IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID PAUL ANDUJA-NOBLES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67652

FILED

SEP 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict of attempt home invasion with a deadly weapon, a class B felony. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Natalie Servellon was at home with her father and younger sister when she heard a banging noise in the family's backyard. She alerted her father, Jesus Servellon, who investigated and discovered appellant David Anduja-Nobles banging on a side panel of the home with a machete. The panel looked similar to a door, although it in fact covered a wall. Anduja-Nobles, upon noticing Mr. Servellon, said "What's up, bro?" Mr. Servellon, frightened for his welfare and that of his family, ran back inside the home, locked the door, and instructed Natalie to call 9-1-1. Mr. Servellon and Natalie secured the doors and windows and both spoke to the 9-1-1 dispatcher. Mr. Servellon told the dispatcher he felt Anduja-Nobles "kind of like tried to attack me" with the machete.

Responding officers arrested Anduja-Nobles at a nearby home. At trial, Mr. Servellon testified that his home had been damaged during the incident: there was damage to the door-like panel, and a screen had been knocked loose from a window and bent. The jury convicted Anduja-Nobles of attempt home invasion with a deadly weapon.

On appeal, Anduja-Nobles argues (1) the evidence at trial was insufficient to support his conviction, (2) the district court abused its discretion in denying Anduja-Nobles' motion in limine to bar the prosecution from using the word "victim" at trial, (3) the district court abused its discretion by admitting the tape of the 9-1-1 call into evidence, and (4) the prosecutor committed misconduct warranting reversal by making an improper argument during closing. We disagree.

The evidence was sufficient to support Anduja-Nobles' conviction. A home invasion occurs when the defendant "forcibly enters an inhabited dwelling without permission of the owner," and if the defendant is in "possession . . . of any firearm or deadly weapon at any time during the commission of the crime," the crime is a class B felony. NRS 205.067(1), (4). An attempt to commit a crime is "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it." NRS 193.330. While the State must prove every element of the charge beyond a reasonable doubt, *Watson v. State*, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994), the verdict will stand if "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). Testimony at trial established Anduja-Nobles had a machete and was pounding it on what looked like a door, and that a window screen was dislodged and damaged during the incident. The evidence of damage to the façade entry of the residence, and the evidence that Anduja-Nobles utilized a machete during the incident, is sufficient to support the jury's guilty verdict.

With regard to Anduja-Nobles' motion in limine to bar the prosecutor from using the word "victim" to describe Mr. Servellon, we first

note Anduja-Nobles cites little authority[1] to support his contention that a prosecutor may not use the word "victim,"[2] and we are unaware of any such rule in Nevada. We review a judge's ruling on a motion in limine for abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). Here, the prosecution generally referred to the Servellons by name throughout trial, and any use of the term "victim" was likely understood by the jurors as merely a reference to the accuser, rather than a legal fact. *See, e.g., State v. Thompson*, 76 A.3d 273, 286 (Conn. App. 2013). Further, we are not persuaded that Nevada law limits the term "victim" to persons physically harmed during the commission of a crime, as Anduja-Nobles argues.[3] Although NRS 217.070 defines "victim" narrowly as pertains to that chapter, we note the Nevada Revised Statutes generally use the term "victim" to set forth procedures and to designate persons impacted by criminal activity, including by property crimes. *See, e.g.*, NRS 50.090;

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[1]The only Nevada law Anduja-Nobles provides is a case from 1870, *State v. Duffy*, wherein our supreme court quoted language from a California case, *People v. Williams*, 17 Cal. 142 (Cal. 1860). 6 Nev. 138, 140 (1870). In *Williams* the California Supreme Court disparaged use of the word "victim" in a jury instruction in a murder case, as under those facts the word was calculated to encourage the jury to find the defendant guilty. *Id.* No Nevada case has since relied upon either *Duffy* or *Williams* to generally discourage the use of the term "victim" at trial.

[2]We need not consider arguments that are not adequately supported. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.")

[3]We note even were the definition of "victim" limited to persons physically harmed during the commission of a crime, Mr. Servellon would arguably meet that definition as he was physically injured when he ran from the back porch into his home.

NRS 205.980. Thus, we conclude the prosecutor did not engage in misconduct by using the term, and the district court did not abuse its discretion in denying Anduja-Nobles' motion in limine.

Neither did the district court err in admitting the tape of the 9-1-1 call. Anduja-Nobles advances three grounds for error: 1) the tape was not relevant, 2) it was cumulative to the other evidence, and 3) it was more prejudicial than probative. We review a district court's decision regarding admission of evidence for abuse of discretion, and we will not reverse a decision to admit evidence unless that decision was manifest error. *Holmes v. State*, 129 Nev. ___, ___, 306 P.3d 415, 418 (2013). Relevant evidence is generally admissible, and evidence is relevant if it has "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." NRS 48.025, 48.015. However, relevant evidence may be excluded if it is cumulative, and is inadmissible if the danger of unfair prejudice substantially outweighs the probative value. NRS 48.035(1), (2).

Here, the district court did not manifestly err in determining the evidence was relevant and not cumulative, and although the evidence may have been prejudicial the probative value was much greater. The evidence was relevant to support the State's version of events to meet its burden of proof. It was not cumulative, as the 9-1-1 call included excited utterances supporting the State's theory that Mr. Servellon feared Anduja-Nobles would attack him or his family by gaining entry to their residence. And, the statements regarding Mr. Servellon's perception that Anduja-Nobles "kind of like tried to attack me" were not more prejudicial than

probative given Mr. Servellon's testimony at trial clarifying his perception of the events.

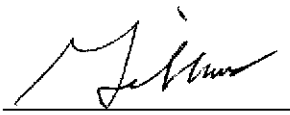
Finally, we decline to reverse the verdict on grounds the prosecutor committed misconduct during closing arguments. In considering allegations of misconduct, we first determine whether the conduct was improper, and, if so, whether it warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). As Anduja-Nobles protests the prosecutor's statement for the first time on appeal, we review for plain error. *Id.* at 1189, 196 P.3d at 477.

In closing arguments, Anduja-Nobles asserted he was not guilty because he was under the influence of a controlled substance during the incident, and thus he did not have the specific intent required for an attempt invasion of the home. In rebuttal, the prosecutor advised the jury that being under the influence of a controlled substance does not acquit a defendant of a specific intent crime. The prosecutor argued "[t]he law doesn't give you a pass on committing a crime because you're under the influence of drugs or alcohol."

NRS 193.220 allows a jury to consider voluntary intoxication in determining specific intent, but states "[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition[.]" Accordingly, we hold the prosecutor did not commit misconduct, as his statements were in conformity with NRS 193.220. We further note that even had this statement been misconduct,

it would not amount to plain error requiring reversal where the district court adequately instructed the jury on the elements of the crime, the State's burden of proof, and NRS 193.220. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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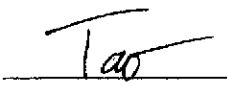

_____, J.
Tao

_____, J.
Silver

cc: Hon. Elliott A. Sattler, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk