

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL RONDELL LAVENDER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67683

**FILED**

APR 20 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of stop required upon signal of police officer. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Michael Rondell Lavender first argues the district court erred in admitting prior bad act evidence regarding one of Lavender's flights from police and his later attempt to flee that resulted in his arrest. Lavender asserts this information was overly prejudicial. We review the district court's decision to admit or exclude evidence of prior bad acts for an abuse of discretion and will not reverse absent manifest error. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

The record reveals the district court conducted a hearing regarding the admission of this evidence. The State sought admission of this information to show that Lavender was aware the police were seeking to arrest him, that he had interactions with these officers prior to the incident at issue in this matter, and for those reasons, he was not mistaken as to who was attempting to stop him during the incident leading to this charge. The district court concluded these encounters were relevant to demonstrate Lavender's "knowledge, intent, motive, and

absence of mistake or accident.” See NRS 48.045(2). The district court further concluded these acts were proven by clear and convincing evidence and that the probative value of this information was not substantially outweighed by the danger of unfair prejudice. We conclude that Lavender has not demonstrated the district court committed manifest error in this regard. See *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012) (describing the test for admission of prior bad acts). Therefore, Lavender is not entitled to relief for this claim.<sup>1</sup>

Second, Lavender argues the district court erred because it did not instruct the jury regarding the limited purpose of prior bad evidence immediately prior to the admission of that evidence at trial. Lavender argues the district court erred by giving the limiting instructions too early and asserts the district court should have waited until the State questioned the witnesses regarding the prior bad acts.

During trial, the district court instructed the jury on the limited purpose of the prior bad act evidence at the beginning of the testimony of the witnesses who would be discussing that evidence. See *Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), *modified in part by Mclellan v. State*, 124 Nev. 263, 268, 182 P.3d 106, 110 (2008). The State then asked a small number of identification questions of those witnesses and then questioned the witnesses regarding Lavender’s prior bad acts of fleeing from the police. Under these circumstances, we

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<sup>1</sup>Lavender also argues this information was not admissible under the res gestae rule. See NRS 48.035(3); *State v. Shade*, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995). A review of the record reveals the district court did not admit this information pursuant to the res gestae rule. Accordingly, Lavender is not entitled to relief for this claim.

conclude there was no error. Therefore, Lavender is not entitled to relief for this claim.

Third, Lavender argues the district court erred by failing to properly advise the jury in the transition instruction that the jury could find him not guilty of misdemeanor stop required upon signal of a police officer. Lavender argues this failure implied the jury had to find him guilty of one of the charges. Lavender did not object to this instruction and thus, no relief is warranted absent a demonstration of plain error. See *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under the plain error standard, we determine “whether there was error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights.” *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks omitted). “A ‘transition’ instruction guides jurors in proceeding from the consideration of a primary charged offense to the consideration of a lesser-included offense.” *Green*, 119 Nev. at 545, 80 P.3d at 95. Here, the jury found Lavender committed the primary offense of felony stop required upon signal of a police officer beyond a reasonable doubt. Because the jury found Lavender was guilty of the primary offense, Lavender does not demonstrate any failure to include further information regarding acquittal for a lesser-included offense amounted to error affecting his substantial rights. Therefore, Lavender is not entitled to relief for this claim.

Fourth, Lavender argues the district court erred by instructing the jury regarding flight. “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). The State sought the flight instruction because of two instances of Lavender’s flight from the police: when he ran away from his vehicle on foot after he failed to stop

upon the signal of an officer and when he attempted to flee as the police moved to arrest him two days later. Lavender asserted the flight instruction was not appropriate because the charge of failure to stop upon signal of police officer necessarily included eluding the officers. The district court concluded the facts demonstrating Lavender's flight were distinct enough from the underlying crime so as to warrant the flight instruction and the record supports the district court's conclusion. See *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005); see also *McGuire v. State*, 86 Nev. 262, 266, 468 P.2d 12, 15 (1970) ("Where there is evidence . . . of flight as a deliberate attempt to avoid apprehension, a flight instruction is proper."). Therefore, Lavender is not entitled to relief for this claim.


Fifth, Lavender argues the State committed prosecutorial misconduct during closing arguments by referring to the incorrect date of a phone call. During trial, the evidence and testimony established officers attempted to arrest Lavender on May 11, 2013, but he successfully fled. Officers then attempted to arrest Lavender on May 15, 2013, and he again successfully fled. One officer testified he gave his business card to a number of people in that area in an attempt to locate Lavender. The officer testified Lavender called later on May 15, 2013, and stated he would turn himself in to the authorities when he was ready to do so. During closing arguments, the State mistakenly asserted the phone call occurred on May 11, 2013. Lavender did not object to these statements, and thus, no relief is warranted absent a demonstration of plain error. See *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).


Arguments of counsel are not evidence and the district court properly so instructed the jury. See *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); see also *Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury


instructions.”). Because the testimony presented at trial established the proper date of the phone call, Lavender fails to demonstrate the State’s misstatements regarding the date of the phone call amounted to error affecting his substantial rights. *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476-77 (explaining the test for prosecutorial misconduct). Therefore, Lavender is not entitled to relief for this claim.

Sixth, Lavender argues cumulative error deprived him of a fair trial. However, because Lavender fails to demonstrate any error, we conclude he was not deprived of a fair trial due to cumulative error.

Having concluded Lavender is not entitled to relief, we  
ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Elissa F. Cadish, District Judge  
Christopher R. Arabia  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk