IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES CLARK WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65761

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence – strangulation. The district court sentenced appellant James Williams to 12 to 40 months in the Nevada Department of Corrections, with 253 days credit for time served. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Williams has appealed from his judgment of conviction, asserting several assignments of error, each related either to the evidence offered or the arguments advanced by the State at trial. Williams raises six contentions on appeal: (1) the State produced insufficient evidence at trial to sustain the conviction; (2) the State violated Williams constitutional rights under the Fifth and Fourteenth Amendments, and under Article I Section 8(5) of the Nevada Constitution, when it referred to his exercise of his right to remain silent; (3) the prosecutor committed misconduct when he interjected his personal opinion during closing argument; (4) the prosecutor committed misconduct when he shifted the burden of proof to the defense during rebuttal argument; (5) the district court violated Williams' right to due process when it denied his motion to strike the State's expert witnesses; and (6) that cumulative error warrants reversal.

Around 6:30 a.m. on November 4, 2013, three police officers of the Las Vegas Metropolitan Police Department responded to the apartment of Williams and his girlfriend, Tressimie Pledger, following Pledger's 9-1-1 call. Upon arrival, officers found Pledger outside of the apartment with noticeable scratches, redness, and bruising on her neck, arms, and legs. Pledger told officers she had a physical altercation with her boyfriend and he had put her in a chokehold and strangled her.

Two officers knocked on the apartment door, but Williams did not answer. Williams testified that he saw officers through the peephole, but did not answer the door because he was scared and naked. Instead, Williams attempted to call his sister. When Williams was unable to reach his sister, he went upstairs to the second floor of the apartment and yelled, "What, bitch," from the window. Williams testified at trial that he yelled, "What, bitch" because he "was trying to get somebody's attention . . . to have a witness before [he] went out[side]." Williams eventually went outside where officers arrested him.

That same morning, Pledger completed a voluntary statement in which she stated Williams attacked her, choked her until she was unconscious, hit her numerous times with a closed fist, and locked her outside of the house. At the preliminary hearing, however, Pledger recanted some of her statements to police and some of her statements in her voluntary statement. Although she testified that she remembered feeling pressure when Williams put his hands around her neck, she stated that she did not lose consciousness and did not have trouble breathing. Further, Pledger testified she did not remember Williams hitting her with a closed fist.

At trial, Pledger claimed she did not remember anything that happened inside of the apartment, getting into an altercation with Williams, making the 9-1-1 call, talking to the police, or making a voluntary statement because she was intoxicated and the "night was one big blackout." As to her testimony at the preliminary hearing, Pledger testified the district attorney forced her to answer the questions and told her what to say.

In response, the State presented two expert witnesses. Dr. Lisa Gavin, a forensic pathologist, analyzed photographs of Pledger's injuries and testified that in her opinion, the location of the injuries indicated a chokehold and a lack of oxygen to the brain. However, Dr. Gavin testified that she could not determine whether or not, based on the photos, Pledger had gone unconscious or felt dizzy as a result of the lack of oxygen. Elynne Greene, the State's domestic violence expert, testified about battered woman syndrome and the "cycle of abuse." She further explained why victims might not want to end the relationship or why they might blame themselves, recant, or not come forward with additional information. Williams then testified and claimed self-defense,[1] explaining that Pledger had attacked him with a knife. The jury convicted Williams and this appeal followed.

---

[1]On appeal, Williams does not contend the State failed to meet its burden in proving beyond a reasonable doubt that he did not act in self-defense.

Sufficiency of the evidence

Williams contends the evidence presented at trial does not support a conviction for domestic battery by strangulation. We disagree. In reviewing a challenge to the sufficiency of the evidence, "[t]he relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (emphasis in original) (internal citation and quotation marks omitted).

Battery is "any willful and unlawful use of force or violence upon" another person. NRS 200.481(1)(a). A battery constitutes domestic violence if it is committed against a "person with whom the person is or was actually residing." NRS 33.018(1). It is undisputed that Williams and Pledger lived together at the time the altercation occurred. Thus, the only issue here is whether the State presented sufficient evidence for the jury to find Williams committed a battery by strangulation. A person commits a battery by strangulation when the person intentionally impedes "the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person in a manner that creates a risk of substantial bodily harm." NRS 200.481(1)(h).

In reviewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Williams strangled Pledger. Officer Chrisnar Sok and Officer Joshua Pepper each testified they observed fresh scratches, bruising, and noticeable marks on Pledger's neck when they arrived at the scene. According to Officer Sok, Pledger said she and her

boyfriend had a physical argument and he "put her in a headlock grip with the front of his left forearm underneath her chin and pressed against the front of her neck . . . causing her not to be able to breathe and blackout for a few seconds." According to Officer Pepper, Pledger said that "she had gotten into a fight with her boyfriend" and that "he had strangled her." When Officer Pepper asked Pledger whether she thought she was going to lose consciousness or pass out when her boyfriend strangled her, she replied, "yes."

Although Pledger testified at trial that she did not remember anything that happened on the night of the altercation, the State offered and the court admitted a recording of Pledger's 9-1-1 call, her voluntary statement, and two phone conversations between Williams and Pledger while Williams was in custody. Both impeached Pledger's testimony as the evidence included statements by Pledger that Williams choked or strangled her. The jury also received as evidence Pledger's preliminary hearing testimony, during which she testified she felt pressure when Williams' hands were around her neck. Finally, the jury received Dr. Gavin's expert testimony concluding that Pledger's injuries indicated a chokehold and a lack of oxygen to the brain. Therefore, we conclude the jury's verdict is based on sufficient evidence to support the conviction of domestic battery by strangulation.

Right to remain silent

Williams contends the State improperly referred to his exercise of his Fifth Amendment right to remain silent in closing argument when it stated, "[Williams] didn't seem too excited to come out and talk to the police." Williams contends the State's comment violated

his constitutional rights under the Fifth and Fourteenth Amendments and under Article I, Section 8(5) of the Nevada Constitution.

We do not believe the State's comment during closing argument constituted a comment on Williams' exercise of his right to remain silent. The State's comment merely described Williams' perceived attitude about going outside and talking to police and did not refer to his failure or refusal to talk to police, or his assertion of his Fifth Amendment right. *Compare McGee v. State*, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986) (explaining that a "'mere passing reference' at trial to an accused's post-arrest silence, 'without more, does not mandate an automatic reversal'") (quoting *Shepp v. State*, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971)), *with Diomampo v. State*, 124 Nev. 414, 420, 428, 185 P.3d 1031, 1035, 1040 (finding that the officer's testimony that defendant "did not say anything" after receiving his Miranda warnings, combined with a separate officer's testimony that defendant "refused to speak to police any further," constituted improper comments by the State on defendant's silence), *and Sampson v. State*, 121 Nev. 820, 831, 122 P.3d 1255, 1262 (2005) ("Whether a prosecutor's comment on a defendant's invocation of her Fifth Amendment rights is reversible error depends on whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's [assertion of her Fifth Amendment rights]") (alternation in original) (internal citation and quotation marks omitted).

We fail to see how Williams invoked his right to remain silent before he went outside. The Fifth Amendment right to remain silent attaches when a person is the subject of police interrogation, either custodial or noncustodial. *See Avery v. State*, 122 Nev. 278, 286, 129 P.3d

664, 669 (2006) (custodial interrogation); *Salinas v. Texas*, 133 S. Ct. 2174, 2183-84 (2013) (noncustodial interrogation). "'Custody' is defined as formal arrest or a restraint on the freedom of movement to a degree associated with formal arrest." *Avery*, 122 Nev. at 286, 129 P.3d at 669. And "[a]n interrogation for *Miranda* purposes 'refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Archanian v. State*, 122 Nev. 1019, 1022, 145 P.3d 1008, 1038 (2006) (internal citation omitted).

During the time Williams was alone inside his house, he was not in custody or subject to interrogation. Therefore, Williams' Fifth Amendment right to remain silent had not attached. Moreover, even if Williams could have invoked his right to remain silent, he failed to do so. *See Salinas*, 133 S. Ct. at 2179 (holding that a defendant who wishes to rely on his right to remain silent must expressly invoke it at the time he intends to rely on it).

Accordingly, since Williams had no cognizable Fifth Amendment privilege, the prosecutor's comment did not violate Williams' Fifth Amendment right to remain silent or his Fourteenth Amendment right to due process. *See Morris v. State*, 112 Nev. 260, 265, 913 P.2d 1264, 1268 (1996). "Due process prohibits any inference to be drawn from the exercise of one's constitutional right to remain silent after arrest." *Id.* at 265, 913 P.2d at 1268. Thus, if one cannot invoke the right to remain silent under the circumstances, one cannot maintain a Fourteenth Amendment due process claim based on the invocation of the right.

For the same reasons this case does not implicate the Due Process Clause of the Fourteenth Amendment, it also does not implicate the Due Process Clause of Article I, Section 8(5) of the Nevada Constitution. *See Wyman v. State*, 125 Nev. 592, 600, 217 P.3d 572, 578 (2009) (reading the Nevada Due Process Clause of Article I, Section 8(5) of the Nevada Constitution as coextensive with the Due Process Clause of the Fourteenth Amendment).

Prosecutorial misconduct

Williams contends the prosecutor committed misconduct by injecting his personal beliefs and opinions into closing argument and by shifting the burden of proof to the defense during rebuttal argument. Williams failed to object to these comments at trial. Therefore, we review for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 478 (2008). In conducting plain error review, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Id.* at 1190, 196 P.3d at 477 (2008).

First, Williams argues the prosecutor injected his own personal belief and opinion into his closing argument when he commented on Williams' explanation for yelling "What, bitch" out of the window. Prosecutors "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). When a prosecutor injects his or her personal beliefs into an argument, it "detracts from the 'unprejudiced, impartial, and nonpartisan' role that the prosecuting attorney assumes in the courtroom." *Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (quoting *State v. Rodriquez*,

31 Nev. 343, 346, 102 P. 863 (1909)). "By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney." *Id.* at 473, 705 P.2d at 1130 (internal citation omitted) (finding the prosecutor's statement to the defendant that he "deserve[d] to die" constituted the penultimate instance of a prosecutor injecting his personal beliefs into an argument); *see also Flanagan v. State*, 104 Nev. 105, 109-110, 754 P.2d 836, 838-39 (concluding the prosecutor stepped out of his role as a representative of the State and improperly invoked his authority of office when he told the jury that "he had been 'doing these kind of cases' for fifteen years" and would easily give the defendant the death penalty if it was his choice).

However, prosecutors are "free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom." *Moore v. State*, 116 Nev. 302, 306, 997 P.2d 793, 795 (2000). "[A] prosecutor may comment upon a defendant's testimony." *State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965). And a prosecutor "may demonstrate to a jury through inferences from the record that a defense witness's testimony is palpably untrue" or not credible. *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990).

At trial, Williams testified that he yelled, "What, bitch" from the second-story window in an attempt to get someone's attention so he would have a witness before going outside. During closing argument, the prosecutor stated:

> I don't know if that would be where [sic] I would yell if I was trying to get a witness. I might say, hey, please watch. Help. I wouldn't try to

> [degrade] somebody to come help me. What, bitch, yeah, that means come over here, watch what's going to go on.

The prosecutor's comment was not improper because it merely addressed Williams' testimony at trial and argued an inference the jury could reasonably draw (i.e., that Williams might be lying or that his testimony is not credible). Unlike *Collier* and *Flanagan*, the prosecutor did not invoke his authority, greater experience, or knowledge to persuade the jury to accept his personal conclusions. Although the prosecutor used the word "I" in argument, the argument did not hinge on his own greater experience or knowledge. Rather, the prosecutor's argument would be substantively the same had he used "nobody" or "anybody" instead of "I."

Moreover, we note that the mere use of the pronoun "I," standing alone, does not always signify an improper expression of a personal opinion. *See U.S. v. Jones*, 468 F.3d 704, 708 (10th Cir. 2006) ("[T]he use of personal pronouns in closing argument is not a *per se* due process violation."); *State v. Luster*, 902 A.2d 636, 654 (Conn. 2006) (recognizing "that the 'use of the word "I" is part of our everyday parlance and . . . because of established speech patterns, it cannot always easily be eliminated completely from extemporaneous elocution'"). Nevertheless, we reiterate the Nevada Supreme Court's directive in *Jimenez v. State*, 106 Nev. 769, 772, 801 P.2d 1366, 1368 (1990), and caution parties not to use such expressions as "I personally believe," or "in my opinion," so as not to "in effect place their own certification on their arguments." Therefore, to the extent Williams argues the prosecutor injected his own personal belief and opinion into his closing argument, the claim was not preserved, and we conclude Williams has failed to demonstrate that the statements prejudiced him or affected his substantial rights.

Second, Williams contends the prosecutor committed misconduct by improperly shifting the burden of proof to the defense during rebuttal. "Although a prosecutor may not normally comment on a defendant's failure to present witnesses or produce evidence, in some instances the prosecutor may comment on a defendant's failure to substantiate a claim." *Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

Here, the prosecutor argued during rebuttal argument:

> I believe there were some comments in closing argument also about the police not recovering the knife or looking for a knife for investigating the knife. . . . I don't even recall either myself or the defense – and they're not obligated to present any evidence; it's my burden, but I don't recall either one of us asking any questions about a knife to Tressimie. It was only after the defendant's testimony that we hear about this knife.

The prosecutor's comment was not improper because it commented on the evidence as presented to the jury and attempted to demonstrate that Williams did not substantiate his version of events. Moreover, the prosecutor emphasized the defense had no duty to present evidence; therefore, Williams fails to demonstrate that the statements prejudiced him or affected his substantial rights. *See Leonard*, 117 Nev. at 81, 17 P.3d at 415 ("Even assuming the prosecutor's remarks were improper, [the prosecutor's] immediate clarification to the jury concerning the burden of proof remedied any impropriety by serving the function of an adequate curative instruction. Thus any error is harmless.").

Expert testimony

Williams contends the district court violated his constitutional right to due process when it denied his motion to strike the State's notice

of expert witnesses and allowed Dr. Lisa Gavin and Elynne Greene to testify.[2] We disagree.

"This court reviews a district court's decision to allow expert testimony for abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (internal citation omitted). "The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987). "The goal, of course, is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." *Id.* at 117, 734 P.2d at 708.

1. *Dr. Lisa Gavin*

First, Williams argues Dr. Gavin's testimony did not assist the jury. Dr. Gavin is a forensic pathologist employed as a medical examiner at the Clark County Coroner's Office in Las Vegas, Nevada. Dr. Gavin received training on strangulation and has examined people whose cause of death was strangulation. She testified consistently with the State's pretrial notice as "a medical examiner" who testified "regarding the mechanics and effects of strangulation and other related matters." Dr. Gavin analyzed photographs of Pledger's injuries and testified that in her opinion, the location of the injuries indicated a chokehold and a lack of oxygen to the brain.

---

[2]Williams does not challenge the witnesses' competency or qualifications, but challenges the admissibility of the testimony.

She further testified that the injuries were consistent with someone who had been strangled. *See State v. Buralli*, 27 Nev. 41, 51 71 P. 532, 535 (1903) ("It is generally held that physicians may give their opinion as to the cause, effect, and consequences of wounds."). *See also Edmonds v. Commonwealth*, 433 S.W.3d 309, 317 (Ky. 2014) (finding the court properly admitted testimony of a nurse examiner who had examined the victim and testified that the victim's symptoms and abrasions were consistent with strangulation); *State v. Delgado,* 303 P.3d 76, 81 (Ariz. Ct. App. 2013) (finding the court did not err in denying defendant's motion to preclude testimony where the State did not intend to ask the expert to make a definite determination whether the victim had been strangled, "but simply to state where her injuries, as depicted in photographs were 'consistent with' a person claiming they had been strangled").

Therefore, we conclude Dr. Gavin's testimony assisted the jury in determining whether or not, based on the location and distribution of Pledger's injuries, strangulation occurred. *See Delgado*, 303 P.3d at 81 ("[A]n ordinary juror does not have the same ability to assess injuries . . . as a physician trained in respiratory physiology who has experience treating patients reporting incidents of strangulation.").

Second, Williams contends Dr. Gavin's testimony improperly vouched for the State's theory of the case. This argument is misplaced. "A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness." *Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 870 (2013) (internal citation omitted). Williams does not argue Dr. Gavin's testimony vouched for another witness. Rather, he argues her testimony vouched for the *State's theory* of the case. Nonetheless, Dr. Gavin testified that she had never met Pledger and neither party asked

Dr. Gavin about, nor did she offer, an opinion of Pledger's credibility or Williams' guilt. Rather, she testified she could not determine who caused Pledger's injuries or how the chokehold was executed. As such, Dr. Gavin did not vouch for another witness's testimony.

Third, Williams contends Dr. Gavin's testimony was more prejudicial than probative, confused the issues, and misled the jury. Specifically, Williams claims the presence of the coroner's office medical examiner implied Pledger could have died and been in the morgue. We find this argument unpersuasive. Based on our conclusion that Dr. Gavin testified consistently with the State's pretrial notice, that her testimony assisted the jury and did not vouch for another witness's testimony, we conclude that her testimony was highly probative, not misleading or confusing, and not substantially outweighed by unfair prejudice. *See* NRS 48.035.

2. *Elynne Greene*

Williams next challenges the State's domestic violence expert, Elynne Greene. Williams first argues Greene's testimony was irrelevant because Greene never met or examined Pledger. We disagree. Greene's testimony was based upon her extensive work with victims of domestic violence and explained to a layperson why a victim of abuse might maintain contact or remain in a relationship with an abuser, recant a report of abuse, blame themselves, or minimize the abusive behavior. *See* NRS 48.061. Accordingly, we conclude Greene's testimony was relevant.

Second, Williams argues Greene's testimony vouched for Pledger's testimony. "A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness." *Perez*, 129 Nev. at ___, 313 P.3d at 870. Greene testified that she had never met

Pledger or Williams, and she was not asked about, nor did she offer, an opinion of Pledger's credibility or Williams' guilt. Therefore, Greene's testimony did not vouch for Pledger's testimony.

Third, Williams contends Greene's testimony about the "cycle of abuse" implied the existence of uncharged bad acts. However, Greene did not testify to matters precluded by NRS 48.061(2) or to prior bad acts. Under NRS 48.061, "expert testimony concerning . . . the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence . . . is admissible in a criminal proceeding *for any relevant purpose*," except "to prove the occurrence of an act which forms the basis of a criminal charge against the defendant." NRS 48.061(1)-(2) (emphasis added).

Green testified consistently with the State's pretrial notice "as an expert in the field of domestic violence" who testified "regarding the cycle of domestic abuse, power and control dynamics in abusive relationships, and the effects of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse on the beliefs, behavior and perceptions of the victim of the domestic violence." Moreover, she testified she had never met Pledger, and did not know whether Pledger or Williams fit into the cycle of domestic abuse or in the power and control dynamics. Therefore, Greene's testimony did not imply uncharged bad acts. *See Boykins v. State*, 116 Nev. 171, 178, 995 P.2d 474, 479 (2000) (concluding the district court did not err in allowing evidence of battered woman syndrome when it excluded testimony on the ultimate issue of whether appellant was suffering from the syndrome).

Finally, Williams contends Greene's testimony was more prejudicial than probative. Based on our previous conclusions and because

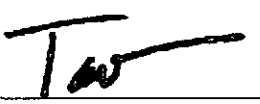
Pledger recanted her testimony at trial, we conclude Greene's testimony was probative, and the probative value was not substantially outweighed by unfair prejudice. *See* NRS 48.035. Therefore, the court did not abuse its discretion in denying Williams' motion to strike the State's notice of expert witnesses and in allowing Dr. Gavin and Greene to testify.

Cumulative error

Finally, Williams contends the cumulative effect of the previously discussed alleged errors denied him a fair trial and therefore require reversal of his conviction. Because there are no errors to cumulate, we conclude that this claim of cumulative error has no merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Valerie Adair, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk