IN THE SUPREME COURT OF THE STATE OF NEVADA

OTIS JAMES HINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64654

FILED

OCT 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in the possession of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, and taking a vehicle without the consent of the owner. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

First, appellant Otis James Hines contends that the district court abused its discretion by allowing the State to introduce evidence that the victims saw him in possession of a knife prior to the incident resulting in the instant charges. Hines claims that testimony regarding his knife possession amounted to improper propensity evidence about a prior bad act and was admitted in violation of NRS 48.045(2). Hines also claims that the district court erred by not providing the jury with a limiting instruction pursuant to *Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001), *modified in part by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). We disagree with Hines' contention.

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Mclellan*, 124 Nev. at 267, 182 P.3d at 109. Here, the district court initially overruled Hines' objections and denied his motion for a mistrial based on testimony regarding his

prior knife possession, ultimately stating, "It's not illegal to carry a knife." The district court later clarified its ruling and directed the State to "stay away from any reference to the Defendant in possession of a weapon prior to the events in question," after additional testimony indicated that Hines carried the knife in his sock, "because actually possessing the weapon in the sock could be considered a concealed weapon, which would be potentially another bad act." The district court also noted that evidence about Hines' prior knife possession only "c[a]me out in a very minimum sense."

We agree with the district court and the State that evidence regarding Hines' prior knife possession *did not* implicate a prior bad act and was admissible independent of NRS 48.045(2) and *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *modified by Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249-50 (2012). As a result, a limiting instruction was not required. We conclude that the district court did not abuse its discretion when it initially admitted the knife-possession evidence and denied Hines' motion for a mistrial. *See Rose v. State*, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007) (we review a district court's decision to deny a motion for a mistrial for an abuse of discretion).

Second, Hines contends that the district court abused its discretion by allowing the State to introduce evidence of his misdemeanor battery conviction pursuant to NRS 48.045(1)(a) without first conducting a hearing outside the presence of the jury and by not providing the jury with a limiting instruction. We disagree.

During his direct examination at trial, Hines admitted to hitting one of the victims, but stated, "I know I was wrong for hitting a woman, *but I don't hit wom[e]n*. Like . . . that's not me. She—she hit me

and I reacted." (Emphasis added.) During his cross-examination, Hines objected when the State attempted to ask him about a prior arrest. The State argued that Hines opened the door and "specifically put his character in evidence," and sought to rebut his testimony and question him about a prior domestic battery arrest. The following day, the district court conducted what Hines concedes was "a quasi-hearing," and the State presented certified judgments of conviction proving that Hines previously was convicted of misdemeanor battery and felony coercion. The State also informed the district court that if Hines denied the convictions, it was prepared to present Hines' prior victims in a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). The district court determined that Hines opened the door and allowed the State to question Hines about his convictions. Hines subsequently did not deny the convictions.

We conclude that the evidence was admissible pursuant to NRS 48.045(1)(a) (permitting rebuttal character evidence); *see also* NRS 48.055(1), and for impeachment purposes, *see* NRS 50.085(3). We further conclude that Hines was not entitled to a limiting instruction and that the district court did not abuse its discretion by allowing the line of questioning. *See Jezdik v. State*, 121 Nev. 129, 136-40, 110 P.3d 1058, 1063-65 (2005).

Third, Hines contends that the district court abused its discretion by rejecting four negatively-phrased jury instructions on reasonable doubt. The district court rejected Hines' proposed instructions after finding them cumulative. Two of the four proposed jury instructions pertained to the attempted murder charge. The jury found Hines not guilty of attempted murder; therefore, he cannot demonstrate that he is

entitled to relief based on the rejection of those two instructions. Nevertheless, "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." *Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005). A "'positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased'" instruction. *Id.* (quoting *Brooks v. State*, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987)). Here, even assuming the district court erred by not giving the other two proposed instructions, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case." *Id.* at 756, 121 P.3d at 590.

Fourth, Hines contends that the district court erred by limiting his cross-examination of one of the victims. Hines claims that he should have been allowed to confront his accuser and present evidence of her employment in order to support his theory of defense—that he went to the apartment "to protect [her] infant son . . . from an unhealthy environment," and not with the intent to assault or batter her. The district court sustained the State's objection and determined that details regarding the victim's employment were not relevant and more prejudicial than probative. Our review of the trial transcript reveals that the limitations placed on Hines' cross-examination of the victim did not violate his confrontation rights, *see Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (we review alleged Confrontation Clause violations de novo), and the district court did not abuse its discretion, *see Crew v. State*, 100 Nev. 38, 45, 675 P.2d 986, 990-91 (1984) (the trial court has broad

discretion to limit the scope of cross-examination); *see also* NRS 48.015; NRS 48.025(2).

Fifth, Hines contends that the State committed prosecutorial misconduct during its rebuttal closing argument by improperly shifting the burden of proof and arguing facts unsupported by the evidence. Hines did not object to the challenged statements and we conclude that he fails 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); *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)); *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 178.602.

Sixth, Hines contends that cumulative error deprived him of a fair trial and requires the reversal of his conviction. Balancing the relevant factors, we conclude that Hines' contention is without merit. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk