IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARY KEITH NEAL, A/K/A GARY KEITH NEAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68397

ORDER OF AFFIRMANCE

Appellant Cary Neal appeals from a judgment of conviction, pursuant to a jury verdict, of battery with use of a deadly weapon resulting in substantial bodily harm constituting domestic violence and abuse of a vulnerable person. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

At trial, the State contended that Neal physically beat a disabled veteran named Kendell Beck, and that Neal shortly thereafter repeatedly burned Kendell's body with a hot iron. Neal countered that Kendell's elderly wife, Ethel Beck, was instead responsible for burning and physically abusing Kendell.[1]

On appeal, Neal asserts that numerous errors were committed during the proceedings below. Specifically, Neal claims that: (1) the district court erroneously failed to sua sponte canvass or remove two jurors who informed the court that they were afraid of Neal; (2) the court erred in refusing to grant Neal's motion for a continuance; (3) the State committed prosecutorial misconduct; (4) the district court erred by issuing

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

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a jury instruction stating that the victim's testimony did not need to be corroborated in order to constitute sufficient evidence of guilt; and (5) the court abused its discretion or committed judicial error by refusing to issue six of Neal's proposed jury instructions. We conclude that these contentions are unpersuasive and therefore affirm the judgment.[2]

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[2]Neal also asserts that his convictions should be reversed for the following reasons: (1) the State failed to present sufficient evidence to convict him; (2) the district court erred by not doing the following before admitting certain testimony from Kendell's fiduciary: (a) holding a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), and (b) issuing a limiting instruction; (3) the district court abused its discretion by allowing the jury to hear a recording of a telephone call that indicated that Neal was incarcerated at the Clark County Detention Center ("CCDC") before trial, and by permitting the State to elicit testimony showing that Neal was a pre-trial detainee; (4) the district court abused its discretion by denying Neal's motion for a mistrial; and (5) the cumulative effect of the errors that Neal raises on appeal warrants reversal even if each error is individually harmless. We have carefully reviewed these contentions and conclude that they are without merit.

Neal further claims that the district court abused its discretion by sentencing him to a seven-to-twenty year prison term under the habitual criminal statute based on two prior felony convictions he incurred in Texas in the late 1990s. We reject this claim because the record shows that Neal is a "career criminal[] who pose[s] a serious threat to public safety." *See Sessions v. State*, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990). Specifically, Neal does not dispute the fact that his two prior felonies and the instant crimes were all violent offenses, or that he was convicted of using a deadly weapon in all three cases. Further, the district court observed that the instant offenses were of a particularly "horrific nature" because Neal assaulted and burned an individual "who clearly suffered from [a] mental impairment[.]"

Neal fails to establish that the district court committed plain error by not sua sponte canvassing or removing the two jurors who indicated that they may have been afraid of him

Neal contends that the district court erred by failing to sua sponte canvass or remove two jurors who indicated that they may have been afraid of him because of his disruptive and aggressive courtroom behavior.[3] We reject Neal's claim because he fails to satisfy the plain-error standard of review.[4]

In criminal cases, "all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension." *See Martinorellan v. State*, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015). Under that standard, an error is "plain" if it is "so unmistakable that it reveals itself by a casual inspection of the record" and is "clear under current law." *See Maestas v. State*, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012) (quoting *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995); *Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005)) (internal quotation marks omitted). Furthermore, such error will merit reversal only if "the defendant . . . demonstrate[s] that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *See Martinorellan*, 131 Nev. at ___, 343 P.3d at 593 (quoting *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008)) (internal quotation marks omitted).

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[3]During Neal's testimony, a juror sent a note to the district court in which the juror stated that it "[f]eels really unsafe." Shortly thereafter, another juror told the bailiff that she was feeling frightened.

[4]Neal concedes that, because he did not preserve this claim for appeal by objecting below, it is subject to plain-error review.

Neal fails to satisfy the plain-error standard because he does not show that the district court committed an error that is "clear under current law." *See Maestas*, 128 Nev. at 146, 275 P.3d at 89 (quoting *Gaxiola*, 121 Nev. at 648, 119 P.3d at 1232) (internal quotation marks omitted). First, the binding authority upon which Neal relies does not clearly establish that: (a) a district court must hold an evidentiary hearing if a juror expresses fear of the defendant, or (b) a lower court must remove that juror without even conducting such a hearing. *See Viray v. State*, 121 Nev. 159, 163-64, 111 P.3d 1079, 1082 (2005) (emphasis added) (holding that a district court has the discretion to remove a juror for violating the court's admonishment not to discuss the case with others); *Pertgen v. State*, 105 Nev. 282, 285, 774 P.2d 429, 431 (1989) (concluding that a district court's factual findings were *sufficient* to establish that no prejudice resulted from threatening telephone calls that certain jurors had received, but not explicitly holding that the district court was *required* to canvass the jurors).

Second, other significant Nevada Supreme Court decisions on this topic are distinguishable because they involve *third-parties* (*i.e.*, not defendants) having *improper contact* with jurors (*i.e.*, not merely frightening jurors). *See Falcon v. State*, 110 Nev. 530, 533, 874 P.2d 772, 774 (1994) (holding that the district court was required to hold a hearing because an alternate juror was present during the jury's deliberations); *Isbell v. State*, 97 Nev. 222, 225-26, 626 P.2d 1274, 1276-77 (1981) (holding that the district court was required to hold a hearing because two jurors discussed the matter with persons who "had no connection with the case").

Third, federal courts appear to be split on this issue. *Compare United States v. Simtob*, 485 F.3d 1058, 1064-66 (9th Cir. 2007) (emphasis

added) (holding that a district court erred by failing to undertake any "inquiry of [a] juror . . . [who had] voiced [a] . . . concern that the *defendant's alleged act* of eye-balling the juror made [that juror] feel threatened"); *with United States v. Owens*, 426 F.3d 800, 804-05 (6th Cir. 2005) (upholding a trial court's refusal to question a juror who indicated that she was afraid of the defendant because he had been staring at her). Accordingly, we conclude that Neal is not entitled to relief on this claim. *Cf. Maestas*, 128 Nev. at 145-47, 275 P.3d at 88-89 (concluding that an error was not clear under current law because "there d[id] not appear to be a consensus" on a particular constitutional issue).

The district court did not err in refusing to grant Neal's motion for a continuance

Neal claims that the district court erred by not granting his motion to continue the trial for six weeks in order to secure the attendance of four out-of-state witnesses. We conclude that the district court did not err in rejecting Neal's request.

"This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion." *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007) (footnote omitted). The supreme court has held that a "district court [may] abuse[] its discretion by denying a defendant's request for a modest continuance to procure witnesses when the delay was not the defendant's fault." *See id.* (footnote omitted) (citing *Lord v. State*, 107 Nev. 28, 42, 806 P.2d 548, 556 (1991)).

Here, the district court did not err by refusing to grant Neal's motion for a continuance because the request was neither modest nor reasonable, and the attendant delay was Neal's fault. *See Rose*, 123 Nev. at 206, 163 P.3d at 416; *see also Lord*, 107 Nev. at 40-43, 806 P.2d at 556-

57 (concluding that a half-day continuance was reasonable); *Mulder v. State*, 116 Nev. 1, 9-10, 992 P.2d 845, 850-51 (2000) (upholding a district court's denial of a motion to continue in part because the delay was "attributable" to the defendant). The record shows that Neal made the request for a six-week continuance nearly seventeen months after the initially scheduled trial date, and that the district court had already postponed the trial date twice due to his counsel's failure to secure the witnesses. Moreover, Neal's counsel filed the motion *on the day of trial*, even though the district court had repeatedly instructed him to inform the court of any obstacles relating to the out-of-state subpoenas *before the calendar call*. Further, Neal's attorney acknowledged that his failure to previously subpoena the out-of-state witnesses "was an error on [his] part[,]" and the record shows that the proceedings would not have been delayed if counsel had diligently attempted to domesticate the subpoenas earlier. Therefore, we uphold the district court's ruling.

Neal is not entitled to relief on his claims of prosecutorial misconduct

Neal claims that his convictions should be reversed because the State committed prosecutorial misconduct during its rebuttal argument. Although we agree that the State may have engaged in improper conduct, we conclude that any such misconduct does not warrant reversal.[5]

Prosecutorial misconduct claims call for a "two-step analysis": (1) ascertaining "whether the prosecutor's conduct was proper"; and (2) "if

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[5]Although we conclude that the prosecutor's improper comments do not merit reversal, we do not condone the prosecutor's actions, and we caution her to avoid future misconduct. We note that this court may take corrective action in response to egregious misconduct.

the conduct was improper, [determining] whether the improper conduct warrants reversal." *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (footnotes omitted). The standard of review applied during the second step of the analysis "depends on whether the prosecutorial misconduct is of a constitutional dimension." *See id.* at 1188-89, 196 P.3d at 476 (footnote omitted). An error that is not of constitutional dimension merits reversal "only if the error substantially affects the jury's verdict."[6] *See id.* at 1189, 196 P.3d at 476 (footnote omitted).

Additionally, if a criminal defendant failed to object to the alleged prosecutorial misconduct at trial or otherwise preserve the error for appeal, then "this court employs plain-error review." *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (footnote omitted). Under this standard, an error is "plain" if it is "so unmistakable that it reveals itself by a casual inspection of the record" and is "clear under current law." *See Maestas*, 128 Nev. at 146, 275 P.3d at 89 (quoting *Patterson*, 111 Nev. at 1530, 907 P.2d at 987 (1995); *Gaxiola*, 121 Nev. at 648, 119 P.3d at 1232) (internal quotation marks omitted). Moreover, even if an error is "plain," it will warrant reversal only if "the defendant . . . demonstrate[s] that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." *See Martinorellan v. State*, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015) (quoting *Valdez*, 124 Nev. at 1190, 196 P.3d at 477) (internal quotation marks omitted).

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[6]To the extent that Neal contends that the constitutional harmless-error standard applies to any of his prosecutorial misconduct claims, he fails to cogently argue or support that contention with authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported).

Here, Neal is not entitled to relief on any of his claims of prosecutorial misconduct. First, Neal's challenge to the State's comment that the instant offenses were committed "by someone that was vicious, someone that was evil" is subject to plain-error review because he failed to object or otherwise preserve the error below. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Further, the State may have committed plain error because it used contemptuous and pejorative language to disparage Neal. *See Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (holding that a prosecutor has a duty "not to inject his personal beliefs into argument[] and . . . not to ridicule or belittle the defendant or the case"). Nevertheless, reversal is unwarranted because Neal did not suffer "actual prejudice or a miscarriage of justice[,]" given that the jury heard evidence tending to establish that Neal had engaged in contemptible conduct (*i.e.*, a mentally disabled individual testified that Neal repeatedly used a hot iron to burn him and also beat him). *See Martinorellan*, 131 Nev. at ___, 343 P.3d at 593 (quoting *Valdez*, 124 Nev. at 1190, 196 P.3d at 477) (internal quotation marks omitted).

Second, Neal preserved his challenge to the State's remark that the unsubstantiated reports of abuse against him did not "mean [that] he wasn't abusing [Kendell and Ethel] in Texas. It means it wasn't proven." *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Moreover, we agree with Neal that this comment was improper because it implied that Neal had abused Kendell and Ethel in the past. *See Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (holding that "[i]t is improper for the State to refer to facts not in evidence" and to suggest "that a defendant has a prior criminal history"). However, we conclude that this error did not "substantially affect[] the jury's verdict" because the district court

sustained Neal's objection to the remark, instructed the jury to disregard it, and told the jury that "the evidence before [it] is that the allegations were unsubstantiated."[7] *See Valdez*, 124 Nev. at 1189, 1195, 196 P.3d at 476, 480 (footnote omitted) (concluding that prejudice resulting from an inflammatory remark was mitigated by the fact that "[t]he district court sustained [an] objection, ordered the comment stricken, and instructed the jury to disregard it").

The district court did not err by issuing Jury Instruction No. 13

Neal claims that the district court erred by issuing Jury Instruction No. 13, which stated that the victim's testimony did not need to be corroborated in order to constitute sufficient evidence of guilt if the jury believed that testimony beyond a reasonable doubt. We reject Neal's assignment of error.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)) (internal quotation marks omitted). Moreover, this court applies a de novo standard of review to determine "whether a particular instruction . . . comprises a correct statement of the law." *See Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008) (footnote omitted).

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[7]We have carefully reviewed Neal's other claims of alleged prosecutorial misconduct, and we conclude that they are either without merit or they do not warrant reversal of Neal's convictions.

None of Neal's challenges to Jury Instruction No. 13 are persuasive. First, although this instruction is usually issued in sexual assault cases, the instruction was appropriate because there was a danger that "[j]urors [may] mistakenly assume that they cannot base their decision on one witness's testimony even if the testimony establishes every material element of the crime." *See Gaxiola v. State*, 121 Nev. 638, 647-50, 119 P.3d 1225, 1231-33 (2005) (holding that a district court did not err by giving a similar instruction in a sexual assault case). Second, this instruction was not duplicative of Jury Instruction No. 19 because the latter provided only a general discussion on the types of evidence that the jury should consider. Third, the instruction did not reduce the State's burden of proof because "[a] 'no corroboration' instruction does not tell the jury to give a victim's testimony greater weight, it simply informs the jury that corroboration is not required by law." *See id.* at 648, 119 P.3d at 1232. Therefore, the district court did not abuse its discretion, commit judicial error, or misstate the law when it issued Jury Instruction No. 13.

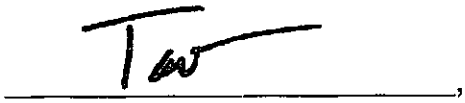
The district court did not abuse its discretion or commit judicial error by rejecting Neal's proposed instructions

Neal argues that the district court committed reversible error by failing to issue several of his proposed instructions. We disagree. In particular, Neal fails to support his proposed "inverse" flight instruction with any legal authority, and we observe that remaining at the scene of the crime is not exculpatory simply because fleeing from the scene may

have been inculpatory. Thus, the district court did not abuse its discretion or commit judicial error in refusing to issue this proposed instruction.[8] Accordingly we,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



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Tao

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Gibbons

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[8]We conclude that the district court did not abuse its discretion or commit judicial error in refusing to issue Neal's other proposed instructions. Specifically, *Emerson v. State*, 98 Nev. 158, 643 P.2d 1212 (1982), does not mandate the issuance of a character instruction whenever the credibility of the defendant is at issue, *see id.* at 161-62, 643 P.2d at 1214; the fact that the court properly instructed the jury on reasonable doubt obviates the need for certain proposed instructions, especially considering that some of them could have had the effect of modifying the reasonable doubt instruction; and portions of a proposed instruction were duplicative of other instructions. *See Holmes v. State*, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342-43 (1998) (concluding that a district court erred by issuing a reasonable doubt instruction that deviated from NRS 175.211(1)); *Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (holding that if a district court properly instructs the jury on reasonable doubt, then it is not required to issue a particular instruction on evidence that is susceptible to two or more reasonable interpretations); *Sanchez-Dominguez v. State*, 130 Nev. ___, ___, 318 P.3d 1068, 1072 (2014) (holding that "a defendant is not entitled to misleading, inaccurate, or duplicative jury instructions").

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