in admitting hearsay evidence

Hector argues that the district court erroneously admitted the 911 call and erroneously allowed Elsie to testify that Ana said Hector hit her earlier that night. We disagree.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible. NRS 51.035. The excited utterance hearsay exception allows a district court to admit

statements that relate to a startling event, made while the speaker was under the stress of excitement from the event. NRS 51.095. The present sense impression hearsay exception allows the district court to admit statements describing or explaining an event, made immediately after the speaker perceived the event. NRS 51.085. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009).

While both the 911 call and Ana's statement are hearsay, they are admissible hearsay. Elsie's statements during the 911 call are admissible pursuant to the excited utterances exception because she was making statements relating to the startling event of Hector's attack while she was still under the stress of the attack. The 911 call could also be admissible pursuant to the present sense impression exception because Elsie was relaying who stabbed Ana shortly after Hector had stabbed Ana. Elsie's testimony regarding Ana's statement that Hector hit her earlier that night is admissible pursuant to the excited utterance exception because Ana made the statement relating to the startling event of Hector hitting her while she was still under the stress of Hector hitting her. Thus, the district court did not abuse its discretion in admitting the 911 call and Elsie's testimony regarding Ana's statement.

The State did not commit prosecutorial misconduct in its closing argument

Hector argues that the prosecutor deprived Hector of his due process and fair trial rights when, in closing arguments, the prosecutor interjected her personal opinions regarding the evidence, referenced facts not in evidence, and vouched for the State's witnesses. We disagree.

"[T]o preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial . . . ." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Because Hector failed to object

to any of the prosecutor's statements, we will conduct a plain error review. See id. In determining if the prosecutor's statements amounted to prejudicial misconduct, we look at whether the statements "so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

The prosecutor did not interject her personal opinions

Hector argues that the prosecutor interjected her personal belief that Hector's sister must have told Hector about Ana's relationship with Campos, because the prosecutor's family would have told her. Hector contends that the prosecutor also interjected her personal belief by stating that the human memory is fallible, as evidenced by her own inability to recall exact testimony offered in this case. Lastly, Hector argues that the prosecutor interjected her personal belief by stating that if an intruder awoke her in the middle of the night, she would yell and scream too. Hector contends that all of this, coupled with the prosecutor's reference to unsupported facts and her vouching for Ana, amounts to reversible prosecutorial misconduct because the verdict may have been different without it. Because we hold the prosecutor's statements did not amount to misconduct, this issue does not warrant reversal.

The prosecutor did not reference facts that were not in evidence

Hector contends that the prosecutor argued that Hector's sister must have told him about Ana's relationship with Campos, which is not represented in the evidence. Hector also argues that the prosecutor's story about how she could not recall specific testimony was improper because there was no evidence to support the story. Hector contends that this, coupled with the prosecutor's interjection of her personal opinions and her vouching for Ana, amounts to reversible prosecutor misconduct because the verdict may have been different without it. We disagree.

"[A] prosecutor may not make statements unsupported by evidence produced at trial." Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992).

The prosecutor did not make statements unsupported by the evidence; rather, she made permissible inferences from the evidence. See Jones, 113 Nev. at 467, 937 P.2d at 63. Thus, the prosecutor did not reference facts that were not in evidence, and Hector failed to demonstrate plain error.

The prosecutor did not vouch for Ana

Hector contends that the prosecutor vouched for Ana by attributing any problems with Ana's testimony to the fallibility of human memory and by personally validating Ana's angry response to Hector's initial visit. Hector contends that this, coupled with the prosecutor's interjection of her personal opinions and her reference to unsupported facts, amounts to reversible prosecutor misconduct because the verdict may have been different without it. We disagree.

A prosecutor "may not vouch for a witness; such vouching occurs when the prosecution places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992)).

The prosecutor did not place the prestige of the government behind Ana's testimony by offering personal assurances of her veracity. Thus, the prosecutor did not vouch for Ana, and Hector failed to demonstrate plain error.

The district court did not err in refusing to issue a reverse flight instruction

Hector argues that the district court abused its discretion by refusing to proffer the requested reverse flight jury instruction. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Reverse flight instructions can invite speculation by the jury as to the many reasons why a guilty person would refrain from flight. People v. Staten, 11 P.3d 968, 984 (Cal. 2000). While flight is circumstantial evidence of guilt, the absence of flight is not evidence of innocence. Thus, the district court did not abuse its discretion in refusing to issue the reverse flight jury instruction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Elissa F. Cadish, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk