

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEMARIO SUDDUTH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77188-COA

FILED

OCT 31 2019

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

ORDER OF AFFIRMANCE

Demario Sudduth appeals from a judgment of conviction, pursuant to a jury verdict, of 33 counts of discharging a firearm at or into an occupied structure, vehicle, aircraft, or watercraft and 3 counts of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Sudduth was involved in an ongoing dispute with several individuals which culminated in Sudduth discharging a firearm into multiple homes.¹ Following a police investigation, Sudduth emerged as the primary suspect, and he was arrested shortly thereafter. During a custodial interrogation, Sudduth voluntarily confessed to discharging a weapon at or into homes on several occasions because of the dispute, and the State charged him with 35 counts of discharging a firearm at or into an occupied structure, vehicle, aircraft, or watercraft; 3 counts of attempted murder with use of deadly weapon; assault with a deadly weapon; and breaking, injuring, or tampering with a motor vehicle. At trial, the State proffered various pieces of evidence, including Sudduth's confession, testimony linking him to the dispute, shell casings from a .380 handgun that were found at each crime scene, and that Sudduth was in possession of .380 handgun when he was

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

arrested. After a six-day trial, the jury returned a guilty verdict on 33 of the 35 counts of discharging a firearm at or into an occupied structure, vehicle, aircraft, or watercraft and 3 counts of attempted murder with the use of a deadly weapon. The district court sentenced Sudduth to serve concurrent and consecutive prison terms totaling 152 to 444 months in the aggregate.

On appeal, Sudduth argues that (1) the State committed reversible error when the prosecutor referenced his confession before it had been admitted into evidence; (2) the State articulated the incorrect legal standard for discharging a firearm at or into an occupied structure or vehicle during its closing argument; and (3) there was insufficient evidence to support his convictions. We disagree.

Sudduth first argues that the State committed reversible error when, during Idris Thomas' direct-examination, the prosecutor referenced a statement from Sudduth's confession, which had not yet been admitted into evidence.² Specifically, the prosecutor asked Thomas, "Do you know Demario Sudduth?" When Thomas answered "I know of him[, but] I don't know him personally," the prosecutor, alluding to a statement in Sudduth's confession, responded, "then why would [Sudduth] say that he was shooting and trying to scare [Idris Thomas]?" Sudduth objected, and the district court sustained the objection, instructing the jury to disregard the question and Thomas' answer.³ Sudduth, however, did not move to strike or for a mistrial, or request a curative instruction.⁴

²The prosecutor did not, however, reference the origin of the statement, i.e., the confession itself.

³Thomas answered, "I don't know," before the objection was sustained.

⁴As a general rule, "even if the defendant objects to prosecutorial misconduct, the failure to move to strike, move for a mistrial, assign

In reviewing claims of prosecutorial misconduct, this court must decide whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Nonetheless, "[we] will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Id.* A nonconstitutional error warrants reversal "only if the error substantially affects the jury's verdict." *Id.* at 1189, 196 P.3d at 476.

We conclude that reversal is not warranted here because the prosecutor's premature reference to a statement contained in Sudduth's confession was harmless. Even if the State erroneously referenced Sudduth's statement, thereby indirectly alluding to the confession before it was admitted into evidence, the district court sustained the objection. Moreover, Sudduth cannot establish prejudice because his confession was subsequently published and admitted into evidence, including the statement the prosecution may have prematurely referenced. Since the jurors were ultimately permitted to consider the objected-to material, the State's untimely reference to the confession could not have substantially influenced the jury's verdict. Therefore, we conclude that any premature reference to the statement contained in Sudduth's confession was harmless, if there was any error.

misconduct or request an instruction, will preclude appellate consideration [of prosecutorial misconduct]." *Id.* at 1190 n.44, 196 P.3d at 477 n.44 (alteration in original) (quoting *Clark v. State*, 89 Nev. 392, 393, 513 P.2d 1224, 1224-25 (1973) (collecting cases)). Here, Sudduth timely objected to the prosecutor's inquiry, claiming it was either hearsay or it assumed facts not in evidence, but he did not move the district court to take further action (e.g., move to strike or for a mistrial). But because the district court issued an admonition sua sponte, this claim appears to have been preserved for appellate review. *See id.*

Sudduth next contends that during its closing argument the State articulated the incorrect legal standard for discharging a firearm at or into a structure or vehicle pursuant to NRS 202.285(1)(b). Specifically, Sudduth argues that “the prosecutor alleged that counting the bullet casings or shells in fact satisfied the mens rea requirement” under the statute. Because Sudduth did not object below, he has waived all but plain error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (“[A]ll unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension.”).

“[T]he decision whether to correct a forfeited error is discretionary.” *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49, *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018). “Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant’s substantial rights.” *Id.* at 50, 412 P.3d at 48. “[A] plain error affects a defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome).” *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted). After reviewing the record, we conclude that Sudduth has failed to meet his burden under *Jeremias*.

Sudduth’s claim that “the prosecutor alleged that counting the bullet casings or shells in fact satisfied the mens rea requirement” is not supported by the record. For example, during the State’s closing argument, the prosecutor used language that was on the whole consistent with NRS 202.285(1)(b). Further, the prosecutor also made no direct attempt, as Sudduth asserts, to negate the mens rea component. Indeed, the prosecutor addressed the statute’s required mental state, providing the jury with a generally accurate explanation thereof. Moreover, even when a prosecutor

does misstate the law, that misstatement is ordinarily rectified by a jury instruction that accurately states the relevant law. *See, e.g., Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) (finding no prejudice where the prosecutor misstated the standard of reasonable doubt because “the jury instruction correctly defined reasonable doubt”); *see also Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (explaining that it is generally presumed “that jurors follow jury instructions”). Here, the prosecutor’s explanation of the law was reinforced by jury instructions, which were accurate. Thus, we conclude that Sudduth has failed to establish any error, plain or otherwise.

Finally, Sudduth advances several arguments that the evidence adduced at trial was insufficient to support his convictions. We disagree and conclude that these contentions are neither cogently argued nor supported by relevant legal authority. *See, e.g., Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). Moreover, the State presented substantial evidence during its case-in-chief, including Sudduth’s voluntary confession.⁵

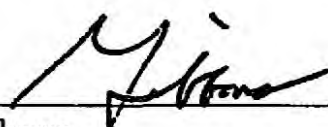
⁵On appeal, Sudduth contends that his confession “was obtained by a ruse.” At trial, however, Sudduth failed to object when his confession was admitted into evidence. Moreover, his counsel affirmatively stated, “[n]o objection” when the confession was published for the jury. Accordingly, Sudduth has not preserved this issue for appellate review and therefore only plain-error review is available. *Martinorellan*, 131 Nev. at 48, 343 P.3d at 593. Nevertheless, a casual inspection of the record reveals no defects affecting Sudduth’s substantial rights. The record reveals that detectives Mirandized Sudduth; that he acknowledged and understood his rights; and that the confession was not the product of coercion. Therefore, we conclude the confession was voluntary as there is nothing in the record indicating that Sudduth’s will was overborne. *Passama v. State*, 103 Nev. 212, 214, 735 P.2d

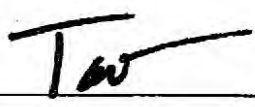
See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (holding that “a verdict supported by substantial evidence will not be disturbed by [this court]”).


In addition to Sudduth’s confession, the State produced ample circumstantial evidence linking Sudduth to the crimes for which he was convicted, including Thomas’ testimony confirming an ongoing feud amongst Sudduth and others connected to the shootings, the recovery of .380 shell casings from all of the crime scenes, and the discovery of a large-capacity .380 handgun where Sudduth was arrested. *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (“[C]ircumstantial evidence alone may sustain a conviction.”). Therefore, we hold that Sudduth’s conviction was supported by substantial evidence and “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

321, 323 (1987) (“The question in each case is whether the defendant’s will was overborne when he confessed.”).

cc: Hon. Michelle Leavitt, District Judge
Kenneth G. Frizzell, III
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Clark County District Attorney
Eighth District Court Clerk