IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARL DEAN EDWARDS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69541

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon of a victim over 60 years of age and possession of a dangerous weapon. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

The issues in this appeal arise from appellant Carl Edwards' trial proceedings. On appeal, Edwards advances four arguments: (1) the State's improper comment on Edwards' decision not to testify at trial requires reversal; (2) the State violated Edwards' state statutory and federal constitutional rights to speedy trial;[1] (3) the State committed

[1]The record reveals that Edwards caused almost all trial delays. To the extent the State did not procure a trial date, we note that such failure was not intentional and the responsibility to procure a trial date fell equally on Edwards' counsel. Therefore, we conclude Edwards' argument that the State violated his speedy trial rights are without merit. *See Bates v. State*, 84 Nev. 43, 46, 436 P.2d 27, 29 (1968) (holding appellant could not complain of a speedy trial violation where "[a]ll the procedural delays complained of were either ordered for good cause or were directly or indirectly occasioned by the motions, stipulations, waivers, tactics, acquiescence and conduct of the appellant . . . ."). Moreover, Edwards has failed to demonstrate prejudice that would entitle him to relief. *See*

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prosecutorial misconduct by interacting with Edwards during the trial;[2] and (4) the district court abused its discretion by not redacting a portion of the transcript from Edwards' preliminary hearing before it read the transcript to the jury.[3] We recount only the facts necessary to address Edwards' first argument.

"The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680

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Sheriff, Clark Cty. v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983) ("Bare allegations of . . . witness unavailability . . . unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice."). Therefore, we conclude the State did not violate Edwards' state statutory or federal constitutional rights to speedy trial.

[2]Edwards points to no authority to support his assertion that the State's act of monitoring him during trial is a statement which could constitute prosecutorial misconduct. Further, Edwards failed to provide authority that this conduct violated his Sixth Amendment right to counsel. Thus, we decline to address either argument on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (declining to address arguments not supported by relevant authority and cogently argued).

[3]"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). We conclude that the district court did not abuse its discretion in admitting the full sentence of Edwards' preliminary hearing testimony that he now challenges. Even if the court did err, the error was harmless in light of the other evidence presented by the State. *See Abram v. State*, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) (concluding that errors in admitting evidence are harmless if there is overwhelming evidence of guilt).

(2006) (internal quotation marks omitted). "Indirect references to a defendant's failure to testify are constitutionally impermissible if 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 a comment on the defendant's failure to testify." *Barron v. State*, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989) (internal quotation marks omitted).

But, "where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no constitutional violation." *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000) (internal quotation marks omitted). Moreover, "courts will not reverse when the prosecutorial comment is a single, isolated incident, does not stress an inference of guilt from silence as a basis of conviction, and is followed by curative instructions." *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987).

Edwards testified at the preliminary hearing but not at trial. During trial, the district court clerk read Edwards' testimony from the preliminary hearing into the record, but the district court did not provide a physical transcript to the jury for its deliberations. During the State's initial closing argument, the prosecutor referred to Edwards' preliminary hearing testimony showing Edwards previously testified that the victim was the initial aggressor. During Edwards' closing argument, defense counsel referred to the victim as a "violent felon" and implied that Edwards reacted to the victim's conduct because he had prior felony convictions. Then, in rebuttal closing argument, the State said:

> Defense counsel, my colleague gets up, obviously there's two sides of every story. Says that [the victim] was the aggressor. He's a violent felon, right? We don't dispute that he's a felon. You heard the testimony. The question is: Did the defendant know that he had a felony on his record? Did the defendant know he was a violent felon? That's what they're saying. Oh, if you, you know, somebody came up to a reasonable person and knew that person to be a violent felon, of course they're going to act in self defense. That's the inferences of their argument. *There was no testimony, zero testimony that the defendant ever knew [the victim] had a felony on his record. Also, zero testimony from the defendant that he was afraid. Zero testimony from the defendant [the victim] ever had a knife.* The testimony was . . .

(Emphasis added). Upon defense counsel's objection, the district court excused the jury to conduct a hearing. The district court denied Edwards' motion for an invited mistrial, but nonetheless gave a curative instruction.

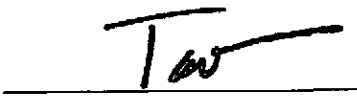
We conclude the State's reference was a fair response to Edwards' claim during closing argument that the victim was the initial aggressor and a violent felon. The chronology of the proceedings indicates that the State did not refer to Edwards' lack of testimony regarding the victim until after Edwards raised that issue during closing argument. Furthermore, both parties referred to Edwards' preliminary hearing testimony as "the testimony" and the jury could have reasonably interpreted the prosecutor's comment to refer to Edwards' preliminary hearing testimony, not his failure to testify at trial. Therefore, because the State's characterization and reference to Edwards' preliminary

hearing testimony was indirect, we conclude that the comment did not constitute misconduct.

Significantly, immediately after the jury returned following the hearing on Edwards' objection, the district court instructed the jury on Edwards' Fifth Amendment right not to testify. The district court instructed the jury that it could not draw any inferences from the fact that Edwards chose not to testify. Thus, we conclude that the jury instruction rendered any alleged prosecutorial misconduct harmless and reversal is not required. *See Lincoln*, 807 F.2d at 809. Therefore, we conclude the district court did not abuse its discretion by denying Edwards' motion for mistrial. *See Ledbetter*, 122 Nev. at 264, 129 P.3d at 680. Accordingly, having considered Edwards' contentions and concluded they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Kimberly A. Wanker, District Judge
Christopher R. Arabia
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk