

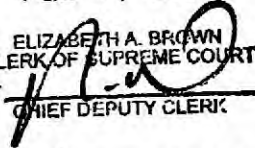
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR PADILLA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79378-COA

**FILED**

FEB 17 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Oscar Padilla appeals from a judgment of conviction, pursuant to a jury verdict, of child abuse, neglect, or endangerment resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.<sup>1</sup>

Padilla lived at his parents' home with his mother and father, Alma Gonzalez and Jorge Padilla; his brother, Diego Padilla; his girlfriend, Iridian Ramirez; and Ramirez's children, who were four and one years of age at the time.<sup>2</sup> The home was small; Padilla's parents shared a bedroom, Diego had his own room, and Padilla and Ramirez slept on the couch in the living room. The children also slept in the living room: the older child slept on a couch, and the one-year-old slept in a playpen with pillows and a blanket.

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<sup>1</sup>The Honorable Cristina D. Silva rendered Padilla's sentence and entered the judgment of conviction. The Honorable Douglas E. Smith presided over the trial.

<sup>2</sup>We recount the facts only as necessary for our disposition. We note that Padilla and Iridian Ramirez were charged together with the same crime but the district court granted a motion to sever defendants and only Padilla's case proceeded to trial.

One morning, all members at the Padilla residence were at home. Gonzalez got up early in the morning to unpack boxes on the front porch. Everyone else in the home was asleep. The older child awoke and went outside with Gonzalez. About an hour later, Gonzalez heard the one-year-old child start to cry inside the house. She went inside, made the child a bottle, and put the child back in the playpen to sleep. The child was not behaving abnormally at this time.<sup>3</sup> Gonzalez returned to the front of the house and resumed unpacking. Jorge and Diego woke up shortly thereafter and went to the front of the house to help Gonzalez.

A few hours later, Ramirez awoke. Ramirez went to the entryway of the front door, which had been open all morning, to ask Gonzalez if the one-year-old child had woken up because it was unusual for the child to sleep so late. Gonzalez said she gave the child a bottle and put the child back in the playpen to sleep. Ramirez went back inside. Diego went to the side of the house and could hear Padilla and Ramirez arguing.

About a half hour later, Padilla emerged from inside of the house and told everyone in the front of the house that he and Ramirez could not wake the one-year-old child. Gonzalez rushed inside and saw Ramirez holding the child, who appeared lifeless. Ramirez and Padilla attempted to resuscitate the child to no avail.

Members of the extended family brought the one-year-old child to the hospital. Doctors intubated the child due to lack of breathing and diagnosed the child with a subdural hematoma, or bleeding into the child's

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<sup>3</sup>Three days prior, the one-year-old child was at a fast food restaurant and fell approximately two feet from the play equipment onto padded flooring. The child sustained a noticeable bump on the upper-left part of the head. The child exhibited no symptoms of any head trauma and behaved normally in the days leading up to the date in question.

brain, caused by multiple fractures to the skull. The treating doctors concluded that the injury was nonaccidental and had to have been intentionally inflicted by some type of blunt-force trauma.

Given the child's condition at the time and the fact that the child behaved normally up to that morning, doctors further concluded that the injury to the child's head must have occurred between six and eight hours before the child arrived at the hospital, or sometime that morning.<sup>4</sup> This timeframe would very likely have begun no earlier than the time that Gonzalez gave the child a bottle. Gonzalez, Jorge, and Diego all agreed that the one-year-old child behaved normally until that morning, including moving, eating, and speaking normally for a child of that age, and the child had not been vomiting and had not appeared to be in any sort of pain or discomfort.

Due to the nonaccidental nature of the child's injuries, hospital staff contacted the police. Officers from the Las Vegas Metropolitan Police Department (LVMPD) were dispatched to the hospital. Once Padilla and Ramirez noticed a police presence at the hospital, Padilla and Ramirez sent each other text messages. Padilla told Ramirez to pretend that she could not speak English. This correspondence was written in cohesive English prose. There was other activity on Padilla's phone that indicated he was awake shortly after Gonzalez gave the child a bottle and put him back to

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<sup>4</sup>Doctors noted that the bump on the child's head from the previous fall at the fast food restaurant was in a different location than the skull fractures and brain bleeding. Additionally, because there was no change in the child's behavior up to this point, including being tired or having difficulties in waking up, which usually occurs shortly after a head injury is inflicted, the doctors ruled out the child's previous fall as the cause of the injuries.

sleep. Padilla told one of the responding officers that he woke up before Ramirez.

Police arrested Padilla and Ramirez for child abuse. The State charged them together with child abuse, neglect, or endangerment resulting in substantial bodily harm. The State alleged alternative theories of principal liability under NRS 195.020. Both Padilla and Ramirez remained in custody at the Clark County Detention Center.

While in custody, Padilla kept in contact with Gonzalez, who relayed messages between Padilla and Ramirez. During her trial testimony, the State questioned Gonzalez on how she facilitated communication between Padilla and Ramirez. She stated she would speak with both of them telephonically and deliver messages and letters back and forth. Laura Chavez, a girlfriend of Padilla's best friend, testified at trial as a character witness for Padilla. She stated that she would also pass messages between Padilla and Ramirez through the same mediums. Upon completion of Chavez's examination, a juror posed a question in writing that asked why Chavez had to pass letters between Padilla and Ramirez. The juror was apparently confused as to why Padilla and Ramirez did not speak face-to-face, which could not happen because both were in custody. However, after consulting the parties' attorneys, the district court refused to read the question to Chavez aloud or allow it to be addressed in order to avoid the appearance that Padilla was in custody.

The jury was instructed on the various theories of liability, including aiding or abetting, conspiracy, and direct-commission liability. During closing arguments, the State argued that all of the three theories were supported by the evidence. The State principally relied on the testimony of the treating doctors—who testified that the child was injured

shortly after Gonzalez gave the child a bottle—to argue that Padilla was the only person around the child at the time the child sustained the subdural hematoma and skull fracture. Additionally, Padilla’s cell phone activity showed that he was awake at this time and was the only person alone with the child until Ramirez woke up. Conversely, Padilla argued that the child’s previous fall at the fast food restaurant was the cause of his injuries. There was no expert testimony supporting this position. The jury found Padilla guilty as charged and the district court imposed a sentence of imprisonment for 8 to 20 years.

On appeal, Padilla argues that (1) there was insufficient evidence to convict him of child abuse, neglect, or endangerment resulting in substantial bodily harm; (2) the district court improperly admitted evidence of a jail call between Padilla and Ramirez;<sup>5</sup> (3) the district court erred by failing to provide a mere presence jury instruction sua sponte;<sup>6</sup>

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<sup>5</sup>Padilla failed to object to the admission of the jail call notes. In fact, he stipulated to their admission. We thus decline to exercise our discretion and review his claims under the plain-error standard. *See Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018) (“[T]he decision whether to correct a forfeited error is discretionary.”). Furthermore, if there was any error, it was invited because of the stipulation and we also decline to consider it for this reason. *See State v. Gomes*, 112 Nev. 1473, 1480, 930 P.2d 701, 706 (1996) (providing that error in admitting evidence was not reversible where defense invited error); *see also Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (“The doctrine of ‘invited error’ embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit.” (quotation marks omitted)).

<sup>6</sup>Padilla provides no authority in support of his claim that a defendant accused of child abuse, neglect, or endangerment must receive a mere presence instruction without requesting it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider

(4) the district court improperly permitted the State to elicit prejudicial testimony regarding Padilla's custody status; (5) the sentencing judge—who was different than the trial judge—was biased against him and rendered a cruel and unusual sentence;<sup>7</sup> and (6) cumulative error warrants reversal. We disagree.

#### *Sufficiency of the Evidence*

Padilla claims that there was insufficient evidence to convict him under a direct, aiding-or-abetting, or conspiracy theory of criminal liability. Padilla does not dispute that the victim was under 18 years of age and suffered substantial physical and mental harm. See NRS 200.508(1)(a)(2), (4)(d)-(e). Padilla only disputes that he knowingly committed child "abuse or neglect," or aided or conspired with Ramirez. The

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an appellant's argument that is not cogently argued or lacks the support of relevant authority). Additionally, the district court provided a mere knowledge or approval instruction stating that such knowledge is insufficient to establish liability by conspiracy, which partially negates Padilla's argument that "the jury was unaware that just because Oscar was with [Ramirez] when the incident/crime occurred, and continued his relationship with her after, did not mean Oscar was part of the crime."

<sup>7</sup>Padilla's sentence is within the parameters provided by the relevant statutes, see NRS 200.508(1)(a)(2), and Padilla does not allege that this statute is unconstitutional. Additionally, Padilla did not object below that the sentencing judge was biased and cites no authority and develops no argument for how the sentencing judge was biased. See *Maresca*, 103 Nev. at 673, 748 P.2d at 6. Moreover, even if we considered this contention on the merits, we note that the district court did not improperly favor the State's argument over Padilla's; it looked at facts presented at trial to determine an appropriate sentence, which is not an abuse of discretion. See *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) ("[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence."). Thus, these arguments fail.

State counters that there is substantial evidence to support all three of the alternative theories of liability.

We review the sufficiency of the evidence “in the light most favorable to the prosecution,” to see if “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) (emphasis omitted); see also *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). “[I]t is the jury’s function, not that of 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). Circumstantial evidence alone may support a conviction. *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Nevada’s child abuse, neglect, or endangerment statute makes it a felony to willfully cause a child under 18 years of age to suffer, or be placed in a situation where the child may suffer, unjustifiable physical pain or mental suffering because of abuse or neglect. NRS 200.508(1). “Abuse or neglect’ means physical or mental injury of a nonaccidental nature,” among other things. NRS 200.508(4)(a). “Physical injury[.]” as used in this statute, is a term of art that “means . . . [p]ermanent or temporary disfigurement[ ] or [i]mpairment of any bodily function or organ of the body.” NRS 200.508(4)(d). “Substantial mental harm’ means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior.” NRS 200.508(4)(e).

The State may allege alternative theories of principal liability—including directly committing the act, aiding-or-abetting, and conspiracy

theories—and need only prove one theory to sustain a conviction. *Bolden v. State*, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 195 P.3d 315 (2008); *Walker v. State*, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000); *see also United States v. Powell*, 469 U.S. 57, 67 (1984) (explaining that the existence of inconsistent verdicts is not relevant to a sufficiency-of-the-evidence review). “[A] jury need not be unanimous as to a particular theory of culpability for a single offense to sustain a conviction. A unanimous general verdict of guilt will support a conviction so long as there is substantial evidence in support of *one* of the alternate theories of culpability.” *Anderson v. State*, 121 Nev. 511, 515, 118 P.3d 184, 186 (2005) (emphasis added).

Here, with respect to principal liability, the evidence revealed, and Padilla acknowledges on appeal, that he was only one of several other people around the child at the time the crime would have been committed. He argues that this fact, standing alone, proves that he was not the principal actor to this crime. However, Padilla concedes he was around the victim child within a six-to-eight-hour period before the child was discovered unconscious, which is circumstantial evidence that supports the guilty verdict. In fact, he admits that he awoke before Ramirez that morning, so he was the only conscious person around the child when the injury would likely have occurred.

Padilla’s willful intent can also be inferred from the fact that he texted Ramirez at the hospital to feign that neither he nor she could speak English. There was no evidence or any indication as to why Padilla asked Ramirez to do this, and he admits in his opening brief that he did so because the doctors questioned them on how the child sustained these injuries.



Additionally, Padilla's jail call with Ramirez showed some type of attempt to stop her from cooperating with police.

The State called several members of Padilla's family as witnesses. All family members had numerous inconsistencies in their rendition of the facts, such as when Padilla woke up on the morning in question. All assumed he woke up after Ramirez, but activity on his phone showed otherwise. Padilla also told LVMPD that he woke up before Ramirez, so he was the sole person awake with the child because everyone else in the house was outside.

All of the State's evidence presented at trial, taken together, supports a guilty verdict under the direct-perpetrator theory. We do not reweigh the evidence properly before the fact finder, and because all essential elements of child abuse were supported by evidence adduced at trial, we conclude that a rational jury could have found Padilla guilty.

