IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY DEMETRIUS FUNCHES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57654

FILED

FEB 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping and battery resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge. Appellant Anthony Funches raises four issues on appeal.

First, Funches argues that the district court erred by admitting his brother's testimony that he received a text message from another witness stating that Funches and two other people had "jumped" the victim. Funches asserts that this statement, which was admitted as non-hearsay showing the effect of the text message on his brother, was inadmissible hearsay, irrelevant, and highly prejudicial. We agree that this statement should have been excluded, as the text message directly implicated Funches and its effect on his brother had little if any relevance. See Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 122 (2002). Nevertheless, we conclude that the error was harmless in light of Funches's own admissions that he and his two codefendants kicked and punched the victim. We further reject Funches's argument that his right to confrontation was violated, as the declarant of the out-of-court

statement testified at trial and was subject to cross-examination. See Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004).

Second, Funches contends that the district court erred by admitting, under the present-sense-impression hearsay exception, a witness's text messages regarding earlier events. We agree that the present-sense-impression exception does not apply to all of the challenged text messages. See NRS 51.085; Browne v. State, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997). The text messages, which were written by the witness shortly after she woke up, involved events that occurred before she went to sleep approximately one to two hours earlier, and thus were not made contemporaneously with the events. See Browne, 113 Nev. at 312, 933 P.2d at 191; Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997), overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). The State argues persuasively that the text messages were admissible under the excited utterance exception because the witness's testimony indicated that she was under the stress of the startling event of seeing Funches and his two codefendants changing their bloody clothes after having been outside with the victim. See Browne, 113 Nev. at 312-13, 933 P.2d at 191-92 (no reversible error occurs if hearsay statements are admissible on other grounds); Medina v. State, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006) (excited utterance exception is not limited to statements made within a specified time after a startling event). In any event, we conclude that any error in admitting these statements was harmless because they were merely cumulative of the witness's own testimony and Funches's admissions. See Browne, 113 Nev. at 313, 933 P.2d at 191-92.

Third, Funches contends that the district court erred in admitting a telephone call between him and his brother, which was recorded while Funches was incarcerated, because the statements were irrelevant and highly prejudicial. He also argues that some of the statements in the recording indicate an uncharged bad act of witness tampering, and that the district court plainly erred by failing to hold a Petrocelli[1] hearing before admitting these statements. Funches failed to include an audio recording of the conversation in the appendix or have it transmitted to this court, and therefore we address this claim based solely on the submitted briefs. See Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (it is appellant's responsibility to provide this court with the portions of the record necessary to resolve the issues raised on appeal). Based on Funches's representation as to the contents of the audio recording, we conclude that there was no error in the admission of the recording, as the statements in the recording were admitted and used to show consciousness of guilt. See Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) ("[d]eclarations made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence" may be admissible as relevant to the issue of guilt); cf. Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001) (evidence that a defendant threatened a witness after a crime "is directly relevant to the

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

question of guilt" and "is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission").

Finally, Funches argues that the effect of cumulative errors warrants reversal of his convictions. We conclude that any errors committed, considered together, do not warrant relief. 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.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Linda Marie Bell, District Judge
Ellsworth Bennion & Ericsson, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk