

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERNANDO ARTURO VARGAS, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69908

**FILED**

DEC 28 2016

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

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Appellant Fernando Arturo Vargas, Jr. first argues the district court committed plain error by admitting statements of an unavailable witness in violation of Vargas' right of confrontation. Vargas did not object to admission of this testimony, 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). 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 review of the record reveals, during cross-examination of a police officer, defense counsel inquired if the officer had learned that Vargas had thrown a weapon at the victim and the officer responded in the affirmative. During redirect examination, the State asked the officer

who had provided that information and the officer responded that it was the victim's girlfriend.<sup>1</sup> Under these circumstances, Vargas has not demonstrated error because he invited this testimony through his cross-examination. See *Rhyne v. State*, 118 Nev. 1, 9 & n.12, 38 P.3d 163, 168 & n.12 (2002) (a defendant is estopped from raising alleged errors on appeal if he invited those errors in the court below). Accordingly, we conclude no relief is warranted.

Second, Vargas argues the district court erred in concluding out-of-court statements were inadmissible hearsay and not excited utterances. Vargas sought to elicit testimony from a defense witness regarding statements from an incident where the victim allegedly threatened Vargas. "We review a district court's determination of whether proffered evidence fits an exception to the hearsay rule for abuse of discretion." *Fields v. State*, 125 Nev. 785, 795, 220 P.3d 709, 716 (2009). The district court heard testimony regarding the circumstances in which the statements were made and concluded the statements, while made with an aggressive intent, were not made under the stress of a startling event. See NRS 51.095; *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006). We conclude Vargas fails to demonstrate the district court abused its discretion in this regard.

Third, Vargas argues a police officer improperly commented on Vargas' custody status by testifying he arrested Vargas and took Vargas straight to the jail. Vargas did not object to this testimony, and thus, no relief is warranted absent a demonstration of plain error. See *Valdez*, 124

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<sup>1</sup>The victim's girlfriend passed away approximately one month before the trial.

Nev. at 1190, 196 P.3d at 477. We conclude the reference in this case did not affect Vargas' substantial rights because it was brief and it did not reveal his custodial status at the time of the trial. *See Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). Moreover, given the totality of evidence produced at trial indicating Vargas' guilt, we conclude Vargas did not demonstrate admission of this testimony constituted plain error because it did not cause "actual prejudice or a miscarriage of justice." *See id.*

Fourth, Vargas argues the State committed prosecutorial misconduct during closing arguments by discussing and using demonstrative exhibits regarding the unavailable witness' statements. Vargas did not object to this argument, and thus, no relief is warranted absent a demonstration of plain error. *See id.* As discussed previously, the testimony was properly admitted, and therefore, the State properly commented on it during closing arguments. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005). Accordingly, we conclude no relief is warranted.

Fifth, Vargas argues the State committed prosecutorial misconduct during closing arguments by asserting the unavailable witness informed Officer McGuire that Vargas approached the victim in an aggressive manner. Vargas asserts this was improper argument because Officer McGuire did not provide this information during his testimony. The record reveals this information was actually provided by Officer Spurling and the victim. Vargas objected to these comments and the district court instructed the jury that arguments of counsel are not evidence and the jurors should use their independent recollection regarding the admitted testimony. *See Randolph v. State*, 117 Nev. 970,

984, 36 P.3d 424, 433 (2001). Jurors are presumed to follow the district court's instructions, see *Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997), and a review of the record reveals the information at issue was duplicative of testimony provided by Officer Spurling and the victim. Under these circumstances, Vargas does not demonstrate he is entitled to relief due to prosecutorial misconduct. See *Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476.

Sixth, Vargas argues the State committed prosecutorial misconduct during rebuttal argument by disparaging the defense. Vargas argues the State improperly asserted the defense was playing to the jurors' emotions and implied the defense had urged jurors to violate their oath to apply the law to the facts. Vargas also asserts the State disparaged the defense by implying the defense improperly referred to the victim's felony convictions. Vargas did not object to these statements, and thus, no relief is warranted absent a demonstration of plain error. See *id.* at 1190, 196 P.3d at 477.

The prosecutor has a "duty not to ridicule or belittle the defendant or his case." *Barron v. State*, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989). However, we will find no error when a prosecutor's comment during rebuttal is in fair response to an argument made by defense counsel in closing argument. *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000). A review of the closing and rebuttal arguments reveals the challenged comments were merely responses to the defense's closing argument. Therefore, we conclude the State's arguments did not constitute misconduct.

Seventh, Vargas argues the State committed prosecutorial misconduct during closing arguments by vouching for the credibility of the


victim and his mother. Vargas did not object to these statements, and thus, no relief is warranted absent a demonstration of plain error. See *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. “The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness’s veracity.” *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted). However, the State is allowed “reasonable latitude” to argue concerning the credibility of witnesses and may demonstrate through inferences a witness’ testimony is untrue. *Rowland v. State*, 118 Nev. 31, 39 & n.7, 39 P.3d 114, 119 & n.7 (2002).


Here, the State asserted that the victim’s mother had no reason to fabricate her testimony, and we find no error in the State’s assertion in this regard. The State also asserted the victim had testified that he held a knife prior to the attack, and, as a prior felon, the victim possibly opened himself to criminal liability for his testimony regarding his actions. The State then assured the jury for those reasons the victim was credible. Those personal assurances were improper. See *id.* at 39-40, 39 P.3d 119 (explaining prosecutors may not provide an opinion regarding the veracity of a witness). However, the evidence demonstrated Vargas stabbed an unarmed man and Vargas does not demonstrate the State’s comments regarding the veracity of the victim affected his substantial rights. Accordingly, we conclude no relief is warranted.

Eighth, Vargas argues he is entitled to relief due to cumulative error. “Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.”

*Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). We have found a witness improperly commented on Vargas custody status, the State improperly asserted during closing arguments that an unavailable witness informed a police officer Vargas approached the victim in an aggressive manner, and the State improperly vouched for the veracity of the victim. However, we conclude after a review of the record that Vargas' guilt was not close as he stabbed an unarmed man and these errors were not egregious. Under these circumstances, we conclude cumulative error does not warrant reversal. Accordingly, we conclude this claim fails.

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

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

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

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

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