

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PATRICK BRAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70390

FILED

DEC 14 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Patrick Brand appeals from a judgment of conviction entered pursuant to a jury verdict of child abuse, neglect, or endangerment with substantial bodily harm. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sufficiency of the evidence

Brand claims the evidence supporting his conviction is insufficient. He argues the evidence shows at least four different people had exclusive care of the victim during the period she suffered her injuries; there was no evidence of bruising, swelling, redness, or other injuries when he returned the victim to her mother; the victim did not verbally communicate she was injured; and the jury's verdict was based on inconsistent testimony.¹ We review 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¹Brand also argues the evidence was insufficient to show he failed to obtain timely medical care for the victim; however, he was not convicted of the child abuse count accusing him of "failing to seek medical treatment."

116-901499

The jury heard testimony that Tammy brought her 21-month-old daughter to MountainView Hospital on Sunday, August 24, 2014, and her daughter underwent a computerized tomography (CT) scan at about 10:00 that morning. Dr. Arthur Montes, a pediatric radiologist, reviewed the CT scan and determined the victim had a depressed skull fracture, a brain contusion, and subdural bleeding. He further determined the victim's injuries were less than 48 hours old.

The victim was transferred to Sunrise Children's Hospital, where she underwent surgery. Dr. Sandra Cetl, a pediatrician who specializes in child abuse pediatrics, was asked to consult on the case. Dr. Cetl testified the victim had suffered a comminuted, depressed skull fracture and these types of injuries are fairly rare because they are only caused by significant amounts of force. She concluded the victim's injuries were the result of an abusive event based on their severity and the lack of history to explain them. And she opined the injuries probably occurred the day before the victim was taken to the hospital.

Dr. Cetl also testified as to the symptomatology of these types of injuries. She stated the immediate symptoms may include a complete or partial loss of consciousness, a change in behavior, extreme sleepiness and lethargy, nausea and vomiting, and a loss of appetite. And she further stated that swelling may not be observable for as much as 72 hours after the injury's occurrence.

Five different people cared for the victim during the 48 hours that preceded the CT scan, but the victim only began to exhibit symptoms of her injuries while she was in Brand's exclusive care. On Saturday, August 23, 2014, Tammy left the victim in Brand's care so she could go to work. Brand took the victim with him as he made deliveries for an auto

parts store, and he informed Tammy via text message that her daughter was very sleepy.

Tammy worked at a veterinarian clinic. When Brand brought the victim to the clinic at 1:00 p.m., she was tired, lethargic, clingy, and had abnormally pale lips. She did not seem interested in the animals, which was unusual because normally she wanted to hug them, pet them, and be around them. Tammy thought the victim was not getting enough rest. Brand left with the victim when the visit with her mother was over.

Tammy lived with her aunt and uncle. After work, she retrieved the victim from Brand and brought her home. The victim was fussy and tired on the way home, she did not want to eat dinner when she got home, and she wanted to go to bed early. Tammy put the victim to bed at about 6:00 p.m. and her aunt, Lisa, stayed with the victim after Tammy left for the evening.

Lisa lay next to the victim all night long. The victim slept fine; occasionally, she patted Lisa to make sure she was still there and then went back to sleep. The following morning, Lisa heard the victim whimper after she left the room, she ran back to see what was going on, and saw the victim's head was swollen. Thereafter, Lisa's husband called Tammy and told her she needed to come home and take the victim to the hospital.

We conclude a rational juror could reasonably infer from this testimony that an abusive event occurred while the victim was in Brand's exclusive care and Brand either directly caused the victim's injury or placed her in a situation where she suffered the injury. See NRS 200.508(1); *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (“[C]ircumstantial evidence alone may support a conviction.”). It is

for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Prosecutorial misconduct

Brand claims the prosecutor committed misconduct by disparaging the defense and offering personal opinions during closing argument. He specifically argues the prosecutor used a mocking voice when reading Brand's text messages, presented a personal opinion as to whether the victim's mother or grandaunt caused the harm, and suggested a work-related accident occurred while the victim was in Brand's exclusive care. We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Because Brand preserved these claims for appellate review, we will review improper conduct for harmless error. *See id.* at 1190, 196 P.3d at 477.

The district court admonished the prosecutor for offering his personal opinions as to what the jury should conclude from the evidence, found the prosecutor did not read the text messages in a mocking or disparaging manner, and asserted the State may argue inferences drawn from the evidence. Moreover, the district court gave a curative instruction to the jury, reiterating that the statements, arguments, and opinions of counsel are not evidence in the case and it is ultimately the jury's duty to determine what the evidence means and to reach a proper verdict.

To the extent the prosecutor's arguments constituted misconduct, we conclude the misconduct was rendered harmless by the district court's curative instruction. *See id.* (“[T]his court will not reverse

a conviction based on prosecutorial misconduct if it was harmless error.”); *Moore v. State*, 116 Nev. 302, 306, 997 P.2d 793, 795 (2000) (“Prosecutors must be free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom.”); *Aesoph v. State*, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986) (“[P]rosecutors must not inject their personal beliefs and opinions into their arguments to the jury.”).

Motion for mistrial

Brand claims the district court abused its discretion by denying his motion for a mistrial because the State impermissibly shifted the burden of proof and indirectly commented on his failure to testify during its closing argument. We review a district court’s ruling on a motion for a mistrial for an abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006).

The district court denied Brand’s motion for a mistrial after finding the State’s arguments were based on reasonable inferences drawn from the evidence admitted at trial, the State legitimately argued the evidence showed five people had exclusive care of the victim and four of these people did not harm the victim, the State did not make the argument each of these four people testified at trial and Brand did not, and the State’s arguments were not prejudicial to the point where they deprived Brand of a fair trial. Moreover, the district court gave a curative instruction to the jury, reiterating that the statements, arguments, and opinions of counsel are not evidence in the case and it is ultimately the jury’s duty to determine what the evidence means and to reach a proper verdict.

The district court’s findings are supported by the record, and we conclude it did not abuse its discretion by denying Brand’s motion for a

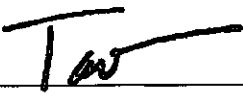
mistrial. *See Moore*, 116 Nev. at 306, 997 P.2d at 795; *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (stating the test for determining whether a prosecutor's comment is an unconstitutional reference to a defendant's failure to testify); *see generally Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 727, 200 P.3d 684, 708 (2009) (Cherry, J., dissenting) ("Curative instructions present a particularly strong alternative to a mistrial.").

Cumulative error

Brand claims cumulative error deprived him of a fair trial. However, we conclude Brand failed to demonstrate any error, so there was nothing to cumulate.

Having concluded Brand is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Aisen Gill & Associates LLP
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk