IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL A. QUICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73772

ORDER OF AFFIRMANCE

Michael A. Quick appeals from a judgment of conviction, pursuant to a jury verdict, of burglary with the assistance of a child, battery with intent to commit a crime with the assistance of a child, conspiracy to commit robbery, robbery with the assistance of a child, battery with substantial bodily harm, and coercion with the assistance of a child. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Quick and his two teenage sons entered a FedEx store, injured an employee, and then immediately took supplies from the store without paying for them. Quick was later arrested and charged with burglary with the assistance of a child, battery with intent to commit a crime with the assistance of a child, conspiracy to commit robbery, robbery with the assistance of a child, battery with substantial bodily harm, and coercion with the assistance of a child. A jury convicted him on all counts.[1]

On appeal, Quick argues (1) the prosecutor engaged in misconduct by soliciting bad act and inadmissible prejudicial evidence, (2) the State improperly impinged on Quick's right to remain silent, (3) the prosecutor improperly vouched for a witness, (4) the district court erred by

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

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failing to give Quick's proposed jury instruction number one, and (5) cumulative error warrants reversal. We disagree.

Quick first argues the prosecutor improperly referenced prior bad acts and other inadmissible evidence by eliciting testimony regarding his departures from Nevada, while on bail, to Chicago and Texas, as well as his expired business license. We review claims of prosecutorial misconduct by first considering whether the conduct was improper and then considering whether any improper conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Prosecutorial misconduct may be harmless where the evidence is overwhelming. *Smith v. State*, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004). But, we review unobjected-to prosecutorial misconduct for plain error. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

Quick failed to object below to the majority of errors he alleges on appeal, and we conclude he fails to demonstrate plain error in those instances.[2] Quick did object to the prosecutor's question regarding whether Quick went to Texas instead of remaining in Nevada for his June court date, and we agree this question may have been improper. However, that error is not reversible where the district court prevented Quick from answering the question and Quick asked the court not to instruct the jury to disregard the

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[2]The detective's testimony that Quick was arrested on a warrant in Chicago was given in the course of explaining the detective's investigation, and an arrest pursuant to a warrant is not, in and of itself, a prior bad act. *See* NRS 48.045(2) (addressing prohibited bad act evidence). Likewise, the detective's testimony that Quick's business license had expired, and Quick's testimony that he was staying with his aunt in Chicago, did not reference any bad act. *Id.* Moreover, Quick opened the door to the testimony regarding his expired business license by arguing that he went to the FedEx store for a legitimate business purpose.

question. *Cf. Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (explaining that instructing the jury to disregard improper statements remedies any potential for prejudice); *Rhyne v. State*, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002) (recognizing that a party who invites an error may not raise that error on appeal). Moreover, we conclude any error was harmless in light of the overwhelming evidence against Quick, including the victim's testimony and the surveillance video of the crimes. *See* NRS 178.598.

Quick next argues the prosecutor improperly infringed on his constitutional right to remain silent by cross-examining him regarding his statement to the detective. Quick did not object below, and we therefore review for plain error on appeal. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (holding that unpreserved errors of a constitutional dimension are reviewed for plain error); *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (holding that unobjected-to prosecutorial misconduct is reviewed for plain error). Although a prosecutor may not cross-examine or impeach a defendant on his post-arrest silence, "cross-examination that merely inquires into prior inconsistent statements" does not violate this rule. *Gaxiola v. State*, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005) (internal quotation marks and citation omitted); *cf. Doyle v. Ohio*, 426 U.S. 610, 613-20 (1976) (addressing the State's cross-examination regarding the defendants' decision to remain silent following their *Miranda* warnings).

Here, the record demonstrates that the prosecutor's question regarded an inconsistency between Quick's statements to the detective and his testimony at trial, rather than Quick's decision to cease speaking to the detective. Moreover, Quick fails to show any prejudice where the court interrupted before Quick could answer the question and directed the prosecutor to move on to the next question. *Cf. Moore v. State*, 122 Nev. 27,

36-37, 126 P.3d 508, 514 (2006) (holding the defendant must show prejudice to establish plain error). Accordingly, we conclude Quick fails to demonstrate plain error requiring reversal.

Third, Quick argues the prosecutor improperly vouched for a witness. Quick did not object below, and we review for plain error. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. After carefully reviewing the record, we conclude the prosecutor did not improperly vouch for the witness here. The parties presented conflicting witness testimony and it was for the jury to decide which witness was more credible. Accordingly, the prosecutor had reasonable latitude to argue witness credibility. *See Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002) (addressing the prosecutor's ability to argue witness credibility where there is conflicting witness testimony).

Fourth, Quick asserts the district court reversibly erred by failing to give his proposed jury instruction number one, which instructed the jury on the difference in the use of force in robbery and larceny, and further instructed the jury to decide whether Quick was guilty of larceny. While a defendant is generally entitled to his requested jury instruction on his theory of the case, a defendant is not entitled to an instruction on an uncharged lesser-related offense. *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). Here, the State did not charge larceny, and the proposed instruction regarded a lesser-related offense. Accordingly, the district court did not err by declining to give this instruction.[3]

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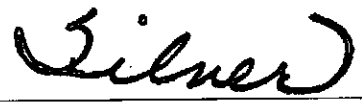
[3]We note that the case on which that instruction was based, *Martinez v. State*, 114 Nev. 746, 748, 961 P.2d 752, 754 (1998), is factually distinguishable from the present case, as in *Martinez* there was no evidence

Finally, in light of the foregoing conclusions, we conclude Quick fails to demonstrate cumulative error. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *see also Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (rejecting appellant's argument of cumulative error where the "errors were insignificant or nonexistent"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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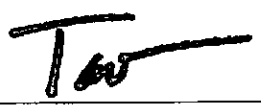

_____, J.
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Gibbons

cc: Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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that the defendant used force to take the property. We further note that the district court correctly instructed the jury on robbery, including the requirement that Quick use force or fear to perpetrate the crime, and we presume the jury followed this instruction and considered Quick's use of force. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (holding that Nevada's appellate courts presume the jury followed instructions).