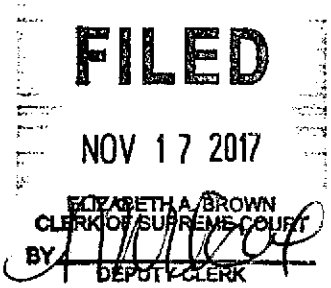
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LOUIS GARCIA-ARIAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71562



ORDER OF AFFIRMANCE

Louis Garcia-Arias appeals from a judgment of conviction entered pursuant to a jury verdict, of false imprisonment and battery with the use of a deadly weapon resulting in substantial bodily harm constituting domestic violence. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Garcia-Arias was convicted by a jury of false imprisonment and battery with a deadly weapon resulting in substantial bodily harm constituting domestic violence. The charges arose from incidents involving his wife, K.G., whom he stabbed, physically abused, and confined in the family's apartment.[1]

On appeal, Garcia-Arias argues reversal of his conviction is required on the following bases: (1) the district court improperly vouched for two witnesses, (2) the district court abused its discretion by allowing an expert to improperly opine on K.G.'s injuries, (3) the district court allowed a lay witness to give improper expert opinion testimony, (4) the district court abused its discretion by admitting a photograph showing Garcia-Arias in custody, and (5) the prosecutor engaged in misconduct during closing arguments. Garcia-Arias argues that even if the errors individually are

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

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harmless, cumulative error warrants reversal. We disagree that reversal is required in this instance.

Garcia-Arias first contends the district court improperly vouched for eight-year-old N.G. and six-year-old L.G. by telling each they were "very brave" for testifying. Garcia-Arias admits he did not object below, and we therefore review for plain error to determine whether the conduct, considered in its entirety, is prejudicial. *Oade v. State*, 114 Nev. 619, 622, 960 P.2d 336, 338 (1998). Vouching occurs when a comment "places the prestige of the government behind the witness by providing "personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (alteration in original) (internal quotations omitted). Trial judges must take extra care with their comments to the parties and witnesses, as a trial judge's statements are liable to mold the jury's opinion, causing prejudice to a party. *Oade*, 114 Nev. at 623, 960 P.2d at 339. The comments here, taken in context, did not place the prestige of the government on the witnesses or imply the witnesses were truthful. And although the comments may have improperly coddled the witnesses, we conclude Garcia-Arias fails to show prejudice in light of the overwhelming evidence against him. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

We next consider whether the district court abused its discretion by allowing a Sexual Assault Nurse Examiner (the nurse) to testify regarding K.G.'s stab and other wounds. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (stating that we review a district court's decision to admit evidence for an abuse of discretion). We conclude the nurse's testimony was proper. Here, the State filed a Notice of Expert

Witness list pursuant to NRS 174.234 and placed the defense on notice as to the scope of the nurse's testimony, which included her observation of K.G.'s wounds. Pursuant to that notice, the nurse testified that sexual assault examinations include a head-to-toe assessment, and after Garcia-Arias' objection, the district court limited the nurse's testimony to observations that she included within her detailed medical records. Garcia-Arias has not shown on appeal that the SANE nurse testified outside the scope of her medical records.[2] Furthermore, the witness testified that she had been a registered nurse for over 30 years in emergency room settings, and such professionals trained in giving medical care may opine as to the cause and consequence of wounds. *See State v. Buralli*, 27 Nev. 41, 51, 71 P. 532, 535 (1903) ("It is generally held that physicians may give their opinion as to the cause, effect, and consequences of wounds . . . ."); *see also Edmonds v. Commonwealth*, 433 S.W.3d 309, 317 (Ky. 2014) (finding the court properly admitted testimony of a nurse examiner who had examined the victim and testified that the victim's symptoms and abrasions were consistent with strangulation). We therefore conclude the district court did not abuse its discretion by overruling Garcia-Arias' objection and admitting this testimony.

Garcia-Arias next argues the State's lay witness, an EMT, gave improper expert opinion by testifying that K.G.'s wounds were from punctures and lacerations and her bruises were five-to-seven days old.

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[2]We note Garcia-Arias did not include the nurse's medical records in the record on appeal. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record." (citation omitted)).

Garcia-Arias failed to object below, and we therefore review for plain error. *See Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). A layperson may testify to inferences rationally based on the witness' perception, whereas an expert may testify to information that requires special knowledge or training. *See* NRS 50.265(1); NRS 50.275. We conclude the EMT's observations that K.G. suffered punctures and lacerations[3] and that her bruises were not fresh were rationally based on the EMT's observations and did not require special knowledge or training. We agree, however, that the EMT's testimony dating the age of the bruises and addressing blood pooling constituted expert testimony, as those observations required special knowledge and training. But this testimony does not warrant reversal, as Garcia-Arias has not demonstrated plain error in light of the overwhelming evidence against him, nor does he explain how proper notice would have made a difference here. *See Burnside v. State*, 131 Nev. ___, ___, 352 P.3d 627, 636-37 (2015) (holding that error was harmless where other evidence corroborated the testimony and the defendant did not request a continuance or explain what he would have done differently had proper notice been given), *cert. denied*, ___ U.S. ___, 136 S. Ct. 1466 (2016).

Garcia-Arias next contends reversal is required because the district court admitted a photograph of him dressed in jail attire and standing in a jail with bars on the windows. We agree the district court abused its discretion by allowing this prejudicial photograph to be admitted into evidence with little, if any, relevance, as the detective could have

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[3]The record belies Garcia-Arias' claim that the EMT testified the wounds were *caused by* punctures and lacerations.

testified that he did not observe any injuries on Garcia-Arias and self-defense was not claimed in this case. *See Mclellan*, 124 Nev. at 267, 182 P.3d at 109. A criminal defendant is constitutionally entitled to a presumption and the indicia of innocence, and the prosecution may not refer to a defendant's physical restraints. *See Haywood v. State*, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991). Here, the photograph was admitted at trial after the detective testified to investigating the crime scene and taking the photograph, and Garcia-Arias' clothing and surroundings suggests he was incarcerated when the photograph was taken. However, we conclude the photograph depicting Garcia-Arias as incarcerated is "comparatively insignificant" when viewed in context of the overwhelming evidence against him, and its admission was ultimately harmless and not grounds for reversal. *See id.* at 288, 809 P.2d at 1273 (noting that even constitutional error can be harmless where it is "comparatively insignificant").

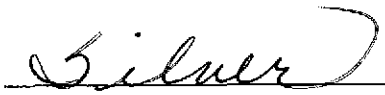
We next consider Garcia-Arias' claim that the prosecutor engaged in misconduct in three instances. In reviewing claims of prosecutorial misconduct, we determine first whether the conduct was improper, and second whether the conduct warrants reversal. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We consider objected-to misconduct for harmless error and unobjected-to misconduct for plain error. *Id.* at 1190 196 P.3d at 477. The record belies Garcia-Arias' claim that the prosecutor argued facts not in evidence, as the record shows the prosecutor was cut off before arguing those facts. We agree, however, the prosecutor may have improperly vouched for K.G. by stating, "I think that's a legitimate basis for [changing her testimony]," and later improperly shifted the burden of proof by suggesting the defense had some responsibility to provide evidence.

We conclude, however, that the misconduct, if any, does not warrant reversal. Garcia-Arias did not object to the prosecutor's statement vouching for K.G., and has failed to show plain error affecting his substantial rights in light of the overwhelming evidence against him. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Further, any prejudice caused by burden-shifting was cured when the court sustained the objection and the prosecutor clarified the law. *See Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001) (holding that sustaining an objection and immediately clarifying "the burden of proof remedied any impropriety by serving the function of an adequate curative instruction"). Finally, the court later instructed the jury that the State bore the burden of proof, that the jury must disregard any evidence to which an objection was sustained, and that statements, arguments, and opinions of counsel are not evidence, and we presume the jury followed those instructions. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

Finally, Garcia-Arias argues that cumulative error warrants reversal. Cumulative error applies where individually-harmless errors, viewed collectively, nevertheless violate the defendant's right to a fair trial and warrant reversal. *See Valdez,* 124 Nev. at 1195, 196 P.3d at 481. In reviewing claims of cumulative error, we consider "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (internal quotations omitted). We conclude cumulative error does not warrant reversal. The issue of guilt was not close on the charges for which Garcia-Arias was convicted, and the errors were neither pervasive nor consequential as related to those charges in light of the overwhelming evidence against him. *Cf. id.* at 1197, 196 P.3d at 482 (concluding there was cumulative error where "[t]he prosecutorial

misconduct occurred throughout the trial" and another error "resulted in serious jury misconduct"). We therefore conclude that cumulative error did not violate Garcia-Arias' right to a fair trial. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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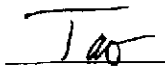
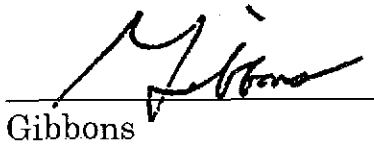


_____, J.
Tao



_____, J.
Gibbons

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