Because there is substantial evidence that Padilla is a direct perpetrator, we need not address the aiding-or-abetting and conspiracy theories of liability under a sufficiency-of-the-evidence review. It is of no legal significance whether the jury thought Padilla directly committed the act, aided or abetted, or was a conspirator to the crime, because a unanimous general guilty verdict will be upheld when there is sufficient evidence to support one of the three theories of criminal liability. Nevertheless, we note that the alternative theories were also supported by the totality of the evidence presented at trial. Therefore, we conclude that sufficient evidence supports Padilla's conviction of child abuse, neglect, or endangerment resulting in substantial bodily harm.

#### *Alleged Impermissible Jury Inference*

Padilla claims that the district court created an inference in the minds of the jurors that he was in custody when it permitted the State to

elicit testimony from Gonzalez and Chavez concerning relaying messages between him and Ramirez. He argues this under a plain error theory, as he makes this argument for the first time on appeal.<sup>8</sup> The State counters that allowing this testimony was not plain error because the jury was never explicitly told that Padilla was in custody, either at trial or at the time that the witnesses facilitated correspondence. We agree with the State.

We review, at our discretion, issues not properly raised before the district court for plain error. *See* NRS 178.602 (“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”); *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018) (“[T]he decision whether to correct a forfeited error is discretionary . . .”). “Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an ‘error’; (2) the error is

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<sup>8</sup>Padilla also claims that testimony regarding the communications that Gonzalez and Chavez facilitated was unduly prejudicial, and that testimony regarding his texts with women other than Ramirez was irrelevant and meant only to inflame the passions of the jury. Both of these claims were not objected to below, and, in any event, the evidence was properly admitted. The testimony from Gonzalez and Chavez was not unduly prejudicial because it showed fear of culpability when Ramirez uttered that she wanted to pretend that she did not know Padilla. *See* NRS 48.015 (describing relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence”); NRS 48.035 (explaining that evidence whose “probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury” is inadmissible). Additionally, reference to his texts with other women were offered to impeach Chavez as a character witness. *See* NRS 48.045(1)(a) (allowing admission of “[e]vidence of a person’s character or a trait of his or her character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence”). Thus, Padilla has not established plain error. *See Jeremias*, 134 Nev. at 50-51, 412 P.3d at 48-49.

'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." *Jeremias*, 134 Nev. at 50, 412 P.3d at 48 (citing *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). 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 (quoting *Miscarriage of Justice*, *Black's Law Dictionary* (11th ed. 2019)).

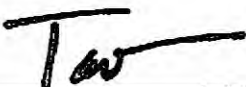
Additionally, we may elect to review constitutional questions on an adequate record despite failure to raise the issue below. *Wilkins v. State*, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). An accused is "entitled to have his guilt or innocence determined solely on basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, *continued custody*, or other circumstances not adduced as proof at trial." *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (emphasis added) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). For example, "an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process [and] equal protection of the laws." *Estelle*, 425 U.S. at 502, 512-13. However, the defendant waives those rights when he fails to object at trial. *Id.* at 512-13.

Here, Padilla did not object at trial to the State's line of questioning that prompted the juror's question regarding the letters. Under *Estelle*, the failure to object is fatal. Although the State's questions provided some indicia that Padilla was in custody, the jury was not directly told of Padilla's custody status or if he was ever in custody as a result of the charges brought against him. In addition, the district court refused to relay the

juror's question to Chavez. The fact that a juror asked why Chavez passed letters provides some credence that the jury was unaware of Padilla's custody status. It is speculation that the district court's refusal to address the question somehow left the jury with the impression that Padilla was in custody at the time and convicted him on this basis. We therefore conclude that Padilla has not established error, plain or otherwise. Accordingly, we

ORDER the judgment of conviction AFFIRMED.<sup>9</sup>

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Cristina D. Silva, District Judge  
Nguyen & Lay  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>9</sup>We have considered Padilla's other arguments and find that they do not have merit. As we discuss throughout this order, there was no error below, so we need not address Padilla's cumulative error claim. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting "insignificant or nonexistent" errors do not warrant cumulative error review); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").