

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CASIMIRO VENEGAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74241

FILED

OCT 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Casimiro Venegas appeals from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, two counts of burglary while in possession of a firearm, two counts of robbery with use of a deadly weapon, two counts of battery with use of a deadly weapon resulting in substantial bodily harm, attempted murder with use of a deadly weapon, two counts of battery with use of a deadly weapon, coercion with use of a deadly weapon, battery with intent to commit a crime, and aiming a firearm at a human being. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

At trial, the State presented evidence demonstrating that Venegas and an accomplice robbed a 7-Eleven store using BB-guns and then robbed and severely battered Javier Colon in his home not far from the store using the BB-guns and an axe.¹ Colon's sister, Adriana, and her three children also lived in the home. When she discovered what was happening, Adriana yelled at the attackers to stop, and her eldest

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

18-902505

daughter called 9-1-1. Police apprehended Venegas and his accomplice in a backyard they were hiding in close to Colon's home.

On appeal, Venegas argues that (1) the district court abused its discretion in failing to grant a mistrial on grounds that the State improperly shifted the burden of proof during its rebuttal closing argument, (2) the district court erred in allowing Adriana's children to testify regarding what they heard during the incident, and (3) cumulative error warrants reversal. We disagree.

We first consider whether the district court abused its discretion in denying Venegas' motion for a mistrial. Venegas argues that the State improperly shifted the burden of proof during its rebuttal closing argument and that the district court should have granted a mistrial rather than giving a curative instruction.

Whether to deny a motion for a mistrial is within the district court's discretion, and this court will not reverse such a decision "absent a clear showing of abuse." *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (internal quotation marks omitted).

During the State's rebuttal closing argument, the prosecutor made the following statement:

I do think it's interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case -- they don't show you any of the pictures, right? They don't go through any of the evidence.

Venegas objected on grounds that the State was improperly shifting the burden of proof to the defendant and moved for a mistrial. The district court sustained the objection, but it declined to grant a mistrial, instead opting to instruct the jury that the State bore the burden of proof and the

defense was not required to present any evidence. Assuming without deciding that the prosecutor's comments were improper, we conclude that the district court did not abuse its discretion in failing to grant a mistrial. In light of the district court sustaining his objection and giving a curative instruction, as well as the overwhelming evidence of guilt presented at trial, the supposedly improper comments did not prejudice Venegas. See *Valdez v. State*, 124 Nev. 1172, 1192, 196 P.3d 465, 478 (2008). Accordingly, we conclude that a mistrial was unwarranted.

We next consider whether the district court erred in allowing Adriana's children to testify regarding what they heard during the incident. Venegas challenges the admissibility of Adriana's children's testimony on grounds of relevancy and unfair prejudice.²

District courts have "considerable discretion in determining the relevance and admissibility of evidence," and this court will not

²Venegas also hints at prosecutorial misconduct and hearsay. Regarding prosecutorial misconduct, Venegas cites only to cases that broadly discuss a prosecutor's duty to refrain from using improper methods to obtain a conviction. As for hearsay, Venegas never uses the term "hearsay" in his brief, but instead, simply states that the children "only testified as to what they heard their mother describe about the incident" and that "the testimony was strictly based off of what the mother saw and said during the incident." Accordingly, this court need not entertain these arguments. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Even so, we note that the district court properly admitted the children's testimony under the excited-utterance exception to the hearsay rule after the State laid a proper foundation. See NRS 51.095.

disturb such decisions unless they are manifestly wrong.³ *Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). Evidence is relevant if it “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015. But evidence, even if relevant, “is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 48.035(1).

Here, the children’s testimony was relevant. It supported the fact that Colon was beaten and that Adriana observed the incident. Moreover, aside from implying that the State elicited the children’s testimony solely to appeal to the jurors’ emotions, Venegas fails to demonstrate how he was unfairly prejudiced by the children’s testimony. Accordingly, we conclude that the district court did not abuse its discretion or plainly err in allowing Adriana’s children to testify about what they heard during the incident.

³It appears from the record that Venegas never objected to the challenged testimony below on grounds of relevance, and he only objected to one of the children’s testimony on grounds of unfair prejudice. Accordingly, in the absence of a proper objection below, we review the district court’s admission of the evidence for plain error. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). When conducting such review, this court must consider whether there was error, whether it was plain or clear, and whether it affected the defendant’s substantial rights. *Id.* It is the defendant’s burden to demonstrate actual prejudice. *Id.*

Finally, we conclude that cumulative error does not warrant reversal, as there is no error to cumulate. *See Watson v. State*, 130 Nev. 764, 790 n.11, 335 P.3d 157, 175 n.11 (2014).

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.



Silver

C.J.



Tao

J.



Gibbons

J.

cc: Hon. Linda Marie Bell, Chief Judge
Aisen Gill & Associates LLP
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk