IN THE SUPREME COURT OF THE STATE OF NEVADA

LUKE JAMES SHAWLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60212

FILED

DEC 18 2013

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 five counts of battery with a deadly weapon; and one count each of battery with a deadly weapon, victim 60 years of age or older, and battery. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

First, appellant Luke Shawley contends that the district court abused its discretion by denying him relief, without conducting an evidentiary hearing, regarding the State's failure to preserve blood and urine samples drawn from him at University Medical Hospital (UMC). The State asserts that UMC is not a state actor and therefore the government never possessed the samples. Because Shawley's blood and urine samples were not taken to support a criminal prosecution, but rather to treat him medically, we agree with the State's contention, *see generally People v. Wright*, 57 Cal. Rptr. 781, 782 (Ct. App. 1967) (a state actor is one "whose primary mission is to enforce the law"); *Williams v. Univ. Med. Ctr. of S. Nev.*, 688 F. Supp. 2d 1111, 1122 (D. Nev. 2010) (whether an entity constitutes a state actor must be analyzed "under the

facts of the particular case" (internal quotation marks omitted)). Accordingly, we must first consider whether the State had a duty to collect the blood and urine samples from UMC. *Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998).

To succeed on a claim that the State failed to collect evidence, the defendant must first show that the evidence was material. *Id.* at 267, 956 P.2d at 115. Shawley asserts that the blood and urine samples were material because, although UMC's testing did not uncover illicit substances outside of normal levels, more sophisticated testing would have established that he consumed an illicit substance during the relevant time period, which rendered him involuntarily intoxicated. We conclude that this assertion is merely a "'hoped-for conclusion,'" *Orfield v. State*, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989) (quoting *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)), but even assuming otherwise, Shawley fails to demonstrate a reasonable probability that the result of trial would have been different. At trial, Shawley presented expert testimony that tests of his hair follicles showed he consumed toxic levels of an illicit substance. Shawley does not assert that further testing of his blood and urine would have shown anything new, only that it would have corroborated the findings of the hair follicle testing. *See id.* at 110, 771 P.2d at 150 (defendant failed to demonstrate prejudice when alternative evidence was presented). We conclude that Shawley fails to demonstrate that he is entitled to relief on this claim.

Even assuming that the State possessed the samples and failed to preserve them, we similarly conclude that Shawley fails to demonstrate that he is entitled to relief. *See State v. Hall*, 105 Nev. 7, 9,

768 P.2d 349, 350 (1989) (in order to succeed on a claim of failure to preserve evidence, "a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed"). First, testimony at trial indicated that the samples were destroyed in the regular course of UMC's business and there is no indication that the police officer present at the hospital believed he had a duty to preserve the samples but chose not to do so out of "animus" because he was a victim in the case. *See California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *Hall*, 105 Nev. at 9, 768 P.2d at 350 (destruction of raw breath samples in DUI prosecution deemed good faith when done in the regular course of business). Second, the results of UMC's testing came back negative for drugs outside of normal levels, and thus, the samples did not possess exculpatory value which was apparent before they were destroyed. Third, Shawley presented expert testimony that testing of his hair follicles demonstrated he had consumed an illicit substance, and he had the opportunity to cross-examine hospital employees regarding the limitations on UMC's testing. *See Hall,* 105 Nev. at 10, 768 P.2d at 351 (defendant failed to demonstrate prejudice where alternative means existed to impeach the State's evidence). We conclude that Shawley fails to demonstrate that the district court abused its discretion by declining to provide relief on his evidentiary collection-and-preservation claims, and by doing so without conducting an evidentiary hearing.

Second, Shawley contends that the district court abused its discretion by allowing footage of a violent video game to be played for the

jury and admitting testimony that he wanted to cheat on his girlfriend with a bartender. "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). A lay witness' assertion that Shawley's actions resembled scenes from a popular video game he played was wholly irrelevant to any issue in the case, *see* NRS 48.015 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."), and any alleged probative value was undoubtedly outweighed by the danger of unfair prejudice, which the State exacerbated by comparing the game's violent character to Shawley, *see* NRS 48.035(1). Similarly, any alleged probative value of testimony regarding Shawley's infidelity was outweighed by the danger of unfair prejudice, *see, e.g., State v. Moses*, 726 A.2d 250, 252-53 (N.H. 1999); *Casterline v. State*, 736 S.W.2d 207, 212 (Tex. Ct. App. 1987); *Winfred D. v. Michelin N. Am., Inc.*, 81 Cal. Rptr. 3d 756, 769 (Ct. App. 2008). We conclude that the district court abused its discretion by admitting this evidence, but that the errors were harmless in light of the evidence introduced at trial. *See Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

Third, Shawley contends that the district court abused its discretion by allowing a witness to testify despite the State's untimely disclosure. We review a district court's decision to allow an untimely disclosed witness to testify for an abuse of discretion. *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Because Shawley fails to demonstrate that the State acted in bad faith, or that he was prejudiced

by the State's untimely disclosure, we conclude that the district court did not abuse its discretion.

Fourth, Shawley contends that the prosecutor inappropriately impugned Shawley's expert witness and committed misconduct by inquiring into whether he falsified data in other cases. Because Shawley did not object to the questioning, we review for plain error. *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (to be plain, an error must be "so unmistakable" that it is apparent from a "casual inspection of the record" (internal quotations omitted)). A material issue in this case was whether Shawley ingested an illicit substance which caused his violent outburst; thus, prior allegations regarding his expert's allegedly faulty testing procedures or errors analyzing test results were relevant and probative of his credibility. *See* NRS 50.085(3). Although the State challenged Shawley's expert's credibility and ethicality, it did not use inflammatory language or argue that he was unreliable because he was getting paid. *Cf. Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 234-35. Shawley's assertion that the State should have introduced documentary or testimonial evidence of prior misconduct fails because such is prohibited by NRS 50.085(3), and he never requested an offer of proof. We conclude that Shawley fails to demonstrate plain error.

Fifth, Shawley contends that the prosecutor committed misconduct when he held up a bottle of alcohol during closing argument to demonstrate the amount of alcohol Shawley allegedly consumed on the night in question. Because Shawley did not object, we review for plain error. *Patterson*, 111 Nev. at 1530, 907 P.2d at 987. Parties may use demonstrative exhibits during argument so long as they are otherwise

admissible, *see Allred*, 120 Nev. at 419, 92 P.3d at 1252-53, and the prosecutor's display of the bottle was an appropriate inference from the evidence presented. We conclude that Shawley fails to demonstrate plain error.

Sixth, Shawley contends that the district court erred by giving instructions which together misstated the elements of battery, implying to the jurors that they did not have to find "willfulness" beyond a reasonable doubt. This court reviews a district court's decision settling jury instructions for an abuse of discretion; however, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (internal citation omitted). Having reviewed the challenged instructions, we conclude that they were not inconsistent and accurately defined the elements of battery. Further, the jury was instructed that it had to find all elements beyond a reasonable doubt. We conclude that Shawley fails to demonstrate that the district court erred.[1]

Seventh, Shawley contends that the district court erred by requiring him to prove his involuntary intoxication defense by a preponderance of the evidence because it alleviated the State of its burden to prove all elements of a crime beyond a reasonable doubt. We disagree.

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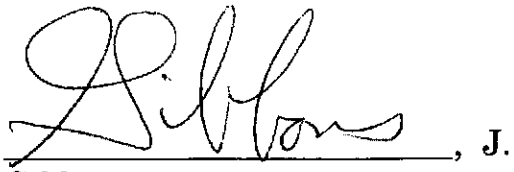
[1]Shawley also contends that the district court erred by failing to *sua sponte* instruct the jury that any common law defense that would justify homicide would justify battery, pursuant to NRS 200.275 and NRS 200.150. This claim lacks merit because Shawley does not suggest any common law defenses other than involuntary intoxication that were applicable.

The State may shift the burden to the defendant to establish an affirmative defense so long as the jury is allowed to consider all of the evidence presented in determining whether the State has met its burden. *See Patterson v. New York*, 432 U.S. 197, 209 (1977) ("If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty."); *see also Martin v. Ohio*, 480 U.S. 228, 233 (1987); *Montana v. Egelhoff*, 518 U.S. 37, 54 (1996). The instructions in this case allowed the jury to consider evidence of Shawley's involuntary intoxication in determining whether the State proved each element of the crime beyond a reasonable doubt. We conclude that Shawley fails to demonstrate he is entitled to relief on this claim.

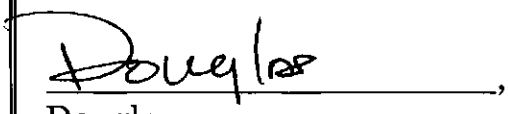
Eighth, Shawley contends that the district court erred by giving an involuntary intoxication instruction that was an incorrect statement of the law and did not fit the facts and circumstances of the case. We disagree. Assuming that involuntary intoxication by mistake is a legally cognizable defense in Nevada, the instruction correctly required that the defense show it was more likely than not that a mistakenly ingested substance caused Shawley's intoxication rather than his alcohol consumption or a mixture thereof. *See Grey v. State*, 124 Nev. 110, 122 n.22, 178 P.3d 154, 162 n.22. Moreover, although Shawley asserts that the State argued the instruction in an inappropriate manner, he did not object, and the record does not establish that the State argued the instruction inappropriately. We conclude that Shawley fails to demonstrate that the district court erred by giving the instruction.

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

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



_____, J.
Douglas

_____, J.
Saitta

cc: Hon. James M. Bixler, District Judge
Goodman Law Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk