IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ORVILLE SAMUAL CURTIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73729-COA

ORDER OF AFFIRMANCE

Orville Samual Curtis appeals from a judgment of conviction, pursuant to a jury verdict, of unlawful sale of a controlled substance in the presence of a child, unlawful sale of a controlled substance, and conspiracy to sell a controlled substance. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Curtis was arrested after selling heroin to a confidential informant (CI).[1] A jury found Curtis guilty on all counts and the district court sentenced him to concurrent and consecutive prison terms totaling 96 to 240 months in the aggregate. On appeal, Curtis argues that the prosecutor engaged in prejudicial misconduct by soliciting prior criminal history evidence and by making improper comments during closing arguments. We disagree.

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). However, because Curtis failed to object below to the errors he alleges on appeal, we review the misconduct for plain error. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187

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

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(2005). Under a plain error standard, the error will warrant reversal only if the defendant shows that the "error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). The test is whether "the verdict would have been the same in the absence of error." *Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). Thus, whether prosecutorial misconduct warrants reversal will depend on the strength of the evidence against the defendant. *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

Curtis first argues that the prosecutor improperly elicited prior criminal history evidence through the investigating officers' testimonies. The test for determining whether a witness has referred to a defendant's criminal history is "whether 'a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.'" *Cunningham v. State*, 113 Nev. 897, 908, 944 P.2d 261, 268 (1997) (quoting *Manning v. Warden, Nev. State Prison*, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983)). Curtis contends that the jury could infer that he had a prior criminal history from learning that the CI identified Curtis from a booking photograph. He also contends that testimony about the type of arrest the investigators planned to use to apprehend him implicated his criminal history.

The testimony stating that the CI identified Curtis from a booking photograph may have been improper because the statement reveals that Curtis had a prior arrest and implies Curtis had a criminal history. However, Curtis has not shown that the error affected his substantial rights by causing actual prejudice or a miscarriage of justice. Upon review of the record, we conclude that the verdict would have been the same without this

testimony because the statement was fleeting and there was extensive evidence to support the jury's verdict. Therefore, because the alleged error did not prejudice Curtis, it does not constitute plain error.

The testimony regarding the factors the officers considered when deciding how to arrest Curtis was not improper because the jury could just have likely inferred from the testimony either that Curtis had a criminal history *or* that the CI was not to be used in future operations.[2] *See Emmons v. State*, 107 Nev. 53, 59, 807 P.2d 718, 722 (1991) (holding that where a jury could just as likely conclude a statement relates to something other than the defendant's prior criminal history, admission is not improper), *overruled on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000). Because the jury would not have necessarily inferred that Curtis had a prior criminal history, the testimony was not improper. Therefore, there is no error.

Second, Curtis argues the prosecutor committed misconduct during closing arguments by implying that it was improper to discuss a drug deal in front of the child, and by telling a personal story comparing the prosecutor's nephew to the child in the instant case. The statement regarding the child overhearing the drug deal was not improper because selling drugs in the presence of a child was the charged crime and negotiating the deal was part of that crime. *See* NRS 453.3325(1)(b). But the personal story comparing the prosecutor's nephew to the child in the instant case was not proper. *See Earl v. State*, 111 Nev. 1304, 1311, 904

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[2]Nevertheless, the record demonstrates this testimony was not essential to the prosecution's case and was potentially prejudicial. We caution prosecutors to warn law enforcement witnesses not to make statements that a jury could infer as suggesting the defendant has a criminal history.

P.2d 1029, 1033 (1995) (stating a prosecutor has a duty to refrain from injecting his personal beliefs into an argument). Curtis has not shown, however, that the prosecutor's brief story prejudiced him by affecting the outcome of the trial. Because the error did not prejudice Curtis, it did not constitute plain error. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Barry L. Breslow, District Judge
Tanner Law & Strategy Group, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk