

IN THE SUPREME COURT OF THE STATE OF NEVADA

PENNY BARTLETT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59771

**FILED**

DEC 12 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY Angela  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Seventh Judicial District Court, White Pine County; J. Charles Thompson, Senior Judge. Appellant Penny Bartlett raises seven errors on appeal.

First, Bartlett contends that the district court erred by refusing to grant her motion to continue trial. "This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion." Higgs v. State, 126 Nev. \_\_\_, \_\_\_, 222 P.3d 648, 653 (2010) (internal quotation marks omitted). "[I]f a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion." Id. Without citing to the record, Bartlett argues that she was prejudiced by this denial because of "[i]ncidents throughout the trial." We conclude that the district court did not abuse its discretion when it denied Bartlett's motion to continue the trial because Bartlett has failed to demonstrate that she was prejudiced by the denial.

Second, Bartlett contends that she was denied her right to a fair trial because the district court changed its pretrial ruling thereby inhibiting her ability to present evidence supporting her theory of self-

defense. “It is within the district court’s sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error.” Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (internal quotation marks omitted) (footnote omitted). In a pretrial order, the district court prohibited the State from introducing evidence of Bartlett’s use of methamphetamines on the date of the incident because its probative value was outweighed by its prejudicial effect. During trial, Bartlett sought to introduce evidence of the victim’s use of methamphetamines to show the victim’s propensity for violence and to establish Bartlett’s state of mind at the time of the crime. Although the district court did not prohibit Bartlett from introducing this evidence, it ruled that Bartlett’s drug use would also be admissible because it would be unfair to leave the jury with the impression that only the victim was intoxicated during the crime. We agree with the district court that only admitting the victim’s drug use and not Bartlett’s would mislead the jury. NRS 48.035(1) prohibits the district court from admitting evidence that could mislead the jury. Therefore, we conclude that the district court did not abuse its discretion in this regard.

Third, Bartlett contends that the district court erred by refusing to admit a tape of her interview with police officers at the hospital as an excited utterance. See NRS 51.095. The district court concluded that Bartlett’s statements were not excited utterances because they were not made while she was under the stress of excitement caused by the event but instead were a response to the officer’s questions after some time for reflective thought. We agree and conclude that the district court did not abuse its discretion by denying Bartlett’s motion to admit the tape as an excited utterance. Thomas, 122 Nev. at 1370, 148 P.3d at 734.

Fourth, Bartlett contends that the district court erred by refusing to grant her pretrial motion for evidentiary presumptions based on a police officer's grossly negligent investigation. The district court conducted an evidentiary hearing on Bartlett's motion and concluded that the police officer was not grossly negligent in conducting his investigation. See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115-16 (1998) (requiring gross negligence in order to grant an evidentiary presumption). We agree and conclude that the district court did not err by denying Bartlett's motion.

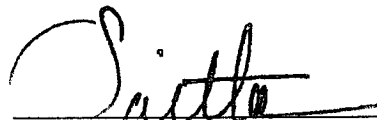
Fifth, Bartlett contends that the district court exhibited bias towards the defense throughout the trial which encouraged the jury to dismiss her defense arguments. "Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court. However, this court has reviewed judicial misconduct . . . under the plain error doctrine." Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998) (citation omitted). Because Bartlett failed to object, we review for plain error and conclude that Bartlett's assignments of judicial misconduct were merely unfavorable evidentiary rulings and not error. Therefore, this contention lacks merit.

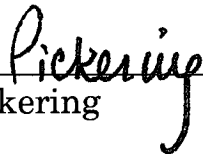
Sixth, Bartlett contends that the State committed prosecutorial misconduct during closing arguments. Because Bartlett failed to object below, we review for plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). Having reviewed the alleged improper comments made by the State we find no error and conclude that, even if there was error, Bartlett has failed to demonstrate actual prejudice or a miscarriage of justice. Id. Therefore, no relief is warranted.

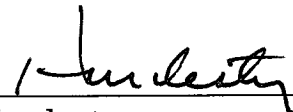
Seventh, Bartlett contends that cumulative error warrants reversal. Because there was no error, and thus no error to cumulate, we conclude that no relief is warranted.

Having considered Bartlett's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Chief Judge, The Seventh Judicial District Court  
Hon. J. Charles Thompson, Senior Judge  
State Public Defender/Ely  
State Public Defender/Carson City  
Attorney General/Carson City  
Richard W. Sears  
Lockie & Macfarlan, Ltd.  
White Pine County Clerk