IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID M. FROSTICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71499-COA

ORDER OF AFFIRMANCE

David M. Frostick appeals from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The State charged Frostick with open murder, alleging that he stabbed his girlfriend, Robin Jenkins, to death with a knife.[1] At trial, Robin's father, Victor Jenkins, testified that he spoke with Robin over the phone from his home in California the night she was killed. During that conversation, Jenkins asked if "he"—in reference to Frostick—was there with Robin, and she said "yes." Robin asked Jenkins to stay on the phone, and she then told someone to "drop that." Jenkins claimed that he heard scuffling, Robin screaming, what sounded like a door slamming, and then silence. Jenkins told his son—who was in the next room—what he heard over the phone, and the son called 9-1-1. About half an hour later, a police officer arrived at Robin and Frostick's Las Vegas home, where he saw blood pooling out from under the front door. He broke down the door, encountered Robin's body in a large pool of blood, and saw Frostick peeking out from the kitchen area and holding a knife. The officer ordered Frostick to drop the

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

knife, and after some initial difficulty in getting Frostick to comply, arrested him. Multiple officers who arrived at the scene testified that Frostick smelled of alcohol and that he kept repeating, "I'm sorry."

Ultimately, following trial, the jury found Frostick guilty of first-degree murder with the use of a deadly weapon and sentenced him to life in prison with eligibility for parole after 20 years. The district court imposed an additional consecutive sentence of 8 to 20 years for the use of a deadly weapon. On appeal, Frostick argues that the district court improperly admitted prejudicial hearsay evidence and an unduly prejudicial photograph of Robin's fatal stab wound. He also argues that the district court made multiple errors with respect to jury instructions and that cumulative error warrants reversal.

First, we consider whether the district court improperly admitted prejudicial hearsay evidence. Frostick argues that the district court erred in admitting Robin's answer of "yes" in response to her father's question as to whether "he" was there. Specifically, Frostick argues that the State failed to demonstrate that the statement was a present sense impression constituting an exception to the hearsay rule. He further argues that no evidence was presented showing that Robin knew who her father was referring to or where Frostick was at the time she made the statement. The State counters that the district court properly admitted the statement because Robin made it contemporaneously with the state of affairs she was describing.

This court reviews a district court's decision to admit evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or

immediately thereafter, is not inadmissible under the hearsay rule." NRS 51.085. The rationale for admitting present sense impressions is that they are "more trustworthy [because they are] made *contemporaneously* with the event described." *Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997).

The district court did not abuse its discretion in admitting Robin's statement as a present sense impression. Her statement—that whomever she understood Jenkins to be referring to was present—constituted a present sense impression because she was affirming that the individual was present at the moment Jenkins asked and she responded. *See Lisle v. State*, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997) (concluding that the district court properly admitted an individual's statement over the phone that various other individuals were present), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Moreover, Frostick's arguments that the State failed to show that Robin actually knew of Frostick's whereabouts or that she understood that Jenkins was referring to Frostick are without merit. These points have nothing to do with whether Robin's statement was a present sense impression; instead, they go to whether the individual Robin identified was actually Frostick. In other words, they relate to the weight of the evidence rather than its admissibility as a present sense impression. Jenkins testified that he was referring to Frostick when he asked the question, and there was no evidence presented at trial that called into question whether Robin understood that Jenkins was referring to Frostick. To the contrary, the evidence at trial demonstrated that Robin and Frostick rented a home, no one else lived there, and they were together therein on the night of the murder.

Next, we consider whether the district court improperly admitted an allegedly gruesome photograph of Robin's fatal stab wound. Frostick argues that the photograph was cumulative and unduly prejudicial because it was not necessary to explain Robin's cause of death or the manner of infliction, especially in light of Frostick's decision not to challenge those facts at trial and the testimony of the State's medical witness on the subject. The State argues that the photograph was sufficiently probative for admission.

"[T]he admission of photographs lies within the sound discretion of the district court," and this court will reverse such decisions only when the district court abused that discretion. *Browne*, 113 Nev. at 314, 933 P.2d at 192. Photographs, even if relevant, are inadmissible "if [their] probative value is substantially outweighed by the danger of unfair prejudice." *See* NRS 48.035(1). However, even "gruesome photos will be admitted if they aid in ascertaining the truth," such as when they show the cause of death, the severity of wounds, and the manner of those wounds' infliction. *Browne*, 113 Nev. at 314, 933 P.2d at 192.

As an initial observation, Frostick failed to include a copy of the allegedly prejudicial photograph in the appellate record, thus precluding full review of his claim. *See Leaders v. State*, 92 Nev. 250, 252, 548 P.2d 1374, 1375 (1976) (rejecting appellant's argument that the district court should have granted a mistrial in part because appellant "failed to designate and include the alleged 'gory photograph' in the record"). Based upon the trial testimony surrounding the photograph, it appears that the photo depicted Robin's most severe wound: the one that the forensic pathologist who conducted the autopsy identified as the cause of death and as being caused by a seven or eight-inch blade (like the one recovered from

Robin and Frostick's home). Accordingly, it was relevant and probative as to the cause of Robin's death, the severity of her wounds, and the manner of infliction. The fact that the photograph was supposedly gruesome is not enough by itself to demonstrate an abuse of discretion when its probative value was high. Moreover, the fact that Frostick did not challenge the cause of death or manner of infliction at trial did not relieve the State of its burden to prove its case beyond a reasonable doubt, and the photograph aided the jury in ascertaining whether the State met its burden. *See Hubbard v. State*, 134 Nev. ___, ___, 422 P.3d 1260, 1265 (2018) (noting that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense" (quoting *Estelle v. McGuire*, 502 U.S. 62, 69 (1991))).

Next, we consider whether the district court erred in failing to give the jury Frostick's proposed instructions on voluntary intoxication.[2]

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[2]We reject all of Frostick's other arguments related to jury instructions. With respect to the supposedly confusing instructions the district court gave on malice aforethought and implied malice, the Nevada Supreme Court has previously approved the exact language the district court used in this case. *See Guy v. State*, 108 Nev. 770, 776-77 & n.2, 839 P.2d 578, 582 & n.2 (1992) (approving the use of "heart fatally bent on mischief" to define malice aforethought and "abandoned and malignant heart" to define implied malice). Moreover, Frostick argues only generally that the instructions were confusing, not that the jury was actually confused by them. *See Leonard v. State*, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001) ("Absent some indication that the jury was confused by the malice instructions . . . , a defendant's claim that the instructions were confusing is merely 'speculative.'"). With respect to Frostick's argument that he was entitled to a spoliation instruction based on the language of *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), we note that he fails to argue the point beyond summarily stating that the district court should have given the instruction. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)

Frostick argues that there was sufficient evidence presented at trial that he was under the influence of alcohol to warrant instructing the jury that it may consider voluntary intoxication when determining intent and that intoxication may negate specific intent. The State argues that there was no evidence presented at trial showing any intoxicating effect on Frostick's mental state.

This court reviews a district court's decision whether to give a particular jury instruction "for an abuse of discretion or judicial error." *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). A criminal defendant "is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). "[V]oluntary intoxication may negate specific intent, and an accused is entitled to an instruction to that effect if there is some evidence in support of his defense theory of intoxication." *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985); *see also* NRS 193.220 (stating that "whenever the actual existence of any particular . . . intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in

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(noting that issues not cogently argued or supported by relevant authority "need not be addressed by this court"). We further note that the rule from *Bass-Davis* does not apply in criminal cases; instead, the applicable rule is that "[t]he State's failure to preserve material evidence can lead to dismissal of the charges if the defendant can show bad faith or connivance on the part of the government or that he was prejudiced by the loss of the evidence." *Higgs v. State*, 126 Nev. 1, 20-21, 222 P.3d 648, 660-61 (2010) (internal quotation marks omitted). Frostick fails to argue this standard or even point to any facts demonstrating that the State failed to preserve evidence in such a way that prejudiced him. Thus, we reject his argument.

determining the . . . intent"). However, mere evidence of some consumption of alcohol is not sufficient; there must also be evidence of "the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060; *see also Commonwealth v. Morales*, 965 N.E.2d 177, 194 (Mass. 2012) ("A voluntary intoxication instruction is not required where the evidence does not suggest a condition of 'debilitating intoxication' that could support a reasonable doubt as to whether the defendant was capable of forming the requisite criminal intent." (alteration and internal quotation marks omitted)).

Here, ample evidence at trial demonstrated that Frostick had likely consumed an unknown amount of alcohol at some point during the day of the murder. For example, police officers testified that they smelled alcohol on Frostick's breath as they arrested him and found three bottles of wine or champagne in the home, one of which was empty. However, evidence of consumption alone is not enough to warrant a voluntary intoxication instruction. As the district court noted in denying the proposed instruction, Frostick presented no evidence that he was actually intoxicated during the murder. At best, Frostick cites to trial testimony that described him as having a blank look on his face after the crime, slipping (along with one of the police officers) in the victim's blood while being led away in handcuffs, and being initially unresponsive to the first-responding police officer's commands. But the police officers who apprehended him uniformly testified that he appeared awake and alert; that he did not slur his words and they could understand everything he was saying; that he was capable of standing upright and walking without issue; that he both asked and responded to questions with no difficulty; and that no other indicia of

intoxication that they had been trained to look for were present. Accordingly, the transcript is devoid of evidence suggesting that Frostick was intoxicated at all, much less intoxicated to such a debilitating degree that he was incapable of rational thought. *See People v. Bradney*, 525 N.E.2d 112, 122 (Ill. App. Ct. 1988) (noting that, for voluntary intoxication to negate the existence of a requisite mental state, it "must be so extreme as to suspend all powers of reason"); 23A C.J.S. *Criminal Procedure and Rights of Accused* § 1841 (2016) ("A voluntary intoxication instruction is not required where the evidence does not suggest a condition of debilitating intoxication that could support a reasonable doubt as to whether the defendant was capable of forming the requisite criminal intent.").

Frostick nonetheless argues that a jury could still infer intoxication from various facts, including that he smelled of alcohol. Frostick's argument rests upon the following logical chain: (1) his mental state 30 minutes after the crime accurately reflected his mental state during the commission of the crime; (2) he had imbibed enough alcohol before the crime (as opposed to during the 30 minutes after the crime that it took police officers to arrive at the scene) to become intoxicated during the murder; (3) his conduct after the crime was animated by that excessive alcohol consumption and not another cause (such as extreme guilt over having just stabbed his girlfriend to death); (4) he was not merely intoxicated but intoxicated to the point of debilitation; and (5) because of that intoxication, reasonable doubt exists that he was capable of forming the requisite intent. But this argument conflates mere consumption of some alcohol at some unknown point in time with a debilitating condition of intoxication at a different specific point in time, effectively inviting the jury to engage in speculation that the two must be the same without a proper

basis in evidence. But contrary to Frostick's argument, the Nevada Supreme Court has held that a voluntary intoxication instruction is not warranted where "[the defendant] did not present evidence on the effect that his consumption of [intoxicants] had on his mental state." *See Garner v. State*, 116 Nev. 770, 786, 6 P.3d 1013, 1024 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002).

Even if the district court did err, we note that Frostick freely argued in closing at trial that his possible intoxication undermined the State's theory that he killed Robin with premeditation and deliberation. Accordingly, any error was harmless. *See Dawes v. State*, 110 Nev. 1141, 1147, 881 P.2d 670, 674 (1994) (holding that failure to give a jury instruction was harmless because the defendant's "closing argument would not have been materially different or more effective with the benefit of the . . . instruction"); *see also Starr v. State*, 134 Nev. ___, ___, 433 P.3d 301, 306 (Ct. App. 2018) (noting that the defendant was not "prejudiced by the lack of a jury instruction echoing an argument he otherwise had complete freedom to make").

Finally, we consider Frostick's argument that cumulative error warrants reversal. Even where multiple errors by the district court are harmless individually, the cumulative effect of those errors can violate a criminal defendant's constitutional right to a fair trial. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). However, where the district court did not err or committed only one error and that error was harmless, there is no cumulative error warranting reversal. *Morgan v. State*, 134 Nev. ___, ___ n.1, 416 P.3d 212, 217 n.1 (2018) ("As there are no errors to cumulate, [appellant]'s argument that cumulative error warrants reversal lacks merit."); *Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035

(2016) ("[O]ne error cannot cumulate."). Here, because the district court did not err (or, at most, committed one single error below), we reject Frostick's argument.

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Oronoz & Ericsson, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk