IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE TYRON BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59051

FILED

SEP 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence and coercion. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Sufficiency of the evidence

Appellant Lawrence Tyron Brown contends that insufficient evidence was adduced to support the jury's verdict. We disagree because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319-20 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The victim testified that Brown, her ex-boyfriend still residing in her apartment, forcefully pushed and eventually punched her during an argument. Brown testified on his own behalf at trial and admitted to punching the victim in the face. The victim also testified that Brown carried her into the bedroom against her will during the fight and forcefully prevented her from leaving. It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be

disturbed on appeal where, as here, sufficient evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 33.018(1)(a); NRS 200.481(1)(a); NRS 207.190(1)(a). Therefore, we conclude that Brown's contention is without merit.

Preservation/destruction of evidence

Brown contends that the district court erred by denying his motion to dismiss the charges based on the State's failure to preserve potentially exculpatory evidence. See Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) ("Loss or destruction of evidence by the State violates due process 'only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'" (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001))). Brown claims that collecting and preserving the drugs found in his pants at the time of his arrest would have substantiated his version of events and impugned the victim's credibility by showing that she was under the influence. Brown alternatively contends that the district court erred by rejecting his proposed instruction pertaining to the failure to preserve the drugs. We disagree.

The district court found that Brown's claim was speculative and denied "the motion to dismiss as the relief sought is unwarranted under the totality of the circumstances as presented." See id. (holding that a mere "hoped-for conclusion" that the evidence in question would have supported defendant's case is insufficient). Later during the trial, the two investigating officers, outside the presence of the jury, testified that despite Brown's and the victim's contrary assertions, no drugs were in fact discovered during the arrest. During the settling of jury

instructions, the district court found that even if the officers failed to collect and preserve the alleged drugs, Brown failed to show that the evidence was exculpatory or material and sustained the State's objection to Brown's proffered jury instruction on the failure to preserve the evidence. See id. at 520-21, 78 P.3d at 905 (holding that absent demonstration of prejudice, defendant not entitled to "jury instruction setting forth the conclusive presumption that" lost evidence was favorable to the defense). We conclude that the district court did not abuse its discretion by rejecting Brown's instruction or denying his motion to dismiss. See Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009) ("This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion."); Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (we review district court's denial of motion to dismiss for abuse of discretion).

Text message/photograph

Brown contends that the district court erred by denying his motion for a mistrial after the victim testified that she sent him a photograph of herself with a friend in a text message hours prior to the incident. Brown claims that the victim's reference to the photograph violated a prior ruling prohibiting any testimony pertaining to the content of text messages. Brown's contention is belied by the record.

The district court prohibited any reference to the content of text messages Brown sent to the victim due to "authentication and verification" issues. The district court's ruling did not encompass text messages sent by the victim to Brown and, as the district court noted, its "ruling did not at all address photographs. . . . I had no way of knowing there were any photographs, so I hadn't made a ruling regarding

photographs." The district court found that its prior order was not violated and denied Brown's motion for a mistrial. The district court also issued a "new ruling" and subsequently instructed the victim not to mention anything contained in text messages she sent or believed were sent by Brown, including "typed language, photographs, images, anything." We conclude that the district court did not abuse its discretion by denying Brown's motion for a mistrial. See Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007) (we review district court's decision to deny motion for a mistrial for abuse of discretion).

Motions to dismiss counsel

Brown contends that the district court erred by denying his proper person pretrial motion to dismiss counsel and the subsequent motion to reconsider and his proper person post-verdict motion to dismiss counsel. In his pretrial motions, Brown challenged the accuracy of the preliminary hearing transcript and alleged that counsel was ineffective. In his post-verdict motion, Brown raised some of the same issues related to the allegedly deficient preliminary hearing transcript and claimed that trial counsel was ineffective. On appeal, Brown provides no argument in support of his contention that the pretrial motions were improperly denied and instead focuses on the allegations of ineffective assistance of counsel raised in the post-verdict motion to dismiss counsel. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Our review of the record reveals that the district court did not abuse its discretion by denying the two pretrial motions and the post-verdict motion to dismiss counsel. See Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576

(2004) (setting forth standard of review and factors to consider when assessing district court's denial of motion to dismiss counsel).

Prosecutorial misconduct

First, Brown contends that the prosecutor committed misconduct during closing arguments by disparaging the defense and defense counsel and by interjecting personal opinions. The district court, however, sustained Brown's objections and defense counsel did not request a curative instruction. Moreover, the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Even assuming that the prosecutor's comments were improper, we conclude that Brown failed to demonstrate prejudice and no relief is warranted on this basis alone. See Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("[P]rejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process." (alteration omitted) (internal quotation marks omitted)); Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) ("A prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" (quoting United States v. Young, 470 U.S. 1, 11 (1985))).

Second, Brown contends that the prosecutor committed misconduct by asking him, "Isn't it true that you have hit, and choked, and pushed [the victim] around multiple times before?" after he testified during the State's cross-examination that he "never punched a woman." Brown did not object and we conclude that he failed to demonstrate plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (challenges to unobjected-to prosecutorial misconduct are reviewed for

plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when reviewing for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice"); see also NRS 48.055(1).

In a related argument, Brown contends that the district court erred by allowing the State to call the victim as a rebuttal witness to testify about three prior instances of domestic violence committed by Brown. The State recalled the victim after Brown, responding to the question above, denied ever hitting, choking, or pushing her and testified that he never punched a woman before the instant offense. Brown now claims for the first time that this evidence was improperly admitted in violation of NRS 48.045(2) ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."). Brown did not object to the line of questioning and we conclude that the district court did not commit plain error. See NRS 48.045(1)(a); Jezdik v. State, 121 Nev. 129, 136-40, 110 P.3d 1058, 1063-65 (2005); see also NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Third, Brown contends that the prosecutor committed misconduct by asking him, on four separate occasions, whether other witnesses were lying. In Daniel v. State, 119 Nev. at 519, 78 P.3d at 904, "[w]e adopt[ed] a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." Here, the prosecutor inappropriately goaded Brown into calling witnesses liars after his testimony regarding the events leading to his arrest differed

from their testimony. Counsel for Brown, however, did not object to two of the instances in which he was goaded into calling the victim a liar and, standing alone, this error did not affect his substantial rights. See Pascua v. State, 122 Nev. 1001, 1007, 145 P.3d 1031, 1034 (2006). On a third occasion, Brown's objection to the form of the question was sustained by the district court. And lastly, although the district court erred by overruling Brown's objection to the prosecutor's question regarding whether the investigating officers were lying about the absence of drugs at the scene of his arrest, we again conclude that the error, standing alone, was harmless. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Daniel, 119 Nev. at 519, 78 P.3d at 904.

Jailhouse letter

Brown contends that the district court erred by admitting a letter he wrote to the victim while he was in jail awaiting trial. Brown claims the letter was exceedingly prejudicial because it (1) refers to a temporary restraining order (TRO) against him that the victim sought after the incident occurred, and also amounts to the admission of a bad act without a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), because writing the victim violated the TRO; (2) refers to his custodial status and possible prison sentence and therefore violates the presumption of innocence; and (3) contains evidence of another bad act, namely, that he attempted to dissuade the victim from testifying. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The district court ruled that Brown's objections to the letter's references to his custodial status, possible punishment, and attempts to dissuade the victim from testifying were untimely and waived; the objections were made after the start of trial and during the presentation of the State's first witness. The district court noted that "there's going to be testimony from the officers that they effected an arrest," and the fact that Brown may be facing jail time is "not something that's going to come as a surprise." Additionally, the district court instructed the jury on the presumption of innocence and not to consider the subject of punishment. See generally Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (providing that this court presumes that the jury follows the district court's instructions). We also note that references to Brown's attempt to dissuade the witness from testifying were admissible 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 question of guilt" and "is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission"). Therefore, we conclude that Brown failed to demonstrate that the district court abused its discretion by admitting these portions of the letter.

Over Brown's objection, the district court found that the references to the TRO did not amount to bad act evidence, but rather were admissible as res gestae. The district court also found that the relevance outweighed the potential prejudice. We disagree. The TRO evidence was

irrelevant, highly prejudicial, and not admissible under the res gestae doctrine because a description of the charged offense did not require any reference to the TRO sought by victim after the incident occurred. See Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (explaining scope of the res gestae statute); Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005) (noting that application of the res gestae statute is "extremely narrow"). Therefore, we conclude that the district court abused its discretion by admitting this evidence. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

Cumulative error

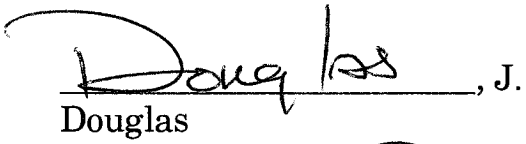
Brown contends that cumulative error denied him a fair trial and warrants the reversal of his conviction. We agree in part.

"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) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

Because Brown admitted to punching the victim, we conclude there was overwhelming evidence presented to support the battery and that conviction must stand. We concluded above that the State presented sufficient evidence of coercion, however, it was not overwhelming. Despite the State's contrary assertion, Brown's testimony did not include an admission of guilt on the coercion charge and, in fact, he repeatedly resisted the prosecutor's attempts at getting him to admit to committing coercion. The issue of Brown's guilt on the coercion charge was close and,

considering the multiple instances of prosecutorial misconduct and the district court's abuse of discretion in admitting the TRO evidence, we conclude "the evidence does not overcome the unfairness of the cumulative error," Valdez, 124 Nev. at 1196, 196 P.3d at 481, and requires the reversal of Brown's coercion conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Douglas

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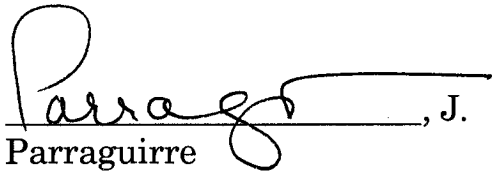

_____, J.
Parraguirre

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