IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JIHAD MAJIDAHAD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71305

FILED

DEC 27 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jihad Majidahad appeals from a judgment of conviction, pursuant to a jury trial, of two counts of battery with a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Majidahad moved in with Antonio Edwards and Cynthia Lacey at Edwards' invitation. After a few days, Edwards and Lacey demanded Majidahad leave because he was bringing stolen property into their house. Majidahad departed their house, but maintained that he left some personal property behind. Majidahad then called the police and asked them to escort him back to collect his property. When the police arrived at the house, Edwards and Lacey stated that Majidahad had no property remaining in the house and he was no longer welcome there.

The next morning, Majidahad returned to the house when no one was home. At some point, Edwards and Lacey came home and discovered Majidahad in the house. A physical struggle ensued. During that struggle, Majidahad struck both Edwards and Lacey with a hammer causing injuries to their heads.

Because of this entry into the home and the use of force, Majidahad was charged with one count of burglary and two counts of

battery with a deadly weapon. He pleaded not guilty and his case proceeded to trial.

At trial, the jury found him not guilty of burglary and guilty of both counts of felony battery. The district court entered a judgment of conviction on the two counts of battery and sentenced him to a maximum of ninety months in prison with a minimum parole eligibility of thirty-six months on each count to run concurrently.

Majidahad appeals from this judgment of conviction raising eleven issues: (1) the district court erred by denying Majidahad's motion to compel the State to re-offer a plea deal; (2) the State improperly exercised peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (3) the district court improperly denied Majidahad's *Batson* challenges to the State's use of peremptory challenges without making proper findings of fact; (4) the district court abused its discretion by granting the State's untimely motion in limine; (5) the district court abused its discretion by denying Majidahad's oral motion in limine to exclude his prior felony conviction; (6) the district court abused its discretion by overruling Majidahad's objection to the introduction of a 9-1-1 call made by a neighbor related to the incident; (7) the district court plainly erred by allowing a police officer to render an expert opinion; (8) prosecutorial misconduct during closing arguments violated Majidahad's constitutional right to a fair and impartial jury; (9) the district court abused its discretion by overruling Majidahad's objection to the district court's jury instruction on a person's flight after the commission of a crime; (10) the district court deprived Majidahad of his right to a fair trial because it was biased against him; and, (11) cumulative errors in the trial proceedings mandate reversal of Majidahad's convictions.

The district court properly denied Majidahad's motion to compel the State to re-offer a plea bargain

Prior to trial, the State offered a plea deal to Majidahad where he could plead guilty to battery with substantial bodily harm and stipulate to a 12- to 30-month sentence. Majidahad rejected the offer.

A few days later, Majidahad reviewed Lacey's voluntary statement given to police. Because of the contents of Lacey's statement, he wished to accept the State's offer. However, when he communicated this request to the State, the State informed him that the offer was no longer available. Consequently, Majidahad's counsel moved the district court to compel the State to re-offer the original plea bargain. The district court denied this motion.

Plea agreements, while matters of criminal jurisprudence, are generally governed by the law of contracts. *See State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1078-79 (1994); *see also Puckett v. United States*, 556 U.S. 129, 137 (2009). "[N]either a defendant nor the government is bound by a plea offer until it is approved by the court." *Crockett*, 110 Nev. at 843, 877 P.2d at 1079 (citing *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992)). And, unless the defendant detrimentally relies upon the agreement, an agreement between the defendant and the prosecution is not binding. *See id.* at 843, 877 P.2d at 1079-80.

Majidahad did not argue below that he relied on the State's offer to his detriment and he does not (and cannot) raise this argument on appeal. Accordingly, we conclude the State was under no obligation to maintain its original offer to Majidahad and so the district court did not

err in rejecting Majidahad's motion to compel the State to re-offer this deal. *See id.*[1]

Majidahad's Batson-based appellate arguments are misplaced

Majidahad argues that the State improperly used peremptory challenges to strike African American jurors from the jury venire in violation of *Batson*. Further, he contends the district court denied his *Batson*-based challenges to the State's peremptory challenges without making proper factual findings.

To make out a *Batson* challenge, a defendant must show, *inter alia*, that "the prosecutor has exercised *peremptory challenges* to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96 (emphasis added). Here, the State sought to remove the jurors in question for cause. Specifically, the State challenged these jurors because they gave equivocal answers about whether their religious beliefs permitted them to fulfill their duties as jurors. The district court, in granting these challenges, described the State's challenges as "challenges for cause."

Thus, we conclude that *Batson* and its progeny are inapplicable to the State's for-cause challenges to these jurors. Accordingly, we reject Majidahad's misplaced *Batson* arguments.

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[1]Insofar as Majidahad argues that his attorney provided ineffective assistance of counsel and this inefficacy prevented him from reviewing Lacey's voluntary statement in time to evaluate the State's offer properly, we decline to consider this argument on direct appeal. *See Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006) ("This court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless.").

The district court improperly considered the State's untimely motion in limine, but this error was harmless

Majidahad argues the district court abused its discretion by partially granting the State's untimely motion in limine. "A district court's ruling on a motion in limine is reviewed for an abuse of discretion." *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). The erroneous exclusion of some evidence is a non-constitutional error, which will be "deemed harmless unless it had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Newman v. State*, 129 Nev. 222, 236-37, 298 P.3d 1171, 1181-82 (2013) (quoting *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)).

Under EDCR 3.20(a), "all motions must be served and filed not less than 15 days before the date set for trial." Further, "[t]he court *will only* consider late motions based upon an affidavit demonstrating good cause and it may decline to consider any motion filed in violation of this rule." EDCR 3.20(a) (emphasis added). Under EDCR 3.28, "[a]ll motions in limine to exclude or admit evidence *must* be in writing *and* noticed for hearing *not later than* calendar call, or if no calendar call was set by the court, *no later than 7 days before trial.*" (emphasis added). The State must support an untimely motion in limine with an affidavit showing good cause for the delay. *See Hernandez v. State*, 124 Nev. 639, 648-49, 188 P.3d 1126, 1132-33 (2008).

Here, Majidahad's trial in this case was set to start on Tuesday, February 16, 2016. The State filed its motion in limine on Friday, February 12, 2016. The State did not include an affidavit demonstrating good cause for its untimely motion in limine.

At a hearing on this motion, Majidahad's counsel argued the district court should not consider the motion because it was untimely and

the State had not offered any support to demonstrate good cause for the delay. However, the district court stated the State requested *ex parte* to file its late motion in limine and it had granted that request.

We conclude the district court's consideration of the State's untimely motion in limine after informally allowing the State to file this late motion *ex parte* was improper. *See Hernandez*, 124 Nev. at 648-49, 188 P.3d at 1132-33. However, we also conclude the district court's partial grant of the State's untimely motion was harmless error.

The district court excluded evidence that Edwards and Lacey were being evicted from their residence, Edwards' and Lacey's transaction history at pawn shops, and that Majidahad met Edwards while in custody at the Clark County Detention Center. While Majidahad argues that these pieces of evidence were "pertinent" to his defense, their exclusion from his trial did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Newman*, 129 Nev. at 236-37, 298 P.3d at 1181-82. Therefore, we conclude the district court's improper partial grant of the State's untimely motion in limine does not merit reversal.

The district court erred by allowing the State to ask Majidahad about a prior felony conviction without a copy of the judgment of conviction, but this error was harmless

Majidahad argues the district court abused its discretion by denying his oral motion in limine to exclude evidence of his prior felony conviction for false statements made in connection to the acquisition of firearms. Specifically, Majidahad argues the State "was not prepared to introduce a certified judgment of conviction" before it brought up his prior conviction.

"We review the district court's decision to admit evidence of a prior felony conviction for an abuse of discretion." *Williams v. State*, 121 Nev. 934, 948, 125 P.3d 627, 636 (2005). Under NRS 50.095(1)-(2), a party may attack the credibility of a witness by introducing evidence that the witness has been convicted of a felony and not more than 10 years has elapsed since the date the witness was released from confinement or the witness's parole, probation, or sentence has expired. Further, "[a] certified copy of a conviction is prima facie evidence of the conviction." NRS 50.095(6).

"NRS 50.095 does not require that the judgment of conviction be presented before questioning a witness about prior felony convictions." *Corbin v. State*, 111 Nev. 378, 382, 892 P.2d 580, 583 (1995). Still, we have "consistently held that the state may not ask the accused or a defense witness a question concerning a prior felony conviction if it is unprepared to prove the prior conviction with a copy of the judgment of conviction in the event that the conviction is denied." *Id.* (citing *Tomarchio v. State*, 99 Nev. 572, 665 P.2d 804 (1983)). Simply, "the prosecution *must* have a copy of the judgment of conviction to impeach a defense witness [regarding a prior felony conviction]." *Yllas v. State*, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996) (emphasis added).

Here, the State presented a number of court documents supporting Majidahad's prior felony conviction for making false statements. It presented a certified copy of an indictment and a certified copy of a petition for a warrant. The district court observed that "[t]here is also a certified copy of the plea agreement where the defendant ple[a]d[ed] guilty to the indictment . . . a Class D felony offense . . . ." Yet, the State conceded below and concedes on appeal that it did not possess a copy of

the judgment of conviction. Accordingly, we conclude the district court erred by permitting the State to ask Majidahad about this prior felony conviction. *See id.*

Nonetheless, this error was harmless. At trial, Majidahad testified at length about his career as a criminal and readily admitted that he was a felon, and had committed the felony at issue here when the State asked him about this conviction. Thus, we conclude Majidahad suffered no prejudice from the brief cross-examination about this prior felony conviction. *See id.* at 867, 920 P.3d at 1006 (discussing how the improper introduction of a third felony conviction if a witness' two other such convictions were admitted by the witness would be harmless error).[2]

The district court did not abuse its discretion by overruling Majidahad's objection to the introduction of a 9-1-1 phone call made by a neighbor

Majidahad argues the district court abused its discretion by overruling his objection to the introduction of a 9-1-1 call made by a neighbor on the morning of the incident. He argues the call was unduly prejudicial and cumulative.[3] We disagree.

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[2]While Majidahad's oral motion in limine was untimely under EDCR 3.20(a) and EDCR 3.28, we note that *Hernandez*'s requirement that prosecutors must provide proof of good cause for delays in filing their motions in limine does not directly apply to similar delays that occur when criminal defendants file motions in limine. *See* 124 Nev. at 648-49, 188 P.3d at 1132-33. We do not decide if application of the local rule could have barred consideration of the oral motion.

[3]Majidahad also suggests the district court improperly determined the call was admissible as a present sense impression, an exception to the general bar on hearsay evidence. However, Majidahad does not offer support for this argument and the court acted within its discretion by determining it was admissible as a hearsay exception. Thus, we need not

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"We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). This recording of the telephone call was admitted through the State's very first witness, the neighbor who made the call, and the recording was more comprehensive than the testimony. Accordingly, we conclude it was not cumulative or duplicative.

Further, the content of the call was relevant and probative, and not substantially outweighed by the danger of unfair prejudice. The caller described commotion and a crowd gathering at the end of her street and police later discovered Lacey outside her home injured. Majidahad complains that Lacey could be heard screaming during the call. However, Lacey's screams alone do not render the otherwise relevant and non-prejudicial call inadmissibly prejudicial. Accordingly, we conclude the district court did not abuse its discretion by admitting this phone call into evidence over Majidahad's objection.

The district court did not plainly err by allowing a police officer to testify about the victims' injuries

Majidahad argues the district court "committed plain error in allowing the Metro [o]fficer to testify as a [m]edical [e]xpert." In particular, Majidahad complains that the district court should not have permitted this police officer to testify that the victims' injuries appeared to

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consider this argument further. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that this court need not consider arguments that are not cogently argued or supported by relevant authority).

be consistent with being struck by an object. Majidahad did not object to this testimony.

"[F]ailure to object precludes appellate review of the matter unless it rises to the level of plain error." *Mclellan*, 124 Nev. at 267, 182 P.3d at 109. "In conducting plain error review, 'we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights.'" *Id.* (quoting *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006)).

A lay witness may testify about opinions derived from his or her perceptions so long as those opinions are helpful to the jury. NRS 50.265(1)-(2). The key distinction between lay and expert testimony is whether the testimony concerns "information within the common knowledge of or capable of perception by the average person" or whether it requires "some specialized knowledge or skill beyond the realm of everyday experience[.]" *Burnside v. State*, 131 Nev. ___, ___, 352 P.3d 627, 636 (2015).

The police officer's testimony about the victims' injuries did not require any specialized knowledge or skill. Rather, he described the injuries and his perceptions using non-medical terms. Because this testimony was not an improper expert opinion, Majidahad fails to demonstrate the district court plainly erred by admitting it. Even if it was expert testimony, any error was harmless as Majidahad admitted he struck the victims on their heads with a hammer. Thus, we reject Majidahad's argument. *See* NRS 178.598 ("Any error...which does not affect substantial rights shall be disregarded.").

The State did not commit prosecutorial misconduct during closing arguments

Majidahad argues that prosecutorial misconduct during the State's closing argument violated his "constitutional right to a fair and impartial jury." We need not consider this argument as Majidahad did not object to this statement or raise this argument in the proceedings below. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) ("[F]ailure to object precludes appellate review of the matter unless it rises to the level of plain error."). Nonetheless, this argument is unpersuasive.

Majidahad complains that the State asserted he was guilty to the jury when the prosecutor stated, "[i]f you look at the law of self-defense, even if you believe the defendant, he's guilty because he cannot claim it under the circumstances in which he testified." This court reviews claims of prosecutorial misconduct using a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "First, we must determine whether the prosecutor's conduct was improper." *Id.* "Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Id.*

"[A] prosecutor may not declare to a jury that a defendant is guilty." *Taylor v. State*, 132 Nev. ___, ___, 371 P.3d 1036, 1045 (2016). However, even if the prosecutor improperly tells the jury the defendant is guilty, this comment alone, without any objection by defense counsel, *may not* be sufficient for a finding of error. *See id.* at ___, 371 P.3d at 1046. Here, we conclude the State's comment was made in the context of a logical argument about Majidahad's self-defense theory and the prosecutor did not "declare" Majidahad guilty to the jury. Thus, we conclude this comment alone (and without objection) was not enough to justify a finding

of plain error. *See id.* Thus, we reject Majidahad's prosecutorial misconduct argument.

The district court did not abuse its discretion in overruling Majidahad's objection to a jury instruction on flight

Majidahad argues the district court abused its discretion by overruling his objection to the inclusion of a jury instruction on a person's flight from the commission of a crime.[4] Majidahad objected on the ground that the evidence did not show that he was fleeing with a consciousness of guilt, which he argued is required by *United States v. Blanco*, 392 F.3d 382, 295 (9th Cir. 2004).

"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). "A jury may properly receive an instruction regarding a defendant's flight so long as it is supported by the evidence." *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 126 (2005), *rejected on other grounds by Farmer v. State*, 133 Nev. ___, 405 P.3d 114 (2017). "[F]light 'signifies something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of

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[4]Majidahad objected to the following instruction:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

avoiding arrest.'" *Id.* at 581-82, 119 P.3d at 126 (quoting *State v. Rothrock*, 45 Nev. 214, 229, 200 P. 525, 529 (1921)). "Because of the possibility of undue influence by such an instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." *Id.* at 582, 119 P.3d at 126.

Here, the instruction given was itself appropriate. *See id.* (concluding that there was no error in giving an identical instruction). Moreover, while Majidahad maintains he ran from the house to escape Edwards, evidence was presented that the police arrived on the scene moments after Majidahad broke away from Edwards, Majidahad jumped a fence to escape the backyard of the house, and a crowd had gathered near the house due to Lacey's screams. Thus, some evidence supports that Majidahad was not merely "going away," but fleeing from the scene. Accordingly, we conclude that, based on Majidahad's behavior in these circumstances, "it was proper to instruct the jury regarding flight." *See id.*

Majidahad presents no proof the district court was biased against him

Majidahad argues the district court "gave the perception of bias [against him] both before and during trial." Because of this bias, Majidahad argues he was denied a fair trial. We disagree.

"[A]n opinion formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, constitutes a basis for a bias or partiality motion where the opinion displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Majidahad points to the district court's ordinary procedural and administrative actions, such as considering motions, asking routine follow-up questions of witnesses, and its efforts to keep the

trial on schedule as proof of its bias. We conclude these actions do not indicate any bias against Majidahad. Accordingly, we reject this argument.

Cumulative errors do not mandate reversal of Majidahad's convictions

Majidahad argues that cumulative errors deprived him of a fair trial. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Here, Majidahad has only shown that the district court committed two harmless, procedural errors while he conceded at trial and concedes on appeal that he struck both victims with a hammer. Thus, we conclude cumulative error does not merit reversal. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) ("A criminal defendant is not entitled to a perfect trial, only a fair trial."). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring:

I join the majority order except with respect to one issue. My colleagues conclude that the district court erred by allowing the State to cross-examine Majidahad about a prior felony conviction without having a certified copy of a judgment of conviction in its possession at the time. The

majority cites *Yllas v. State*, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996) for the proposition that "the prosecution *must* have a copy of the judgment of conviction to impeach a defense witness." The case does contain that language, but I don't think the principle applies here.

As I read it, the rule was designed to ensure that the State does not unfairly and irreparably poison a jury by falsely implying, out of the blue, that a defendant has a criminal record when no independent proof of such a criminal record actually exists. The danger is that a surprise accusation of prior criminal activity is so prejudicial, and so likely to irrevocably taint the jury, that the bell cannot be unrung if the allegation is without sufficient basis in fact and might therefore eventually prove to be untrue.

But here, Majidahad took the stand and freely admitted to his prior felony conviction on direct examination before the State ever mentioned it. The State then followed up on cross-examination to ask some more questions about the conviction that the defendant just admitted under oath to exist only a few moments earlier. To conclude that the State cannot ask any follow-up questions simply because it could not independently establish the truth of what he already volunteered to be true is, to my mind, not a proper application of the rule. The danger that the rule seeks to prevent simply does not exist here, and applying it here when it should not be applied is to promote form over not only substance but over common sense as well. Consequently, I would conclude that no error occurred when the district court allowed the State to ask the cross-examination questions at issue.

Tao, J.

Tao

cc: Hon. Douglas W. Herndon, District Judge
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