IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAYSHAWN ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68323

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping, child abuse, neglect or endangerment, and preventing or dissuading a witness from testifying or producing evidence. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

RELEVANT FACTS AND PROCEDURAL HISTORY

Appellant Dayshawn Anderson was a passenger in a vehicle stopped by police. Ignoring police commands, Anderson fled the scene on foot and entered the nearby home of a friend, Julie Felder-Thrash (referred to by other witnesses as Ms. Felder), where Felder's infant granddaughter was sleeping. The police searched for Anderson and eventually learned from Felder that he was in her home. After obtaining verbal and written consent from Felder to search the home, police repeatedly ordered Anderson to come out of the house. Anderson eventually emerged from a back bedroom holding Felder's granddaughter in the air under her armpits, away from his body, so that the baby covered the top half of his body. When ordered to put the baby down, Anderson squatted behind a couch, still holding the baby in front of himself, and

placed the baby on the floor; he was immediately taken into custody. During a later interrogation, Anderson stated that he held the baby out in front of him because he was scared and thought the police were going to shoot him.

Anderson was initially charged with First Degree Kidnapping and Child Abuse, Neglect or Endangerment. After his arrest, Anderson instructed Felder not to appear at his preliminary hearing. As a result, Felder did not appear at the preliminary hearing, but was subsequently arrested on a material witness warrant. Felder later testified that she did not appear at the preliminary hearing because Anderson instructed her not to attend, despite her subpoena, and she was afraid. The State then added an additional charge of Dissuading a Witness from Testifying. At trial, the State played several recordings of Anderson's jail phone calls where he asked his girlfriend and mother to make sure that Felder did not show up for the preliminary hearing. Anderson was convicted on all counts. This appeal followed.[1]

ANALYSIS

On appeal, Anderson argues that: (1) insufficient evidence supports his convictions; (2) the district court erred in denying his *Batson*[2] challenge; (3) the district court erred by allowing the State to amend the Information after the close of evidence; (4) the district court erred in limiting his cross examination of a witness regarding police misconduct; (5) prosecutorial misconduct violated his right to a fair trial; (6) the

[1]We do not recount the facts except as necessary to our disposition.

[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

district court abused its discretion in denying him credit for all time spent in custody; and (7) cumulative error merits reversal. For the reasons set forth herein, we affirm the judgment of the district court.

Anderson's convictions are supported by substantial evidence

In reviewing a challenge to the sufficiency of the evidence, this court must take the evidence in the light most favorable to the prosecution, and determine whether *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)). The jury, not the court, assesses the weight of the evidence and determines witness credibility. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, we will not disturb a verdict that is supported by substantial evidence. *Id.* Substantial evidence has been defined as evidence that "a reasonable mind might consider adequate to support a conclusion." *Steese v. State*, 114 Nev. 479, 488, 960 P.2d 321, 328 (1998).

Kidnapping

Under NRS 200.310(1), "a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony."

Here, Anderson concedes that he moved the baby from her car seat into the back room of her grandmother's apartment after walking into the apartment. But, Anderson contends the State failed to prove beyond a

reasonable doubt that he took the baby from her car seat either with the specific intent to confine or keep her from Holman and Felder, or with the intent to perpetrate an unlawful act upon her. Although there was conflicting testimony as to whether Anderson knew the baby was inside when he entered, officers testified that Anderson stated he was holding the baby out in front of him like a human shield because he was afraid police were going to shoot him.

Because a kidnapper's state of mind is subjective, the trier of fact must infer intent from attendant circumstances. *Wilson v. State*, 85 Nev. 88, 90, 450 P.2d 360, 361-62 (1969). Weighing evidence and determining the credibility of witnesses must be left to the jury. *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007). Based on the evidence presented, the jury could reasonably infer that Anderson intended to keep the baby from her mother and grandmother, or that he intended to unlawfully use the baby as a human shield between himself and the police. Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude that substantial evidence supports Anderson's conviction for first-degree kidnapping.[3]

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[3]We have also considered Anderson's argument that the movement or restraint of the baby was merely incidental to the alleged child abuse, neglect or endangerment and conclude it is without merit. The jury was properly instructed pursuant to *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006), and the evidence presented was sufficient to allow the jury to reasonably conclude that a kidnapping occurred independent of the other offense.

Child abuse, neglect or endangerment

The State proceeded on a theory of child abuse, neglect or endangerment under which it was required to prove that, "(1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect." *Clay v. Eighth Judicial District Court*. 129 Nev. ___, ___, 305 P.3d 898, 904 (2013). The State alleged that Anderson abused or neglected the baby through negligent treatment or maltreatment, which is defined in relevant part by NRS 200.508(4)(a) and NRS 432B.140. On appeal, Anderson argues that his conviction cannot stand because he was not a person responsible for the baby's welfare under NRS 432B.140. The State argues Anderson assumed responsibility for the baby's welfare because he took her from her car seat and he was the only adult present in the apartment when he placed her in danger.

Viewing the evidence in the light most favorable to the prosecution, we conclude that substantial evidence supports the jury's verdict. Once Anderson took the child from her car seat and hid her in the back room of the apartment while police searched for him, Anderson affirmatively prevented anyone else from caring for, or being responsible for, the child.

Dissuading a witness

NRS 199.230 provides that it is unlawful to prevent or attempt to prevent another person from appearing before any court as a witness or to cause or induce another person to be absent from such a proceeding or evade the process which requires the person to appear as a witness to testify. Here, Felder testified Anderson told her not to come to his preliminary hearing, and the jury heard Anderson's recorded jail calls

where Anderson discussed with his girlfriend and mother to guarantee Felder did not testify. Accordingly, we conclude that substantial evidence supports the jury's verdict.

The district court did not err by allowing the Information to be amended

The district court may amend the Information at any time before the verdict if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced. NRS 173.095. We review the district court's decision to permit an amendment for an abuse of discretion. *Green v. State*, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978). Here, the Amended Information filed at the beginning of trial alleged that Anderson committed child abuse and neglect by placing the baby in a situation where she might suffer physical injury, negligent treatment, or maltreatment, by using the child as a human shield to prevent himself from being shot by police. During trial, the State conceded that it had not shown the baby suffered any physical injury and sought to file a second Amended Information, striking the intentional physical injury theory of abuse or neglect. The district court allowed the State to amend the Information to conform to the evidence presented and removed one of the State's theories of liability; no additional or different charges were added. Based on these facts, we cannot say the amendment prejudiced Anderson's substantial rights. Moreover, the amendment was not even necessary; even if the amendment had been denied, it merely eliminated an alternative theory that the State was not required to prove in order to convict Anderson. Consequently, the district court did not abuse its discretion in permitting the State to amend the Information.

The district court did not err by limiting the scope of Anderson's cross-examination of Holman.

This court generally reviews evidentiary rulings by the district court for an abuse of discretion. *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1132 (2008). District courts have wide discretion to control cross-examination, but they are limited when bias is at issue; attorneys must be permitted to elicit facts that might color the witness's testimony. *Lobato v. State*, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) (quoting *Bushnell v. State*, 95 Nev. 570, 573, 599 P.2d 1038, 1040 (1979)). While demonstrating a witness's own bias through cross-examination is generally afforded broad discretion it is still limited by relevance considerations. *See Lobato,* 120 Nev. at 520, 96 P.3d at 771; *Hernandez* 124 Nev. at 646, 188 P.3d at 1132; *Davis v. Alaska*, 415 U.S. 308 (1974). Here, none of the officers who allegedly committed misconduct against Holman testified at trial. The district court therefore properly concluded that Holman's testimony about those officers was not relevant.

The district court acted within its discretion in awarding credit for time served

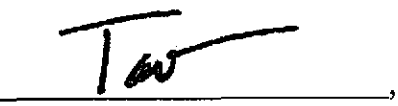
Anderson argues that the district court erred in refusing to grant him credit for all the time he spent in custody. This court reviews sentencing decisions by the district court for an abuse of discretion. *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). NRS 176.055(1) provides that "the court may order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement before conviction, unless the defendant's confinement was pursuant to a judgment of conviction for another offense." Here, the district court granted Anderson 231 days

credit for his time in custody from the time of his arrest up to January 21, 2015 when he was sentenced in another case. Having reviewed the record and considered the parties' arguments, we conclude that the district court acted within its discretion in awarding credit for time served.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

[4]We have considered Anderson's arguments regarding his *Batson* challenge and the record shows the district court followed the proper three step analysis. Regarding his allegations of prosecutorial misconduct, the prosecutor's comments do not appear to be plainly improper based upon a review of the record. We note that attempts to degrade defense counsel in front of the jury are misconduct. *Yates v. State*, 103 Nev. 200, 205, 734 P.3d 1252, 1255 (1987). Nevertheless, the comment was not plain error requiring reversal because the comment was isolated and brief. *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). Similarly, Anderson's argument regarding cumulative error is without merit as we have not determined reversible error exists among the other issues raised.

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