

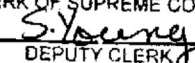
IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD JAMES LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63088

FILED

MAR 11 2015

TRAGIE 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 murder. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge. Appellant Edward James Lewis raises four contentions on appeal.

Prosecutorial misconduct

Lewis argues that the prosecutor elicited testimony that Lewis had not requested to test any physical evidence, which impermissibly shifted the burden of proof. We disagree. During cross-examination, Lewis' questioning of the forensic witness focused on the investigators' decisions to test certain evidence and not test other evidence. On redirect, the State asked the witness if the defense had requested to test any evidence. In this context, the questioning did not shift the burden of proof to the defendant to prove his innocence but illustrated that the investigators' decisions not to test certain evidence was not unreasonable. Additionally, the question was brief and the jury was instructed that Lewis was presumed innocent and that the State bore the burden of proving every element of the charged offense. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (recognizing that the jury is presumed to follow jury instructions). Thus, we cannot say that the

question “so infected the proceedings with unfairness as to make the results a denial of due process.” *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

Lewis also contends that the prosecutor misstated key defense evidence during closing arguments and improperly inserted his personal beliefs. We disagree. Officer Josh Sanford testified that he contacted John Fisher, a neighbor who had been at Lewis’ home earlier that evening, on the night of the murder and told him that he was investigating a disturbance at Lewis’ home. Fisher responded to Sanford “Is Sue hurt bad? She’s not dead, is she?” In his closing argument, the prosecutor accurately quoted that statement. The prosecutor’s argument, that Fisher’s statement is a logical response to a police officer at his home inquiring about a disturbance at Lewis’ residence, was not an assertion of the prosecutor’s personal belief but instead a reasonable inference drawn from the evidence presented at trial. *See United States v. Sullivan*, 522 F.3d 967, 982 (9th Cir. 2008) (explaining that no prosecutorial misconduct occurs when reasonable inferences are argued from the evidence).¹

Admission of evidence

Lewis contends that the district court erred in admitting irrelevant evidence by permitting the State to introduce the fact that no biological evidence was discovered on Fisher’s boots and socks, which were seized during police questioning, because he did not wear those items when he was at Lewis’ residence earlier that evening. He contends that the admission of this evidence, the testimony about the lack of blood

¹Lewis also argued that a witness improperly implied that Lewis had been arrested for other crimes. The State responded that this argument was based on an inaccurate reading of the record, and Lewis concurred in his reply brief and withdrew the argument.

evidence, and the State's repeated emphasis of this fact violated his right to due process.

We discern no abuse of discretion. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (reviewing admission of evidence for abuse of discretion). Generally, all relevant evidence is admissible. NRS 48.025. However, relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of misleading the jury, or needless presentation of cumulative evidence. NRS 48.035. Testimony about the clothing a possible suspect was wearing and how the police collected and tested that clothing was relevant to the investigation of the homicide. As the testimony, video, and physical evidence demonstrate that the boots and socks were not worn at the scene of the murder, the testimony that forensic testing did not reveal the presence of incriminating trace evidence on the items did not pose a risk of improperly misleading the jury.

Jury instructions

Lewis argues that the district court erred in overruling his objection to three jury instructions and the verdict forms.

First, Lewis contends that the instruction that neither party is required to call all the witnesses who may have been present or produce all evidence improperly suggests that the defense had some burden of proof. We disagree. The district court instructed the jury that Lewis was presumed innocent and that the State bore the burden of proving every element of the crime beyond a reasonable doubt. The instruction of which Lewis complains did not impermissibly modify the instruction on the State's burden. Therefore, the district court did not abuse its discretion in giving the instruction. *See Funderburk v. State*, 125 Nev. 260, 263, 212

P.3d 337, 339 (2009) (reviewing the settling of jury instructions for abuse of discretion).

Second, Lewis argues that the instruction that the State is not required to prove every factual statement of the information impermissibly reduces the burden of proof. We discern no abuse of discretion. *See Funderburk*, 125 Nev. at 263, 212 P.3d at 339. Due process requires that the prosecution prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The given instruction is not an incorrect statement of law and complies with the mandate of *Winship*.

Third, Lewis contends that the instruction regarding direct and circumstantial evidence is internally inconsistent and impermissibly reduces the State's burden of proof. We disagree. The instruction accurately describes direct and circumstantial evidence and informs the jury that a finding of guilt may rest on either type of evidence or a combination of both. In addition, the court instructed the jury that Lewis was presumed innocent and the State bore the burden of proving the elements of the offense beyond a reasonable doubt. The challenged instruction, which merely defines how evidence is classified, did not modify the given instructions on the State's burden of proof or otherwise indicate that the jury could make findings that were not supported by evidence. Therefore, the district court did not abuse its discretion in instructing the jury in this regard. *See Funderburk*, 125 Nev. at 263, 212 P.3d at 339.

Fourth, Lewis asserts that the verdict forms employed by the district court do not follow the "unable to agree" approach to transitional instructions regarding lesser-included offenses as mandated in *Green v. State*, 119 Nev. 542, 80 P.3d 93 (2003). He asserts that the court should

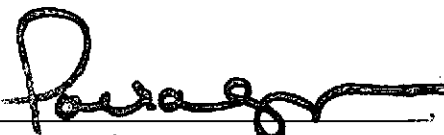
have used the proffered form, which listed all offenses on one page, instead of the given forms, which listed offenses on separate pages. We disagree. The district court instructed the jury that it should consider the evidence as it applies to each offense, and that if it "can not agree" that the defendant is guilty of that offense, consider the next lesser-included offense. This instruction complied with the approach endorsed in *Green*. See *id.* at 547-48, 80 P.3d at 96-97. The use of separate verdict forms did not conflict with this instruction or undermine the jury's ability to follow the instruction. Therefore, the district court did not abuse its discretion in instructing the jury or providing the jury with verdict forms. See *Funderburk*, 125 Nev. at 263, 212 P.3d at 339.

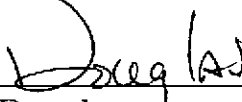
Cumulative error

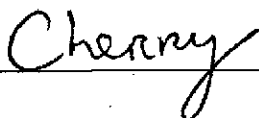
Lastly, Lewis contends that the cumulative effect of errors denied him a fair trial. Because we have found no error, there is nothing to cumulate.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Lidia Stiglich, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk