

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72313

FILED

SEP 21 2018

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

ORDER OF AFFIRMANCE

James Howard Hayes, Jr. appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of burglary. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Security officers at Harrah's Hotel & Casino apprehended Hayes after he entered a hotel room and immediately searched personal belongings and took \$350 from a wallet that was lying in a suitcase. Harrah's security set up a hotel room for an "integrity check," and surveillance video in the room and in the hallway recorded the incident. Security officers watched from the adjacent hotel room and intercepted Hayes as he attempted to leave the room. A responding police officer searched Hayes and found the money, and Hayes told the officer that "their money is in my left front pocket." At trial, Hayes took the stand and testified to his prior felony conviction for attempted possession of a credit card without cardholder's consent, and also testified to soliciting prostitution on the night in question and intending to engage in sex acts with a prostitute. At the time of trial, Hayes also had another pending burglary case for entering a hotel room at a different casino and searching

through a guest's luggage. A jury convicted Hayes of burglary following a two-day trial.¹

In this appeal, Hayes asserts several bases for reversal, including that (1) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and Hayes's right to due process and a fair trial by failing to timely produce a surveillance video, (2) the district court erred by denying Hayes' *Batson* challenge, (3) the evidence was insufficient to support the verdict, (4) the district court erred by denying Hayes' motion for a mistrial, and (5) cumulative error warrants reversal.² We disagree.

As an initial matter, the record belies Hayes' argument regarding the sufficiency of the evidence. Evidence is sufficient to support a verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408,

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

²Hayes also argues minorities were underrepresented on the jury venire and that the district court erred by failing to give his proposed jury instructions. But, Hayes fails to support these arguments on appeal. First, Hayes fails to provide facts or argument demonstrating that any underrepresentation in the jury venire was the result of systematic exclusion. See *Williams v. State*, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (setting forth the elements of a fair-cross-section violation). Second, Hayes fails to demonstrate that Nevada law required the district court to give his instructions on the lesser-related offenses. See *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) (holding the court is not required to instruct the jury on lesser-related offenses), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006) (addressing lesser-included offenses). Accordingly, we decline to consider these arguments. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (providing that this court need not consider arguments not adequately briefed or cogently argued).

414 (2007) (internal quotations omitted)). As relevant in this case, NRS 205.060(1) defines burglary as the entry into any room with the intent to commit larceny. Here, overwhelming evidence, including witness testimony and surveillance video, supported the State's position and provided facts by which the jury could infer intent. See *Sharma v. State*, 118 Nev. 648, 659, 56 P.3d 868, 874 (2002) (“[I]ntent can rarely be proven by direct evidence of a defendant’s state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime”); *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (noting circumstantial evidence is enough to support a conviction).

Moreover, on direct examination, Hayes’ counsel elicited testimony from Hayes that he was a convicted felon for attempted possession of a credit card without the cardholder’s consent, and Hayes admitted to committing the misdemeanor crime of soliciting prostitution, in mitigation of the burglary charge. See NRS 201.354(3). Thus, here, the jury was free to conclude Hayes was not a credible witness and therefore disbelieve Hayes’ testimony as to his intent at the time of this crime. See *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975) (holding it is the jury’s province to assess witness credibility). Accordingly, we conclude the evidence overwhelmingly supports the conviction.

Turning to Hayes’ remaining arguments, we first review de novo whether the State adequately disclosed information under *Brady*. *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). To prove a *Brady* violation, an accused must demonstrate “the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” *Id.* at 67, 993 P.2d at 37. Evidence is material only “if there is a

reasonable probability that the result would have been different if the evidence had been disclosed.” *Id.* at 66, 993 P.2d at 36.

Here, the record does not suggest the State withheld the evidence or contributed to the delay in producing that evidence. Rather, the record shows that Harrah’s initially failed to provide the surveillance video, and once Harrah’s did provide the video the State immediately notified Hayes. Nor does Hayes demonstrate the evidence was material in this case, where it did not show Hayes engaged in the actions underlying this crime, and where other evidence, including other surveillance video, did show those actions. Again, in light of the overwhelming evidence and Hayes’ own testimony, Hayes fails to show prejudicial error. We therefore conclude Hayes fails to demonstrate a *Brady* violation here.

We next consider whether the district court reversibly erred by denying Hayes’ *Batson* challenge. When a party opposes a peremptory challenge under *Batson*, the party must set forth a prima facie case of discrimination, after which the proponent of the challenge must present a neutral explanation for the challenge. *Ford v. State*, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006). The district court then determines whether the opponent has proved purposeful discrimination. *Id.* We give great deference to the district court’s factual findings and will not reverse the court’s decision unless it is clearly erroneous. *See Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008); *Kaczmarek v. State*, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

Here, the State argued, and the record shows, that the challenged juror was being prosecuted by the district attorney’s office and was angry at the justice system. Hayes does not demonstrate this reason was a pretext for discrimination; for example, he does not show that any

other juror indicated similar feelings against the State or was in fact similarly-situated.³ *Cf. Diomampo v. State*, 124 Nev. 414, 425-27, 185 P.3d 1031, 1038 (2008) (addressing discriminatory and neutral peremptory challenges, and noting that peremptory challenges “allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias.” (internal quotations omitted)). Accordingly, the district court did not abuse its discretion by denying Hayes’ *Batson* challenge.

Finally, we address Hayes’ argument that the district court was required to grant a mistrial after the prosecutor engaged in misconduct by asking a question that improperly referenced Hayes’ other burglary charge. We review the denial of a mistrial for an abuse of discretion. *Domingues v. State*, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996). In evaluating a claim of prosecutorial misconduct, we employ a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine whether the prosecutor’s conduct was improper. *Id.* Next, we consider whether the improper conduct warrants reversal. *Id.* In so doing here, we are cognizant that a prosecutor’s reference to a defendant’s criminal history may violate the defendant’s right to due process if “the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.” *Rice v. State*, 108 Nev. 43, 44, 824 P.2d 281, 281-82 (1992). But, any error that does not “infect[] the trial with unfairness” and is not constitutional error is subject to harmless-error review, and we will not lightly overturn a criminal conviction based solely on a prosecutor’s comments. *Valdez*, 124

³We reject Hayes’ arguments regarding the prospective juror accused of a DUI. The record shows the State questioned that juror regarding her experience and her feelings, and that the juror unequivocally affirmed her impartiality.

Nev. at 1189-1190, 196 P.3d 477 (internal quotation marks omitted); *Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005); *Ruñion v. State*, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000).

Our review of the record demonstrates that the prosecutor's question was likely improper, as the district court had previously declined the State's requests to admit evidence of Hayes' other pending burglary case. However, in light of the fact that Hayes admitted during direct examination that he was a convicted felon for attempted possession of a credit card without the cardholder's permission, we conclude that in this instance prosecutor's question on cross-examination does not warrant reversal, and the district court did not err by denying Hayes' motion for a mistrial. Critically, Hayes himself gave prejudicial testimony regarding his own bad acts by admitting to the misdemeanor crime of soliciting prostitution. Therefore, the prosecutor's improper question, under these circumstances, does not rise to prejudicial error warranting reversal.⁴

Importantly, too, the defense objected immediately to the prosecutor's question, and the district court sustained the objection. See *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002) (concluding that reversal was not warranted where the defendant immediately objected and the district court sustained the objection). Further, the district court properly instructed the jury, both at the beginning and end of trial, that the statements and arguments of the attorneys were not evidence in the case and that the jury was to disregard

⁴We further note that where the State asked the question in the context of addressing Hayes's intent to meet a prostitute, and the question was generally worded, it is not clear the jury would have inferred from this question that Hayes had burglarized another hotel room.

any question to which the court sustained an objection. We presume the jury followed these instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Finally, the error is harmless in light of the overwhelming evidence against Hayes.⁵ *Valdez*, 124 Nev. at 1189, 196 P.3d 477. Accordingly, having concluded Hayes is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



Silver

C.J.



Gibbons

J.

TAO, J., concurring:

I concur in the judgment except with respect to its conclusion that the prosecutor “likely” committed misconduct in asking of the defendant on cross-examination: “You ever walked into anybody else’s hotel room before?” Before any answer was given, the defense counsel immediately objected, the objection was sustained, and so the question was

⁵In light of our disposition, we reject Hayes’ arguments regarding cumulative error. See NRS 178.598 (harmless error does not warrant reversal); see also *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (“One error is not cumulative error.”).

not answered. The defendant nonetheless argues on appeal that the question itself constituted prosecutorial misconduct necessitating a mistrial because it was designed to obliquely refer to the defendant having been charged in another case with the crime of burglary, and the prosecutor had not followed the procedure for admitting "other bad act" evidence set forth in NRS 48.045.

The problem is this. It is not a crime to "walk into someone else's hotel room." That becomes a crime only if the entry was accompanied by the specific intent to commit a crime inside the room, in which case the entry rises to the level of a burglary. As literally framed, the prosecutor's question did not refer to any "bad act" as that term is defined and understood under NRS 48.045. Rather, it only asked whether the defendant had ever done something that many people have done quite innocuously: I myself have "walked into" the hotel rooms of friends and family members visiting from out of town on many occasions.

The obvious concern here is that, had the line of questioning been allowed to continue, the prosecutor may have intended to follow up with a more pointed question that would have touched more directly upon the defendant's pending burglary charge. But the line of questioning was not allowed to continue, so no impermissible "bad act" evidence was ever actually elicited. Whatever the prosecutor may have intended in his mind to do next had no objection been lodged, the question that was actually asked was not itself improper, and I am not inclined to throw around a label as serious as "prosecutorial misconduct" before any such misconduct actually occurred. Our job is to rule on the legality of what actually happened below, not speculate about things that did not happen but might have happened had everything been different. Here, thanks to the quick

and timely intervention by the district court, no prosecutorial misconduct was allowed to occur, and I think we ought to just say that and stop there.



Tao

J.

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

