IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVIN LAMPKIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81757-COA

ORDER OF AFFIRMANCE

Devin Lampkin appeals from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of burglary while in possession of a deadly weapon, and seven counts of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Three masked men wearing Reebok, Vans, and ASICS shoes entered a Las Vegas Verizon store yelling expletives and threats. The shortest robber approached customers holding a handgun, demanded their property, and then took their property. The other two robbers took the manager into the back room and forced him to place dozens of inventory phones into a bin. Unbeknownst to the robbers, the manager also placed a tracking device in the bin. The shortest robber remained out front to monitor the customers. When the robbers left the store, the manager and a video surveillance camera observed the robbers entering a nearby Ford vehicle. The vehicle was occupied by a driver and a backseat passenger. The vehicle also had a DriveTime placard placed around the rear license plate.

As they drove away from the store, police officers monitored the vehicle's movements until the tracking device stopped at a specific building within an apartment complex. Within three minutes, officers had

established aerial surveillance of the complex. Soon after, they located the getaway vehicle. Officers then observed three people who matched the general description of the robbers exit apartment 1109 at different times. One person removed the DriveTime placard from the getaway car and attempted to exit the apartment complex in that car; officers arrested him for possession of stolen goods. Another person tried discreetly exiting apartment 1109 and entering a nearby apartment; officers arrested him at that apartment where they also located a purse taken from one of the Verizon customers. The third person jumped out of apartment 1109's back window and eventually escaped officer pursuit.

Now monitoring apartment 1109, officers noticed movement within the apartment, established a perimeter, and used a bullhorn to demand that the occupants exit the apartment. However, the occupants refused to exit for six hours, creating a standoff. Eventually, two individuals exited the apartment, one of them appellant Lampkin. Lampkin wore Reebok shoes and someone else's pants.

Officers then searched apartment 1109 and discovered the stolen phones hidden in a bed sheet and in one of the robber's backpacks. Officers also discovered other incriminating evidence: a knife (matching one worn by one of the robbers) hidden in a dryer, a black sweatshirt (matching one worn by one of the robbers), a shredded pair of ASICS (the brand of shoes one of the robbers wore) hidden in various discreet places throughout the apartment, a pair of Vans shoes (like those worn by one of the robbers) tucked within pants underneath a pile of clothing, and a hidden handgun that appeared as if someone had placed cardboard around the grip to prevent leaving fingerprints.

A grand jury indicted Lampkin on one count of conspiracy to commit robbery, one count of burglary while in possession of a deadly weapon, and seven counts of robbery with use of a deadly weapon. Before trial, the State offered Lampkin a guilty plea agreement that would only be effective if his codefendants likewise accepted the terms of the plea agreement. When one of the codefendants did not accept, the State withdrew the offer, the case proceeded to trial, and the jury convicted Lampkin on all charges. Lampkin now raises numerous issues on appeal and we address each in turn.

The jury had sufficient evidence to convict on all charges

Lampkin first claims that the jury lacked sufficient evidence to convict him because the district court improperly admitted certain evidence and the remaining evidence was either not evidence of guilt or insufficient to find guilt.[1] Without the improper evidence, Lampkin claims, the jury

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[1]Lampkin argues the district court improperly admitted two pieces of evidence: (1) a detective's testimony that Lampkin refused to exit the apartment when demanded, which Lampkin claims commented on his Fifth Amendment right to be silent or not cooperate, and (2) that detective's testimony that he performed a frame-by-frame analysis of video surveillance identifying the robbers' brand of shoes, which Lampkin claims was improper lay opinion. This court need not address these issues because Lampkin presented these claims as a "sufficiency of the evidence" claim, and this court must review improperly admitted evidence on such claims. *Stephans v. State*, 127 Nev. 712, 721, 262 P.3d 727, 734 (2011); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that courts follow the "principle of party presentation" on appeal, which requires the litigants to frame the issues). Even considering Lampkin's claims, they lack merit because the evidence was properly admitted. *See Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (noting that a Fifth Amendment right does not attach absent a custodial interrogation); *see also State v. Butner*, 67 Nev. 436, 440, 220 P.2d 631, 633 (1950) (holding admission of evidence at trial subject to abuse-of-discretion appellate review).

improperly relied on evidence that he was merely present with guilty parties and in an apartment with stolen goods.

Under a sufficiency of the evidence claim, we ask only "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." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (emphasis in original)). On appeal, we do not weigh the evidence or make credibility determinations. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, there is insufficient evidence only if the State has "not produced a minimum threshold of evidence upon which a conviction may be based." *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). Because circumstantial evidence alone may support a conviction, *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002), that "minimum threshold" is low.

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence supports Lampkin's convictions. Five people robbed a Verizon store. Officers monitored the getaway vehicle to a specific apartment complex and started surveillance of the complex within three minutes. Officers observed as three individuals exited a specific apartment and either tried escaping from the officers, were arrested while possessing some of the stolen goods, or tried concealing evidence of the crime. Two more people, one of them Lampkin, were found within that apartment, after refusing to exit the apartment for six hours. When Lampkin finally exited, he wore shoes matching one of the three robbers who went inside the store. Officers found shoes matching the other two brands the robbers wore inside the apartment, concealed or destroyed. The

apartment also contained other incriminating evidence, including the stolen phones, a knife, and a handgun. Under these circumstances, a rational juror could have found that Lampkin committed the crimes with which he was charged. *Rose*, 123 Nev. at 202, 163 P.3d at 414. Sufficient evidence therefore supports Lampkin's conviction.

Lampkin has no due process right to a noncontingent plea bargain offer from the State

Lampkin next argues that the State violated his due process rights when it extended a plea offer contingent on his codefendants' acceptance. Based on an unpublished, noncontrolling, state trial court decision, Lampkin claims that although he has no right to receive a plea bargain, once one is extended it cannot be conditioned on factors outside his control.[2]

Generally, Nevada courts view deprivation of due process claims as constitutional questions and review them de novo. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015). However, Lampkin has forfeited this claim because he did not object to the prosecution's withdrawal of the plea offer,[3] nor did he make any pretrial motion informing the district court that his due process rights had allegedly been violated. *Leonard v. State*, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

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[2]*See generally Commonwealth v. Martin*, Nos. CP-38-CR-0000899-1993, CP-38-CR-0001079-1993, 2014 WL 7803228 (Pa. Ct. Com. Pl. Dec. 5, 2014).

[3]We recognize, however, that Lampkin did state on the record that he wanted to accept the plea offer if he could have, but he made no formal objections or motions regarding the matter even though he had the opportunity to do so. He consequently did not do enough to properly preserve the issue on appeal as now argued.

Forfeited errors can still be reviewed for plain error; however, Lampkin also failed to argue plain error in his briefing and consequently we decline review on this issue. *Jeremias v. State*, 134 Nev. 46, 50, 52, 412 P.3d 43, 48-49 (2018). Nonetheless, even if we reviewed this forfeited issue for plain error, there was no error. *See Missouri v. Frye*, 566 U.S. 134, 150-51 (2012) (recognizing that states *can* permit prosecutors to withdraw extended plea offers); *State v. Crockett*, 110 Nev. 838, 845, 877 P.2d 1077, 1081 (1994) (noting that prosecutors may withdraw an extended plea offer "anytime before a defendant pleads guilty, so long as the defendant has not detrimentally relied on the offer"); *see also Caruso v. State*, Docket No. 80361 (Order of Affirmance, May 14, 2021) (observing that "the weight of authority refutes [the appellant's] contention" that a "conditional guilty plea offer based on the decision of a third party is fundamentally unfair").

The district court did not rely on improper evidence at sentencing

As previously explained, the State offered Lampkin a plea agreement whereby Lampkin would plead guilty to burglary and robbery with a deadly weapon in exchange for a recommended sentence of four-to-ten years in state prison, contingent on his codefendants accepting the same terms. Not all codefendants agreed, so the State withdrew the offer. Before jury selection, one of his codefendants pleaded guilty without any negotiated agreement in place and was sentenced to 7 to 17 ½ years in state prison. Then, at Lampkin's sentencing, the prosecutor recommended that Lampkin be sentenced to 12 to 51 years and told the district court that he did not want his recommendation to be considered a "trial tax." The district court then sentenced Lampkin to 10 to 51 years. Lampkin now claims that the district court imposed a trial tax when it imposed a sentence greater

than his original plea terms.[4] He also claims that the district court relied on impalpable and highly suspect evidence when it considered the prosecutor's reference to a trial tax and then sentenced Lampkin more severely than both his original plea terms and his codefendant's sentence.

Lampkin failed to object to the prosecutor's trial tax comments or the district court's alleged reliance on it; therefore, he has waived the sentencing issue unless he shows plain error. *Riddle v. State*, 96 Nev. 589, 591, 613 P.2d 1031, 1033 (1980) (stating that contemporaneous objection is required to preserve an issue for appeal). Lampkin, however, also failed to argue plain error in his briefing, therefore we decline to review this claim. *Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49.

Nevertheless, even if we reviewed for plain error, Lampkin's claim is unpersuasive. District courts have wide discretion in imposing sentences. *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). To prove error, Lampkin must show (a) that the district court actually relied on the trial tax comment to his detriment in sentencing him and (b) that was the *only* evidence upon which it relied. *See Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016); *Blackburn v. State*, 129 Nev. 92,

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[4]Lampkin also claims that the prosecutor imposed a trial tax by recommending a sentence longer than that contained in the contingent plea offer, but such a claim is improper because prosecutors cannot impose trial taxes. *See Mitchell v. State*, 114 Nev. 1417, 1428-29, 971 P.2d 813, 821 (1998) (noting the acceptability of the "prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial"), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002), *and Rosky v. State*, 121 Nev. 184, 191 & n.10, 111 P.3d 690, 694 & n.10 (2005).

98, 294 P.3d 422, 427 (2013); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Lampkin has not demonstrated any error because he failed to point to any evidence in the record showing the district court actually relied on the prosecutor's comments. Indeed, the district court never acknowledged the prosecutor's comments at all. The district court did, however, explicitly inform Lampkin that it would consider the individual circumstances of his life of crime in sentencing him. The district court therefore did not err, plainly or otherwise.

The district court did not err when it denied the oral motion to dismiss

Near the end of trial, the district court conferenced with the prosecutor and defense counsel to settle jury instructions. At that time, defense counsel made an oral motion to dismiss one of the robbery charges. He claimed that because the 11-year-old victim did not testify, the State could not otherwise prove that her phone had been taken through "reasonable fear or apprehension." The district court denied the motion to dismiss because circumstantial evidence can justify a conviction, and the district court reasoned that the State could prove the essential elements beyond a reasonable doubt through video evidence and other witness testimony. Lampkin now claims the district court should have construed the motion to dismiss as an advisory instruction to acquit and, if it had, the instruction should have been given because the "force or fear" element of the robbery charge could not be proved absent the victim's testimony.

Again, Lampkin forfeited this claim because he failed to raise the issue at trial. *Leonard*, 117 Nev. at 63, 17 P.3d at 403. He also forfeited the issue because he failed to argue plain error in his briefing. *Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49. Even if we reviewed for plain error,

Lampkin's claim is unpersuasive. Lampkin must show 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 [his] substantial rights." *Id.* at 50, 412 P.3d at 48. "[A] plain error affects [his] 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.

First, Lampkin has not shown the district court erred when it denied the motion to dismiss. Motions to dismiss during a jury trial for insufficient evidence are improper. *State v. Combs*, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000). Defendants must instead seek an advisory instruction to acquit. *Id.*; *see also* NRS 175.381(1). Because the district court could not have granted the motion to dismiss under Nevada law, *see Silks*, 92 Nev. at 94, 545 P.2d at 1161, it was proper to deny the motion on that basis alone.

Second, Lampkin has failed to provide any authority to show the district court had a duty to construe the motion to dismiss as an advisory instruction. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that reviewing courts do not need to address issues lacking support by relevant authority). Any alleged error is therefore not "plain." *Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) ("For an error to be plain, it must, 'at a minimum,' be 'clear under current law.'" (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001))).

Third, Lampkin has not shown any actual prejudice because he has not demonstrated that the result would have been any different had the district court had a duty to construe the motion as an advisory instruction request. The decision to grant an advisory instruction rests in the court's "sound discretion," and an appellate court can only overturn if there has been an abuse of that discretion. *Milton v. State*, 111 Nev. 1487, 1493, 908

P.2d 684, 688 (1995) (quotation omitted). If there is "substantial evidence to support a verdict in a criminal case . . . the reviewing court will not disturb the verdict nor set aside the judgment." *Sanders v. State*, 90 Nev. 433, 434, 529 P.2d 206, 207 (1974). A conviction can rest entirely on circumstantial evidence. *Bolden v. State*, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008).

To convict, the prosecution had to show that Lampkin took "personal property . . . against [the victim's] will, by means of force or violence or fear of injury." NRS 200.380(1). Nevada law does not require the prosecution prove the victim subjectively feared, just that an objectively reasonable person in that situation would have relinquished property because of it. *Mangerich v. State*, 93 Nev. 683, 685, 572 P.2d 542, 543 (1977) ("Certainly, the appearance of a strange man in a ski mask demanding money could cause a reasonable clerk to fear for her safety and relinquish property."). The district court found, and we agree, that the State could have proved these elements without the 11-year-old's testimony. As in *Mangerich*, a jury could properly find from the father's testimony and the video surveillance that an objectively reasonable 11-year old would have been frightened enough to relinquish her property when masked, armed men making demands and threats robbed a store, and one of them, while holding a gun, demanded her phone. Therefore, the district court would not have abused its discretion in denying a request for an advisory instruction. Lampkin's claim is thus unpersuasive both under plain error review and on the merits.

The State did not commit prosecutorial misconduct

Lampkin next claims the prosecution committed misconduct in closing arguments when the prosecutor inappropriately quantified the reasonable doubt standard and referred to facts not in evidence. While Lampkin contemporaneously objected to the prosecutor's comments on reasonable doubt, he failed to object when the prosecutor allegedly referred to facts not in evidence. Therefore, because Lampkin failed to object and then failed to argue plain error in his briefing, Lampkin has waived his prosecutorial misconduct claim regarding references to facts not in evidence. *See Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49. We accordingly decline to review for plain error. *See id.* We consequently will only review the prosecutorial misconduct claim that Lampkin properly preserved—that the prosecutor inappropriately quantified the reasonable doubt standard.

In his rebuttal closing argument, the prosecutor stated:

> Specifically, your instruction tells you that doubt to be reasonable must be actual, it cannot be mere possibility or speculation.
>
> We talked a lot about what's possible in this trial. Is it possible that this happened? Is it possible that that happened? Mere possibility is not enough to be reasonable doubt. You may have doubts; you may have unanswered questions.
>
> There are some things that the State can't give you. We don't have the 24 hour surveillance on these defendants or their co-conspirators to tell you everything that happened along the way.
>
> You might be curious why Mr. Warren Hunt moved the car. You might be curious why Jason Crump ran away. Those might be doubts in your mind. But a reasonable doubt cannot just be unanswered questions.

Lampkin argues that the prosecutor's reference to "unanswered questions" inappropriately quantifies or misstates the statutorily-prescribed reasonable doubt instruction.

Nevada courts review allegations of prosecutorial misconduct through a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, a court must decide if the prosecutor's conduct was improper. *Id.* If it is improper but a nonconstitutional error, courts will only reverse if the defendant shows the error "substantially affected the jury's verdict." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). Courts "will not reverse a conviction based on prosecutorial misconduct it if was harmless error." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. If the error is constitutional, reversal is required unless the State can show beyond a reasonable doubt that "the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476.[5]

Prosecutors may not "quantify, supplement, or clarify the statutorily prescribed standard for reasonable doubt." *Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 514 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). Nor may they "explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt." *Id.* at 632, 28 P.3d at 514. They can argue, however, that the evidence, or lack thereof, meets or does not meet the reasonable doubt standard. *Id.* Prosecutors may also respond to issues and arguments defense counsel raises in their closing argument. *Greene v.*

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[5]In his briefing, Lampkin claims that quantifying the reasonable doubt standard amounts to constitutional error, yet he has provided no legal authority to support this proposition and did not otherwise cogently argue the point. We decline to consider that point here. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

State, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

First, the State's conduct was not improper; Lampkin listed in closing argument a number of "unanswered questions" and stated that because there were unanswered questions, there was reasonable doubt. The prosecutor's comments at issue here merely rebutted that argument and properly suggested that the specific unanswered questions in this case were not enough to generate reasonable doubt. The supreme court has previously approved this very conduct. *See Browning v. State*, 120 Nev. 347, 365-66, 91 P.3d 39, 52 (2004).[6]

Even if the prosecutor's comments were improper, they would not merit reversal. Properly given jury instructions or references to them render errors such as this harmless. *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) ("We have nevertheless consistently deemed incorrect explanations of reasonable doubt to be harmless error as long as the jury instruction correctly defined reasonable doubt."); *Wesley v. State*, 112 Nev. 503, 514, 916 P.2d 793, 801 (1996) (holding a prosecutor's reference to a proper jury instruction before improperly characterizing the reasonable doubt standard rendered the error harmless). Here, proper jury instructions were given, and when Lampkin objected to the State's comments, the court reminded the jury that it had a written reasonable

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[6]The *Browning* court noted that a suggestion that unanswered questions can still merit a guilty verdict "d[oes] not violate our admonition to counsel not to 'explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt'" and that "the prosecutor basically argued 'that evidence and theories in the case before the jury either amount to or fall short of that definition,' which is acceptable argument." *Id.*

doubt instruction. The State therefore did not commit misconduct, and even if it did, the error would have been harmless because Lampkin has not shown the error substantially affected the jury's verdict.

No cumulative error occurred

Finally, Lampkin claims that all errors below cumulated and deprived him of his due process rights. As discussed, the district court did not commit any error, so there are no errors to cumulate. *Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate"). We therefore need not review this claim. *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting reviewing courts need not perform cumulative review at all if appellant shows nothing more than "insignificant or nonexistent" errors). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk