

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN JOSEPH RUSSO, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79740-COA

**FILED**

JUN 23 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

John Joseph Russo, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of battery with substantial bodily harm. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On the afternoon of January 22, 2019, Mike Alrock was working at Diamond Inn Motel, when suddenly Russo and his companion Amanda Stamper entered the lobby and demanded a forty-dollar refund.<sup>1</sup> According to Russo, he and Stamper had recently rented a room at the motel but believed they had overpaid by forty dollars. Because Alrock could not verify that Russo and Stamper had overpaid, he refused to issue a refund. At that point, the situation began to escalate and Alrock called the police. As Alrock was calling the police, Russo punched him in the face and continued to attack Alrock as he fell to the ground, which caused Alrock to black out. When Alrock recovered consciousness, Russo was still attacking him and demanding money. At some point prior to the police arriving, Russo took three deposit envelopes containing approximately \$800 and fled the scene along with Stamper. Two days later, on January 24, Russo and Stamper returned to the motel and allegedly demanded a forty-dollar refund. Because Russo was apparently armed with a knife, the motel clerk called 9-

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

1-1 and Las Vegas Metropolitan Police Department (LVMPD) officers were dispatched to the motel, where they arrested Russo and Stamper. Detectives recovered surveillance video depicting the motel lobby, which captured both the January 22 and January 24 incidents.

The State charged Russo via criminal complaint with conspiracy to commit robbery, burglary, robbery, battery with substantial bodily harm, burglary while in possession of a deadly weapon, and attempted robbery with use of a deadly weapon. The first four counts were related to the January 22 incident, whereas the last two counts were related to the January 24 incident. After a preliminary hearing, Russo's case was bound over to district court, and the State filed an information, which, in essence, dismissed the counts associated with the January 24 event (i.e., burglary while in possession of a deadly weapon, and attempted robbery with use of a deadly weapon). The information charged Russo with conspiracy to commit robbery, burglary, robbery, and battery with substantial bodily harm.

Prior to trial, Russo filed a motion to exclude the surveillance video obtained from the Diamond Inn Motel. The district court denied the motion. At trial, the State presented, among other things, testimony from Alock, Detective Christopher Rivera (the lead detective), and Officer Mitchell Neddo (the responding officer), as well as the surveillance video depicting the motel lobby. After a three-day trial, the jury returned a guilty verdict on the charge of battery with substantial bodily harm, and the district court imposed a sentence of 24 to 60 months in prison with 237 days' credit for time served. This appeal followed.

On appeal, Russo argues that (1) the State committed prosecutorial misconduct when it moved to admit evidence that the parties

allegedly agreed would not be admitted; (2) the district court erred when it permitted admission of video evidence, where the evidence was incomplete pursuant to NRS 47.120(1) and without a proper showing of chain of custody or foundation; and (3) there was insufficient evidence to support his conviction for battery with substantial bodily harm.<sup>2</sup> We disagree.

First, Russo argues that the State committed prosecutorial misconduct when the prosecutor “threatened” to admit video evidence related to the January 24 charges against Russo even though the State had dismissed those charges after the preliminary hearing (i.e., allegedly uncharged bad acts). Specifically, Russo contends that this was misconduct because the prosecutor had assured him that the State would not attempt to admit such evidence at trial.

Assessing claims of prosecutorial misconduct involves a two-step process that requires the reviewing court to determine, first, whether the prosecutor’s conduct was improper and, if so, next determine whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). “If the error is of constitutional dimension, then [the reviewing court] . . . will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict.” *Id.* at 1189, 196 P.3d at 476. “If the error is not of constitutional dimension, [the

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<sup>2</sup>Russo also argues that the State filed an overly broad notice of expert witnesses in violation of NRS 174.234(2). Because the State dismissed the charges requiring expert testimony prior to trial, and because none of the expert witnesses named in the notice actually testified, we conclude the error, if any, was harmless and therefore does not provide a basis for reversal. See NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

reviewing court] will reverse only if the error substantially affects the jury's verdict."<sup>3</sup> *Id.*

Having reviewed the record, we conclude that there is no evidence of prosecutorial misconduct. The record clearly demonstrates that the prosecution did not move to admit the January 24 surveillance video containing the uncharged bad act evidence until after Russo's counsel had referenced the video in her opening statement. Moreover, the colloquy with the district court regarding the uncharged bad act evidence occurred outside the presence of the jury. Based on this, it does not appear that the prosecutor was acting with an improper motive, such as attempting to persuade the jury to wrongly convict Russo. *See Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (explaining that "[t]he relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"); *see also* 75 Am. Jur. 2d *Trial* § 406 (2020) (citing *St. Clair v. Commonwealth*, 451 S.W.3d 597 (Ky. 2014) (defining prosecutorial misconduct "as a prosecutor's improper or illegal act involving an attempt to persuade the jury to wrongly convict a defendant or assess an unjustified punishment") (internal quotation marks omitted)).

Furthermore, it is not inherently improper for a prosecutor to argue that uncharged bad acts are relevant to a case and therefore admissible evidence. *See* NRS 48.045(2) (providing that evidence of other bad acts is admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). This is especially true where, as mentioned, the conversation between the

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<sup>3</sup>In his opening brief, Russo concedes that his claim is not of a constitutional dimension.



prosecutor and the court occurred outside the jury's presence and therefore had no effect on the jury, and the edited recording was ultimately admitted without objection. Accordingly, we conclude that the prosecutor did not engage in misconduct.<sup>4</sup>

Next, Russo argues that the district court erred when it denied his motion to exclude the January 22 surveillance video because the State failed to adequately establish the video's chain of custody; moreover, Russo contends, since the video was incomplete, it was inadmissible pursuant to NRS 47.120(1).

According to the district court's minutes, the judge determined during a pre-trial hearing that "if [a] foundation can be laid, [the January 22 video] would come in." Later, however, during trial but outside the jury's presence, Russo's attorney stipulated to admitting State's Exhibit 8 ("[t]he video surveillance of the [January 22] incident"). Because Russo stipulated to the admission of the January 22 surveillance video, he has waived this issue on appeal. *See, e.g., United States v. Molina*, 596 F.3d 1166, 1169 (9th Cir. 2010) ("A defendant who has stipulated to the admission of evidence cannot later complain about its admissibility unless he can show that the stipulation was involuntary." (internal quotation marks omitted)); *cf. Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (providing that a party cannot "complain on appeal of errors which he himself induced

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<sup>4</sup>Assuming *arguendo* that the prosecutor did commit misconduct, reversal would still be unwarranted because the question of guilt in this case was not close, as a surveillance camera captured Russo battering Alrock and Alrock testified to the same. *Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) ("The level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt.").

or provoked the court or the opposite party to commit” (internal quotation marks omitted)). Additionally, adequate foundation and chain of custody were established.

Finally, Russo argues that there was insufficient evidence to convict him of battery with substantial bodily harm. Although Russo concedes that a battery occurred, he contends that the evidence was insufficient to support a finding of substantial bodily harm pursuant to NRS 0.060.

When reviewing the sufficiency of the evidence, this court must decide “whether, after viewing the evidence in the light most favorable to the prosecution, *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); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). It is the jury’s role, not the reviewing court, “to assess the weight of the evidence and determine the credibility of witnesses.” *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, “a verdict supported by substantial evidence will not be disturbed by [this] court.” *Id.* Moreover, “circumstantial evidence alone may support a conviction,” *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002), and eyewitness testimony by itself is sufficient to convict if the witness’s testimony establishes all the elements of the crime beyond a reasonable doubt, *Gaxiola*, 121 Nev. at 650, 119 P.3d at 1233.

Substantial bodily harm is defined as either: “Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ”; or “[p]rolonged physical pain.” NRS 0.060(1), (2). At trial, Alrock testified that Russo hit him multiple times,

that he fell to the ground, and blacked out. Alrock testified further that he went to the hospital, and that after a CT scan he was diagnosed with an acute fracture and contusions. Additionally, the prosecutor asked Alrock "how long were you in pain after the incident?" Alrock replied, "Believe me until now. . . . This one [pointing to his left cheek] . . . I put ice on it every night." In other words, Alrock testified that he was still suffering from discomfort and pain months after the battery occurred, which is evidence of prolonged physical pain.

Alrock's testimony was also corroborated by the testimony of responding LVMPD officer, Mitchell Neddo. Specifically, Officer Neddo testified that when he arrived at the Diamond Inn Motel, Alrock had injuries on the left side of his face and "the cheek area just below the eye," that the injuries appeared to be fresh, and that Alrock "seemed like he was in a lot of pain." Furthermore, the jury watched the January 22 surveillance video that showed Russo battering Alrock. Therefore, we conclude that any rational trier of fact could have found beyond a reasonable doubt that the battery resulted in substantial bodily harm. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



Gibbons

, C.J.



Tao

, J.



Bulla

, J.

cc: Hon. Michelle Leavitt, District Judge  
Law Office of Betsy Allen  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk