IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICARDO ALONSO FUENTES, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76293-COA

ORDER OF AFFIRMANCE

Ricardo Alonso Fuentes, Jr. appeals from a judgment of conviction entered pursuant to a jury verdict of two counts of driving under the influence (DUI) of alcohol resulting in death. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

First, Fuentes argues there was insufficient evidence to support the jury's finding of guilt. Fuentes contends the evidence produced at trial did not establish excessive speed was the cause of the accident, the witnesses' testimonies concerning the color of the traffic signal was not reliable, and the evidence regarding Fuentes' blood alcohol level did not satisfy the statutory requirements for proof of DUI. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The jury received evidence that Fuentes was driving over 80 mph in a 45-mph speed zone. Several witnesses testified Fuentes either drove through a red light or the victims' vehicle had the green light at the intersection. Fuentes then drove his vehicle at a high rate of speed into the victims' vehicle, resulting in an accident that caused the victims' deaths.

Witnesses who approached Fuentes shortly after the accident testified he smelled of alcohol and that he acknowledged he had consumed alcohol. An officer testified the horizontal gaze nystagmus test indicated Fuentes was under the influence of alcohol. Medical personnel transported Fuentes to a hospital and a phlebotomist took his blood sample within two hours of when Fuentes drove his vehicle. Later testing revealed Fuentes had a blood alcohol concentration of .132. Given this testimony and evidence, the jury could reasonably find Fuentes committed DUI resulting in two deaths. *See* NRS 484C.110(1); NRS 484C.430(1). While Fuentes contends the eyewitness testimony was not reliable or the evidence was not sufficiently explained to the jury, it is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Therefore, we conclude Fuentes is not entitled to relief based on this claim.

Second, Fuentes argues the district court abused its discretion by permitting a police officer to state his opinion that Fuentes was under the influence of alcohol and unable to safely drive a vehicle. The police officer in question was a DUI enforcement officer and he was permitted to testify as an expert witness concerning his expertise in DUI enforcement and recognition. During trial, the police officer testified that he has training in field sobriety testing and drug recognition, was a certified instructor in field sobriety testing, and conducts training courses at the police academy. He stated he observed Fuentes shortly after the accident and that Fuentes acknowledged he had consumed alcohol. The officer further testified he could smell alcohol on Fuentes and he conducted the horizontal gaze nystagmus test on Fuentes. The district court permitted the officer to testify that, based on his observations, he had the opinion that Fuentes was under the influence of alcohol. The officer further testified that persons

under the influence of alcohol, such as Fuentes at the time of the accident, cannot safely drive a vehicle.

"[T]he admissibility of expert testimony is a matter for the sound discretion of the trial judge." *Townsend v. State*, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987). An expert witness may give an opinion on subjects that embrace the ultimate issue to be decided by the trier of fact so long as it is within his scope of expertise. *Id.* at 118, 734 P.2d at 708; *see also* NRS 50.295 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). However, "[a]n expert may not comment on a witness's veracity or render an opinion on a defendant's guilt or innocence." *Cordova v. State*, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000); *see also Townsend*, 103 Nev. at 119, 734 P.2d at 709 (stating an expert witness may not invade "the prerogative of the jury to make unassisted factual determinations where expert testimony is unnecessary").

Given the police officer's status as an expert witness in DUI enforcement and recognition, his testimony concerning his opinion that Fuentes was intoxicated was proper testimony within the scope of his expertise. And, even if, as Fuentes argues, the officer's opinion that Fuentes was intoxicated and therefore unable to safely drive amounted to an improper opinion on Fuentes' guilt, we conclude any error was harmless beyond a reasonable doubt in light of the strong evidence of Fuentes' guilt. *See Cordova*, 116 Nev. at 669, 6 P.3d at 485; *Townsend*, 103 Nev. at 119, 734 P.2d at 709 (reviewing admission of improper expert witness testimony for harmless error). Therefore, Fuentes is not entitled to relief based on this claim.

Third, Fuentes argues the district court abused its discretion by permitting a criminalist to state his opinion that Fuentes was under the influence of alcohol and unable to safely drive a vehicle. The criminalist

testified he conducted testing on Fuentes' blood sample and Fuentes had a blood alcohol concentration of .132. The criminalist stated an average person would be under the influence of alcohol at that level of alcohol in the blood. The criminalist further testified that an average person with a blood alcohol concentration of .132 would have an impaired ability to perform certain tasks, such as driving.

As stated previously, we review admission of expert testimony for an abuse of discretion. *Id.* at 119, 734 P.2d at 709. An expert witness may give an opinion on issues that embrace the ultimate issue to be decided by the trier of fact so long as it is within his scope of expertise. *Id.* at 118, 734 P.2d at 708. A review of the criminalist's testimony reveals he did not state an opinion that Fuentes was unable to safely drive a vehicle, but rather that an average person with a blood alcohol concentration of .132 would have a diminished ability to safely drive a vehicle. Such testimony was within the scope of the criminalist's expertise and did not render an improper opinion that Fuentes was guilty. *Cf. Cordova*, 116 Nev. at 669, 6 P.3d at 485. Therefore, Fuentes is not entitled to relief based on this claim.

Fourth, Fuentes argues the district court abused its discretion by declining to permit him to pose questions regarding the results of the drug and alcohol testing of the victims. During trial, Fuentes questioned a witness regarding whether there had been any post-accident testing of the victims for the use of drugs and alcohol. He then asked the witness if he was aware of the results of that testing. The State objected to this question. Fuentes explained that he posed the question in an effort to show that the victims were not tested for all possible drugs and the victims may have contributed to the accident. The district court concluded information concerning the testing of the victims was not relevant as to whether Fuentes committed DUI. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." *Archanian v.*

State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). The Nevada Supreme Court has explained that "a criminal defendant can only be exculpated where, due to a superseding cause, he was in no way the proximate cause of the result." *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (internal quotation marks omitted). Because the toxicology results for the victims would not have demonstrated that Fuentes in no way was the proximate cause of the accident, the district court properly concluded such information was not relevant. Therefore, Fuentes is not entitled to relief based on this claim.

Fifth, Fuentes argues the district court abused its discretion by refusing to permit him to argue in closing that the jury should consider that they did not hear what kind of toxicology screening was done on the victims. Because, as noted above, the district court correctly determined the results of the victims' toxicology reports were irrelevant, we conclude the district court did not abuse its discretion by precluding Fuentes from arguing in closing that the jury had heard nothing about what kind of toxicology screening was done on the victims. Therefore, Fuentes is not entitled to relief based on this claim.

Sixth, Fuentes argues the district court erred by refusing to permit him to have access to the victims' cell phone records. Fuentes does not specify where in the record it demonstrates that he requested the victims' cell phone records and was refused them. *See* NRAP 28(e)(1) (stating "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected."). Therefore, we decline to consider this claim.

Seventh, Fuentes appears to assert the district court erred by refusing to permit him to argue in closing that the jury should consider the State's failure to present the victims' cellphone records at trial. During closing argument, Fuentes began to discuss the victims' cellphone records and stated "[d]id you find out that the driver of the overturned vehicle was not on his cellphone?" The State objected and argued that Fuentes should not be permitted to discuss this information as the district court had granted a motion in limine precluding admission of evidence related to the victims' conduct while driving. The district court agreed and sustained the State's objection. Because evidence related to the victims' conduct while driving was not admitted at trial, the district court properly did not permit Fuentes to premise his arguments upon facts not in evidence. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009). Therefore, Fuentes is not entitled to relief based on this claim.

Eighth, Fuentes argues the district court erred by declining to utilize his proposed jury instruction concerning the definition of "driving under the influence." "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). "It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." *Rose v. State*, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007). "[A] defendant is not entitled to misleading, inaccurate, or duplicative jury instructions." *Sanchez-Dominguez v. State*, 130 Nev. 85, 89-90, 318 P.3d 1068, 1072 (2014).

The district court reviewed Fuentes' proposed instruction and concluded it was substantially similar to the instructions submitted by the State, but the State's instructions were more accurate statements of the law. A review of instructions 14 and 15 demonstrate they contain accurate

statements of the law, *see Anderson v. State*, 109 Nev. 1129, 1134 & n.1, 865 P.2d 318, 320 & n.1, 321 (1993) (approving of a jury instruction containing language similar to that utilized in this matter), and the district court properly exercised its duty to ensure not only "that the substance of the defendant's requested instruction [was] provided to the jury, but that the jury [was] otherwise fully and correctly instructed." *Crawford*, 131 Nev. at 755, 121 P.3d at 589. Therefore, Fuentes is not entitled to relief based on this claim.

Ninth, Fuentes argues he is entitled to relief due to cumulative error. Fuentes failed to demonstrate there were multiple errors which could have been cumulated. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000). Therefore, Fuentes is not entitled to relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Martin H. Wiener
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk