IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN A. BANKS A/K/A KEVIN BANKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62533

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon of a person 60 years of age or older, five counts of discharging a firearm at or into a structure, and felon in possession of a firearm. Eighth Judicial District Court, Clark County; Douglas Smith, Judge. Appellant raises five issues on appeal.

First, appellant argues that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

The jury heard evidence that appellant, armed with a gun, knocked on the door of a residence and, when Parestine Driver opened the door, appellant asked whether "D" was there. Driver told him that "D" was not present and shut the door. Appellant pushed the door open and Driver again shut the door. Moments after appellant retreated from the door, several shots were fired into the residence. Two shots hit the 63-

year-old victim in the head and neck, killing him. One witness identified appellant as the man who knocked on the door and saw appellant with a gun in his hand. Another occupant of the residence heard the knock at the door and recognized appellant's voice. A witness, who was in a nearby alleyway, related that she observed appellant exit the passenger side of a four-door blue car, approach the residence, and ask for "D," and, after being denied access to the residence, fire several shots into the residence. Two other witnesses who heard the shots observed a blue car drive away from the residence; one of those witnesses identified appellant as the passenger in the car. Evidence was also introduced that appellant and "D" had an altercation some time before the shooting and that appellant told "D," "I'm going to come back and I'm going to get you." After the jurors returned guilty verdicts on the charges, evidence was introduced showing that appellant had been previously convicted of possession of a controlled substance and assault with the use of a deadly weapon.

The jury could reasonably infer from the evidence presented that appellant was guilty of murder with the use of a deadly weapon of a person 60 years of age or older, five counts of discharging a firearm at or into a structure, and felon in possession of a firearm. *See* NRS 193.165; NRS 193.167; NRS 200.010; NRS 200.030; NRS 202.285; NRS 202.360. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Second, appellant argues that the district court abused its discretion by excluding Driver's preliminary hearing testimony that the

man who knocked on the door of the residence was not the person who fired shots at the residence. Toward the end of trial, counsel advised the district court that he intended to introduce Driver's preliminary hearing testimony. The prosecution objected, arguing that counsel had not filed a timely motion to introduce the testimony and had not shown any attempt to secure Driver's appearance at trial. Counsel responded that he had made no effort to secure her presence because he expected her to appear at trial considering the efforts the prosecution made in ensuring her appearance at the preliminary hearing. The district court denied admission of Driver's testimony considering the "late hour" of the request.

On appeal, appellant contends that Driver's preliminary hearing testimony was admissible under NRS 171.198(7), which allows for the admission of preliminary hearing testimony at trial. Preliminary hearing testimony may be used by the defendant at trial "when the witness is sick, out of the State, dead, or persistent in refusing to testify despite an order of the judge to do so, or when the witness's personal attendance cannot be had in court." NRS 171.198(7). Appellant argues that Driver was unavailable because she was served a subpoena to appear at trial and did not appear and that NRS 171.198 imposes "no additional requirement that the proponent of the preliminary hearing testimony to undertake any further independent efforts." While the plain language of NRS 171.198(7) does not expressly assign the responsibility of showing unavailability on the proponent of the preliminary hearing testimony, appellant offers no legal authority obligating the prosecution to secure a witness the defense wishes to present at trial. *See Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986) ("The burden of proving the unavailability of the witness rests upon the party offering the prior [preliminary hearing]

testimony."); *see generally State v. Farquharson*, 655 A.2d 84, 90-91 (N.J. Super. Ct. App. Div. 1995) ("[G]enerally a prosecutor does not have an obligation to obtain witnesses for a defendant in the absence of a showing that such witnesses were made unavailable through the suggestion procurement, or negligence of the prosecutor." (quotation marks and brackets omitted)). And counsel conceded at trial that he made no effort to secure her presence at trial but rather relied solely on the fact that the prosecution had subpoenaed Driver to appear at trial. Under these circumstances, we conclude that appellant failed to demonstrate that the district court abused its discretion in this regard. *See Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (observing that the admission of evidence lies within the district court's sound discretion, and we review that decision for an abuse of discretion or manifest error); *Means v. State*, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004).

Third, appellant contends that the district court abused its discretion by excluding Sheree Davis' police statement that appellant was not the shooter because the statement was admissible under NRS 51.315, which provides that a statement is not excludable as hearsay if "(a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) The declarant is unavailable as a witness." Whether the nature and circumstances under which Davis' statements were made demonstrated strong assurances of accuracy is questionable, *see Johnstone v. State*, 92 Nev. 241, 244, 548 P.2d 1362, 1363-64 (1976), but we conclude that Davis' unavailability was not shown. Appellant argues that the unavailability requirement was satisfied because the prosecution subpoenaed Davis for trial and she failed to appear. However, as we noted above, appellant has provided no authority

suggesting that the prosecution bears the responsibility of securing a witness the defense wishes to testify at trial and appellant does not indicate that he made any effort to secure her appearance at trial other than relying on the State's subpoena. *See generally Farquharson*, 655 A.2d at 90-91. Consequently, we conclude the exclusion of this evidence does not constitute reversible error.

Fourth, appellant argues that the prosecutor committed misconduct in closing argument by interjecting her personal opinion concerning the testimony of State witness Jeffrey Greene. Because appellant did not object, his claim is reviewed for plain error affecting his substantial rights. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). A heated exchange between defense counsel and Greene erupted during cross-examination when defense counsel challenged Greene's military service. During closing argument, the prosecutor asked the jury to "give [the exchange between counsel and Greene] the attention it deserves, which is none." "[P]rosecutors must not inject their personal beliefs and opinions into their arguments to the jury." *Aesoph v. State*, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986); *see also Valdez*, 124 Nev. at 1192, 196 P.3d at 478. Considering the challenged comments in context, *see Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002), we conclude that the prosecutor merely suggested to the jury that the exchange between counsel and Greene was irrelevant. Accordingly, we conclude that appellant failed to show plain error in this instance.

Fifth, appellant argues that cumulative error warrants reversal of his convictions. Because appellant has not demonstrated any error, there is nothing to cumulate. Therefore, this claim lacks merit.

Having considered appellant's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Douglas Smith, District Judge
Sterling Law, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk