IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PETER DUNCAN KEFALAS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70899

ORDER OF AFFIRMANCE

Peter Duncan Kefalas, Jr. appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, robbery with use of a deadly weapon, and burglary while in possession of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

On appeal, Kefalas contends, among other arguments, that: (1) the State committed prosecutorial misconduct by misrepresenting during voir dire and in its opening statement that one of the two victims would testify concerning the offenses (hereinafter the "non-testifying victim"), and (2) the State elicited hearsay statements from certain witnesses. We conclude that Kefalas' arguments are unpersuasive and therefore affirm the judgment of conviction.[1]

Kefalas fails to demonstrate that the State committed prosecutorial misconduct by misrepresenting that one of the victims would testify

A remark made by a prosecutor in an opening statement does not constitute misconduct if it is a reference to "evidence the prosecutor intends to offer which the prosecutor believes in *good faith will be*

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

available and admissible."[2] *Watters v. State*, 129 Nev. 886, 890, 313 P.3d 243, 247 (2013) (emphasis added) (quoting ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 3-5.5 (3d ed. 1993)). After the prosecutor made the remarks at issue, she represented to the district court that the non-testifying victim had failed to appear even though that person had been served with a subpoena. The prosecutor further represented that the non-testifying victim had "maintained good contact with [the District Attorney's Office] from the inception of the case up through . . . this trial," and that the individual had appeared at the courthouse on the previous day. Since Kefalas does not challenge these representations or otherwise demonstrate that the prosecutor's prior statements to the jury were not made in good faith, we conclude that he fails to demonstrate that the prosecutor engaged in improper conduct. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (holding that "[w]hen considering claims of prosecutorial misconduct, . . . we must determine whether the prosecutor's conduct was improper").

The purported hearsay statements identified by Kefalas do not warrant reversal

Hearsay evidence is generally inadmissible. *See* NRS 51.065. For most purposes, hearsay is defined as "a statement offered in evidence to prove the truth of the matter asserted." *See* NRS 51.035. "We generally review a district court's decision to admit evidence for an abuse of discretion . . . ." *Hernandez v. State*, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008). Further, "[a]ny hearsay errors are evaluated for harmless

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[2]Kefalas does not aver that a different appellate standard applies to the statement that the prosecutor made during voir dire.

error." *Coleman v. State*, 130 Nev. 229, 243, 321 P.3d 901, 911 (2014). Kefalas contends that the State introduced the following inadmissible hearsay evidence: (1) one of the police officers provided testimony that implicitly established that the non-testifying victim identified Kefalas at a show-up, and (2) another police officer testified that medical personnel told him that Kefalas was "faking" a seizure during his arrest.

Even assuming that the admission of this evidence violated the hearsay rule, neither error would warrant reversal because the errors would be harmless. Here, the primary victim identified Kefalas and testified that Kefalas and his alleged accomplices pushed their way into the victims' motel room wherein they grabbed several possessions belonging to him. This victim also testified that after the non-testifying victim told Kefalas and his alleged accomplices to "stop," Kefalas lifted up his shirt to reveal the butt of a handgun.

Furthermore, police officers located Kefalas and his alleged coconspirators nearby and together shortly after the report of the robbery. An officer testified that he later searched Kefalas and found an air soft pellet gun in Kefalas' waistband. Lastly, another officer testified that he arrested one of Kefalas' alleged accomplices and observed that this person was carrying a garbage bag, which Kefalas admits contained property belonging to the victim who testified at trial. Given the strength of the evidence against Kefalas, we conclude that these purported violations of the hearsay rule were harmless. *See Dias v. State*, 95 Nev. 710, 712, 714-15, 601 P.2d 706, 707-09 (1979) (concluding that hearsay evidence identifying the defendant as the perpetrator was harmless because there was other direct and circumstantial evidence linking the defendant to the crimes in question); *United States v. Reed*, 724 F.2d 677, 679 (8th Cir.

1984) (concluding that hearsay evidence suggesting that the defendant misrepresented his name and age was harmless "when viewed in the context of the entire trial and the overwhelming evidence of . . . guilt").

Kefalas also argues that one of the victims violated the hearsay rule by testifying that as Kefalas and his alleged accomplices ransacked the motel room, the non-testifying victim: (1) "told them to stop," (2) became very "aggravated," (3) was unable to "control her temper," and (4) began "yelling" at Kefalas and his purported accomplices. We conclude that the district court did not abuse its discretion in allowing the testimony because these were not "statements" subject to the hearsay rule. *See* NRS 51.045 (defining a "statement" as "[a]n oral or written *assertion*" or "[n]onverbal conduct of a person, if it is intended *as an assertion*" (emphasis added)). Moreover, even if these portions of the victim's testimony constituted hearsay, they most likely would have been admissible as excited utterances.[3] *See* NRS 51.095 ("A statement relating

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[3]For that same reason, we reject Kefalas' claim that the prosecutor committed misconduct by stating during her closing argument that the non-testifying victim "t[old] them to stop." *See Valdez*, 124 Nev. at 1188, 196 P.3d at 476.

Furthermore, we need not address Kefalas' contention that there is insufficient evidence to sustain his convictions because he does not cogently argue that point. *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 with relevant authority). Similarly, we decline to address whether the district court erred in permitting a police officer to testify that Kefalas spontaneously implicated himself in other unspecified crimes because Kefalas fails to identify a particular basis for his objection thereto or support it with a citation to any relevant authority. *See id.* Moreover, since we resolve this case without applying the plain-error standard, we do

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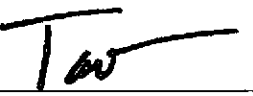
to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Eric G. Jorgenson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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not reach Kefalas' argument that this standard is inapplicable to his unpreserved appellate claims.

Since we find no error, and the issue of guilt in this case is not close, we reject his cumulative error claim, notwithstanding the seriousness of his convictions. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 ("When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." (internal quotation marks omitted)).

Lastly, we have considered Kefalas' remaining arguments and conclude that they are unpersuasive.