IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS LAMAR COTTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77994-COA

FILED

APR 23 2020

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

ORDER OF AFFIRMANCE

Thomas Lamar Cotton appeals, pursuant to NRAP 4(c), from a judgment of conviction for assault with a deadly weapon. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

When Detective Danny Hawkins was working an undercover operation canvassing a housing complex, he encountered Cotton.[1] Cotton began to question Hawkins, inquiring about his presence in the neighborhood. After a brief exchange, Cotton started to advance towards Hawkins, and Hawkins saw a gun in Cotton's right hand. After informing Cotton that he was a police officer, Hawkins drew his own gun and fired two shots, wounding Cotton in the buttocks. Cotton was immediately arrested and charged with assault with a deadly weapon. During a search incident to arrest, officers found two knives and drug paraphernalia on Cotton's person.

At trial, Cotton argued that any testimony stating that the knives were on Cotton's person was inadmissible because the knives were irrelevant and more prejudicial than probative. Cotton also argued that the State's references to the uncharged act of attempted robbery were improper, and that the court should instruct the jury on his proposed definitions of:

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

assault, reasonable doubt, mere menace, and two reasonable interpretations. The court denied all of these motions and arguments, and the jury found Cotton guilty.

On appeal, Cotton argues the district court abused its discretion by: (1) allowing the State to introduce evidence that Cotton was armed with knives during the crime; (2) permitting the State to reference an uncharged act and failing to give a limiting instruction; and (3) rejecting Cotton's proposed jury instructions. Cotton also argues the prosecution committed reversible misconduct by vouching for witness credibility. Finally, Cotton argues that these errors, when taken in the aggregate, amount to cumulative error that warrants reversal.

First, we consider whether the district court erred by allowing the State to introduce testimonial evidence that Cotton had knives in his possession during the crime. Cotton argues that because Hawkins did not see the knives until Cotton's arrest, any mention of their existence was irrelevant to the story of the crime, failed to prove Cotton's intent for assault, and was unduly prejudicial. The State contends that the knives' probative value was not substantially outweighed by the danger of unfair prejudice because it helped prove Cotton's state of mind for the crime charged.[2]

We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "An abuse of discretion occurs if the district court's decision is

---

[2]On appeal, the State only argues that the evidence was admissible to prove intent, however, before the district court the State argued admissibility based on intent and the doctrine of *res gestae*. "The failure to specifically object on the grounds urged on appeal precludes appellate consideration on the grounds not raised below." *Pantano v. State*, 122 Nev. 782, 795 n.28, 138 P.3d 477, 486 n.28 (2006).

arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). A district court's nonconstitutional error in admitting evidence is reviewed under a harmless error standard. *See Tavares v. State*, 117 Nev. 725, 731-32, 30 P.3d 1128, 1132 (2001), *modified in part by Mclellan*, 124 Nev. at 270, 182 P.3d at 110. A nonconstitutional error is harmless unless it had a substantial and injurious effect or influence on the jury's verdict. *Tavares*, 117 Nev. at 732, 30 P.3d at 1132; *see also Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008).

Here, the district court limited the evidence's introduction. The prosecution was only permitted to have a witness testify regarding the knives' presence on Cotton during his arrest along with references to other things that were found on Cotton. This limitation makes the effect of the evidence much less prejudicial. Nonetheless, we still conclude that the admission of the testimony of the knives was improper to either prove Cotton's intent or to tell the entirety of the story. While intent is a necessary element of assault, NRS 200.471(1)(a)(2) specifically states that the prosecutor must show a defendant "[i]ntentionally plac[ed] another person in reasonable apprehension of immediate bodily harm."[3] Because Hawkins never saw the knives during the crime, evidence of Cotton's possession of the knives reasonably could not be used to prove that Cotton intended to place Hawkins in reasonable apprehension with them.

Additionally, the record does not show that a description of the knives was necessary to tell the entirety of the story as they were not

[3]NRS 200.471 was amended effective January 1, 2020. However, the amendments do not affect the issues on appeal.

discovered until after Cotton's arrest. *See Sutton v. State*, 114 Nev. 1327, 1331 & n.2, 972 P.2d 334, 336 & n.2 (1998) (recognizing that evidence of uncharged acts to tell the complete story of the crime is only admissible if a witness "cannot describe the crime charged without referring to related uncharged acts" (quoting NRS 48.035(3))). Thus, it was an abuse of discretion to admit the evidence. However, we conclude that the district court's error was harmless and Cotton has not shown that it had a substantial and injurious effect on the jury due to the brief testimony about this evidence and the fact that the knives themselves were not ever seen by the jury. Furthermore, there was other substantial evidence that supports the jury's verdict.

Next, Cotton argues that the district court improperly admitted references to the uncharged act of attempted robbery and that the court's failure to give a limiting instruction constituted an abuse of discretion. Under NRS 48.035(3) (the *res gestae* statute), a prosecutor is sometimes permitted to introduce evidence of an uncharged act to present the "complete story" of the crime. *Tabish v. State*, 119 Nev. 293, 307, 72 P.3d 584, 593 (2003). Admissibility is narrow and based on "whether witnesses can describe the crime charged without referring to related uncharged acts." *Sutton*, 114 Nev. at 1331, 972 P.2d at 336 (quoting *Allan v. State*, 92 Nev. 318, 321, 549 P.2d 1402, 1404 (1976)); *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 698-99, 405 P.3d 114, 119-20 (2007). If admitted, a defendant may request that the court give a cautionary instruction to the jury. NRS 48.035(3).

As an initial matter, while Cotton did object to the State's use of the uncharged act during closing argument, he failed to object during

Hawkins' testimony on the specific grounds proffered on appeal. Thus, we may only review that testimony for plain error. "[T]he decision whether to correct a forfeited error is discretionary." *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018), *cert denied*, ___ U.S. ___, 139 S. Ct. 415, 202 L.Ed. 2d 320 (2018). "Before [the] 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 the 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.

We conclude that even if there was error, it was not plain. Hawkins testified that he feared that Cotton would rob him during the incident in question. Hawkins' fear of being attacked is an essential element of the crime charged, and therefore it was admissible. Further, the testimony had nothing to do with the doctrine of *res gestae* because Hawkins did not accuse Cotton of committing another uncharged robbery. Rather, Hawkins' testimony related to his state of mind during the crime charged. The prosecutor also never accused Cotton of intending to commit robbery during closing argument, but only reinforced Hawkins' testimony regarding his perception of the crime at issue, namely his fear of harm. The argument thus constituted permissible argument based on the facts in evidence. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("[T]he prosecutor may argue inferences from the evidence and offer conclusions on contested issues." (internal quotation marks omitted)). The record demonstrates that the district court even instructed the jury to consider the prosecutor's

statements as pure argument. Moreover, Cotton also failed to show that this statement alone affected his substantial rights.

Next, we consider whether the district court erred in declining to give several of Cotton's proposed jury instructions, including his proposed definition of assault (the lesser-included charge). The district court "has broad discretion to settle jury instructions," and this court reviews the district court's "decision to give [or decline to give] a particular instruction for an abuse of discretion or judicial error." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "[A] defendant is entitled to a jury instruction on his or her theory of the case as long as there is some evidence to support it . . . ." *Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 654-55, 404 P.3d 761, 765 (2017). Although district courts must provide these instructions, "the defendant is [not] entitled to instructions that are misleading, inaccurate, or duplicitous." *Crawford*, 121 Nev. at 754, 121 P.3d at 589. The district court also has discretion to "refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions." *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

The district court rejected Cotton's proposed assault definition because it did not conform to the statutory definition provided in NRS 200.471, but instead included language from the statute's previous version. We conclude that this was not error because the proposed instruction was a misstatement of the law. Cotton also argues that the district court refused to give an instruction on the lesser-included offense of assault. However, the district court did in fact give an instruction which included the elements of assault when it defined the crime of assault with a deadly weapon in jury instruction 10. The district court further gave the inverse definition in jury

instruction 11 and provided a verdict form with the lesser included offense. Therefore, even though the district court did not specifically instruct the jury on the lesser included offense, we conclude there was not an abuse of discretion or judicial error requiring reversal.

Cotton also argues that the district court erred by failing to give an instruction regarding "mere menace," but fails to explain why it was necessary when it did not fit the defense he asserted. Under the doctrine of "mere menace," the crime of assault does not occur when a victim merely feels "menace" when the defendant made no effort to trigger that feeling other than being present at the scene. *See Anstedt v. State*, 89 Nev. 163, 165, 509 P.2d 968, 969 (1973); *Wilkerson v. State*, 87 Nev. 123, 126, 482 P.2d 314, 316 (1971). But here, Cotton did not assert that he did nothing to trigger any reaction in Hawkins. Rather, he focused his cross-examination of Hawkins on disputing whether he drew a gun and pointed it directly at Hawkins, or instead drew a gun and simply held it down at his side. Either way, the "mere menace" instruction was not an accurate statement of the law under these facts, and therefore, the district court did not abuse its discretion in refusing to give it. After a careful review of the record, we also conclude that the district court's decision to reject Cotton's other proposed jury instructions was not an abuse of discretion or error of law because the additional proposed instructions were either a misstatement of the law or were already substantially covered by other instructions.

Next, Cotton alleges that the State engaged in prosecutorial misconduct by vouching for the credibility of a witness. However, we conclude that the alleged improper statements do not meet the standard for witness vouching because the prosecutor was arguing in rebuttal facts argued by Cotton and thus they were not improper. *See Browning v. State*,

120 Nev. 347, 359, 91 P.3d 39, 48 (2004) ("[V]ouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness's veracity." (internal quotation marks omitted)).

Finally, we consider whether cumulative error warrants granting a new trial. Cumulative error applies where individually harmless errors, viewed collectively, nevertheless violate the defendant's right to a fair trial and therefore warrant reversal. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481. In reviewing claims of cumulative error, we consider "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (internal quotation marks omitted). Here, Cotton was convicted of assault with a deadly weapon, a serious crime, and the issue of guilt was not close. Namely, Hawkins personally described the encounter which the jury believed, and Cotton was shot by Hawkins and arrested at the scene of the crime with the gun still in his possession. Further, we determine that the district court's one clear error—allowing the State to introduce evidence of the knives found on Cotton during his arrest—was harmless. Thus, we conclude there was no cumulative error warranting reversal.

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Nevada Appeal Group, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk