IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LOVELL RANDOLPH, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71092

ORDER OF AFFIRMANCE

Lovell Randolph, Jr., appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of pandering, conspiracy to commit robbery, attempt robbery with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The charges arose from Randolph's involvement in a shooting. Randolph and his uncle, Demario Washington, attempted to rob the victim outside his hotel room after receiving information from Randolph's girlfriend, Ariana Johnson, who had spent the night with the victim. Washington shot the victim when the victim failed to cooperate with their demands. The incident was captured on the hotel's surveillance videos. Randolph, Washington, and Johnson were apprehended nearly two weeks after the shooting at Randolph's apartment, where they lived together before and after the shooting. Johnson agreed to testify for the State, and Randolph and Washington were jointly tried. This court recently affirmed

Washington's conviction in docket number 71160.[1] *Washington v. State*, Docket No. 71160 (Order of Affirmance, Ct. App., Oct. 31, 2017).

On appeal, Randolph advances numerous bases for reversal, arguing (1) the district court improperly denied his motion to sever the trials, (2) the best evidence rule barred Johnson's testimony regarding her text messages to Randolph, (3) the State prejudiced Randolph's case by eliciting testimony that he called Johnson from jail, (4) the State failed to notice two witnesses as experts, (5) witnesses improperly narrated the surveillance video, (6) the district court improperly admitted statements Johnson made to officers as prior consistent statements, (7) the district court failed to record bench conferences, (8) the prosecutor engaged in misconduct, (9) the evidence was insufficient, (10) the State prejudiced Randolph's case by asking numerous leading questions, and (11) Johnson's testimony was uncorroborated and the district court failed to *sua sponte* give an accomplice jury instruction. Randolph further argues that even if the errors individually are harmless, cumulative error warrants reversal. After careful consideration, we conclude the majority of Randolph's arguments are without merit and no error warrants reversal.

We first address Randolph's preserved arguments regarding joinder, Johnson's testimony, and Johnson's statements to detectives. Joinder of the trials was proper and not prejudicial in this instance, where the evidence that the defendants lived together before, during, and after the shooting showed they were connected together in a conspiracy, and Randolph did not demonstrate to the district court why a joint trial would

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

be unfairly prejudicial.[2] *See* NRS 173.115; *Rimer v. State*, 131 Nev. ___, ___, 351 P.3d 697, 707-09 (2015) (addressing joinder). Johnson's testimony regarding the text messages was not barred by the best evidence rule, where that testimony was offered to show generally what occurred, rather than to prove the contents of the writing for its independent legal significance. *See* NRS 52.235; 2 Kenneth S. Broun et al., *McCormick on Evidence*, § 234 (7th ed. 2013 & Supp. 2016). And, Johnson's prior consistent statements were admissible because the defense called into question Johnson's credibility on cross-examination, the statements were consistent with her trial testimony, and the State offered them to rebut the implication that Johnson fabricated her testimony to obtain a more favorable outcome in her case.[3] *See Runion v. State*, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000) (explaining the elements of prior consistent statements).

Next, we note Randolph did not object below to Johnson's testimony that Randolph called Johnson from jail, nor did he argue that Johnson's testimony was uncorroborated at trial. Generally, the failure to assert an error below will bar appellate review in the absence of plain error. *See City of Las Vegas v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, ___ P.3d ___, ___ (2017). After considering Randolph's assertions of error on appeal, we conclude that Randolph fails to show plain error. *See Gaxiola v.*

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[2]Moreover, we note the record shows Washington and Randolph may have coordinated their defenses, as Washington's testimony tended to exculpate Randolph.

[3]We are not persuaded that Johnson was motivated by a desire to obtain leniency in her own case at the time she made the statements. The statements were inculpatory, she made them immediately following her arrest, and the officers with whom she spoke testified they did not promise leniency in return for her cooperation.

State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (holding plain error arises where the error prejudicially impacts the verdict or seriously affects the judicial proceeding's integrity). First, Johnson's testimony regarding Randolph's phone call from jail did not plainly violate Randolph's right to a presumption of innocence. *See Haywood v. State*, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991) (holding a defendant is entitled to a presumption and the indicia of innocence, and the prosecution may not refer to a defendant's physical restraints). Specifically, here a witness, rather than the prosecutor, made the statement, which referred generally to Randolph's incarceration following arrest, a fact already known to the jury. And, the statement did not suggest Randolph was incarcerated at the time of trial. Second, we conclude the district court did not plainly err by failing to *sua sponte* offer an accomplice jury instruction, as other evidence corroborated Johnson's testimony.[4] *See* NRS 175.291 (requiring accomplice evidence be corroborated); *Gonzalez v. State*, 131 Nev. ___, ___, 366 P.3d 680, 686 (2015) (holding a cautionary instruction is favored, but not required, if accomplice testimony is corroborated); *Sheriff v. Hamilton*, 98 Nev. 320, 321-22, 646 P.2d 1227, 1228-29 (1982) (addressing the corroboration requirement).

We decline to address Randolph's arguments regarding narration of the surveillance video or the State's use of leading questions, as he fails to provide relevant authority and cogent argument on those points and does not cite the relevant portions of the record. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting that we need not

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[4]We note that in regard to the charges, Johnson was a victim, and not an accomplice, of pandering. *See* NRS 175.291(2) (defining an accomplice "as one who is liable to prosecution, for the identical offense charged against the defendant").

address arguments that are not cogently argued or adequately supported with relevant authority); NRAP 28(a)(10)(A) (requiring record citations).

We agree, however, that the State should have noticed two detectives as experts pursuant to NRS 174.234(2). Their testimonies regarding pimp-prostitute subculture, while rationally based on their perceptions, were framed by their experience and training, both of which required special knowledge "beyond the realm of everyday experience." *Burnside v. State*, 131 Nev. ___, ___, 352 P.3d 627, 636 (2015); *see also* NRS 50.265 (addressing lay witness testimony); NRS 50.275 (addressing expert testimony). However, Randolph did not object to the testimony below and we conclude he fails to show the error warrants reversal. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161-62 (2008) (reviewing the State's failure to notice an expert witness for plain error where the defendant did not object at trial). Importantly, the State noticed an expert on pimp-prostitute subculture, and Randolph was therefore aware the State intended to produce such evidence at trial. Critically, too, Randolph does not explain how noticing these two witnesses as experts would have made any difference in the case. *See id.* (holding appellant failed to show plain error where he did not specifically show how notice would have changed what occurred at trial). Therefore, we conclude the State's failure to notice these witnesses as experts is not reversible error.[5]

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[5]We are likewise unpersuaded by Randolph's argument that the State's failure to notice witness Ryan Burke requires reversal. The overwhelming evidence against Randolph belies his claim of prejudice, and we conclude he waived this argument by failing to advance it below. *See Jones v. State*, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997) (holding the defendant must show he was prejudiced by the State's failure to endorse a witness to obtain a reversal for the State's failure to notice a witness);

We also agree the district court should have recorded the bench conferences. *See Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014) (holding that due process requires "a district court to memorialize all bench conferences, either contemporaneously or by allowing the attorneys to make a record afterward"). But, the district court's error is reversible only where the defendant shows that the omitted conferences preclude this court from meaningful appellate review, *id.*, and Randolph has failed to show such is the case here.

As to Randolph's claim of prosecutorial misconduct, we addressed and dismissed an identical claim in *Washington v. State*, and we likewise reject the argument here. *See* Docket No. 71160 (Order of Affirmance, Ct. App., Oct. 31, 2017). Although the prosecutor's comment was improper, the district court sustained the objection and issued a curative instruction, and in light of the overwhelming evidence of Randolph's guilt produced at trial we conclude the prosecutor's question was harmless beyond a reasonable doubt. *See Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008) (addressing reversible and harmless prosecutorial misconduct); *see also Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (noting that we presume jurors follow the district court's instructions).

Finally, we reject Randolph's arguments that the evidence was insufficient or that cumulative error warrants reversal. Overwhelming evidence supports the verdict here, where the State offered testimony from the victim, a co-conspirator, responding and arresting officers, and the hotel staff, and also provided the jury with the surveillance video and the desk

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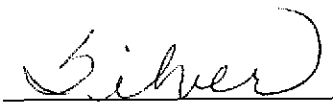
McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) (providing that, generally, the failure to object at trial will bar appellate argument).

clerk's 911 call. *See Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (addressing the low threshold for sufficiency of evidence). We further conclude cumulative error does not warrant reversal here as the issue of guilt was not close and the quantity and character of the errors, even viewed collectively, are inconsequential when measured against the case as a whole. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (setting forth the factors to consider when evaluating a claim of cumulative error). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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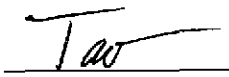
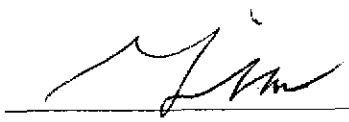
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk