IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RYAN ANTHONY WARREN-HUNT, A/K/A RYAN ANTHONY WARRENHUNT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81027-COA

ORDER OF AFFIRMANCE

Ryan Anthony Warren-Hunt 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.

Five people participated in the robbery of a Las Vegas Verizon store.[1] Three masked men, at least one armed, entered the store yelling expletives and demanding phones while two robbers remained outside waiting in a nearby Ford vehicle with a paper DriveTime placard for a license plate. Inside the store, two robbers took the manager into the back room and forced him to put dozens of inventory phones into a bin while the third robber demanded and collected customers' property at gunpoint. Unknown to the robbers, the manager also placed a tracking device in the bin with the phones.

After the robbers exited the store while still wearing masks and entered the getaway vehicle, a vehicle later identified as Warren-Hunt's, officers monitored the vehicle's movements through the tracking device until

[1]We recount the facts only as necessary to the disposition.

it stopped at a specific apartment building. Just three minutes later, police officers arrived on scene and conducted aerial visual surveillance. Those officers then observed someone, later identified as Warren-Hunt, move a vehicle in the apartment parking lot to a covered spot that obscured visual surveillance and then enter apartment 1109. When the officers sent a detective to obtain a visual observation on the car, the detective confirmed it matched the description of the getaway vehicle.

Officers then observed two individuals exit apartment 1109, one of whom, Warren-Hunt, approached the getaway vehicle and removed the DriveTime placard before entering the vehicle. After minutes of waiting in the vehicle, Warren-Hunt attempted to exit the parking lot, observed the police blockade at the exit, and then continued driving within the parking lot until the police stopped him and took him into custody. During a search of the vehicle incident to arrest, officers discovered the DriveTime placard, a phone taken during the robbery, $1,000 in $100 bills (the amount and denomination taken from a customer during the robbery), Warren-Hunt's driver's license, and his California license plate.

In total, officers observed five people exit apartment 1109. Besides Warren-Hunt, one individual was arrested after discreetly exiting the apartment and entering his own nearby apartment. Officers found a purse stolen during the robbery in his apartment. Another suspect jumped out the apartment's back window and escaped officers. And the remaining two individuals only exited the apartment after a six-hour standoff with police.

During a subsequent search of apartment 1109, officers discovered incriminating evidence from the robbery. For example, they found 29 of the phones hidden in a bedsheet, a hoodie matching one that a

robber wore, a knife matching one a robber wore, a handgun, and two pairs of shoes matching those the robbers wore that had either been hidden or shredded into pieces. Officers additionally found a backpack that contained 14 of the stolen phones in the main compartment and Warren-Hunt's debit card, medical insurance card, and California vehicle registration documents in the smaller compartment.

A grand jury subsequently indicted Warren-Hunt on, and a trial jury convicted him 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 the use of a deadly weapon. The district court subsequently sentenced Warren-Hunt to an aggregate sentence of 16-75 years. Now on appeal, Warren-Hunt makes numerous arguments. We address each in turn.[2]

Whether the district court abused its discretion in admitting certain evidence

Warren-Hunt argues that the district court abused its discretion when it admitted (1) Gianna Dellegrazie's testimony regarding the contents of her purse and the effect the robbery had on her daughter, (2) evidence that his personal effects were found within the same backpack as stolen phones, and (3) Detective Jeffrey Clark's testimony that Warren-Hunt alleges reaches the ultimate conclusion of his guilt.

On appeal, we review a district court's decision to admit evidence for an abuse of discretion and will only reverse if "manifestly wrong."

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[2]Warren-Hunt first argues that the district court erred in relying on the family court rules to hold that the State timely filed its notice of intent to seek habitual criminal treatment. The district court, however, did not impose the habitual criminal enhancement. Therefore, Warren-Hunt's substantial rights were not affected and we need not further consider this argument. *See* NRS 178.598.

Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). At trial, only relevant evidence is admissible. NRS 48.025. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination . . . more or less probable." NRS 48.015. Even relevant evidence may be excluded though if its "probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1). Such prejudice generally appeals to the "emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (quoting *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001)). Probative value, on the other hand, "turns on 'the actual need for the evidence in light of the issues at trial and the other evidence available to the State.'" *Harris v. State*, 134 Nev. 877, 881, 432 P.3d 207, 211 (2018) (quoting *State v. Jones*, 450 S.W.3d 866, 894-95 (Tenn. 2014)).

Even when a district court improperly admits evidence, we will disregard harmless errors. NRS 178.598. For nonconstitutional errors such as improperly admitting evidence, the State bears the burden of proving that the error "did not have a substantial and injurious effect or influence in determining the jury's verdict." *See Randolph v. State*, 136 Nev., Adv. Op. 78, 477 P.3d 342, 351 (2020) (quoting *Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018)).

Dellegrazie's testimony regarding the effect the robbery had on her daughter

At trial, the prosecution called Gianna Dellegrazie, one of the victims from the Verizon robbery, to testify. During her testimony, Dellegrazie testified that her seven-year-old daughter, who was also present during the robbery, "does not like Las Vegas now," that she will not go into a Verizon store anymore, and that she is having trouble at home because of the

robbery. Warren-Hunt objected, claiming the testimony was irrelevant and prejudicial. The district court, however, found the testimony relevant to proving the force or fear element in robbery and in explaining why the daughter was not testifying.

Here, the district court abused its discretion in admitting this testimony. Although perhaps relevant, the evidence had minimal probative value. The State did not need that testimony to satisfy the force or fear element because plenty of existing evidence established masked men, at least one with a gun and another with a knife, yelled threats while demanding phones and other property. Nor did the State need to establish the force or fear element regarding the daughter because the State dropped the charge naming the daughter as a victim in the amended indictment. The jury thus had no reason to know why the daughter was not testifying, and any value that provided to the case would have been minimal.

Yet the risk of unfair prejudice from this testimony was significant. Indeed, the district court allowed Dellegrazie to testify unnecessarily about the significant impact the robbery had on her seven-year-old daughter, which deliberately appealed to jurors' emotions. And when, as here, it has minimal probative value, the risk of unfair prejudice substantially outweighs the probative value. Consequently, the district court abused its discretion in admitting this testimony.

Although the district court abused its discretion in admitting this evidence, the State has met its burden in proving the error harmless. The State did not need Dellegrazie's objectionable testimony to prove its case, nor did it rely on the improper testimony. Indeed, as we explain in detail in the sufficiency of the evidence section below, the jury had sufficient evidence to convict without that testimony. In light of such evidence, the State has

shown that the improperly admitted testimony did not have a substantial and injurious effect on the trial outcome.

Dellegrazie's testimony regarding the contents of her purse

Dellegrazie also testified that her purse, which a robber took during the robbery, contained

> [M]y late son's batting glove. I had his chain cross that he used to bite with his teeth marks on it. I had a couple other of his, oh, he used to have one of those sweatbands that he wore in baseball, so I had that. And, like, and angel-thing that he had when he was baptized and I kept it all in a little bag. . . . And some ultrasound pictures, after his accident, that I had tried – miscarriages that I didn't have, whatever, I had those this [sic] there too.

The State then asked her when the child passed, how old he was when he passed, and whether the items were sentimental and replaceable. Dellegrazie responded that her son passed when he was four and that the items were both sentimental and irreplaceable. Warren-Hunt objected to this testimony, claiming it was irrelevant and prejudicial, and moved for a mistrial. The district court overruled the objection and denied the motion for mistrial because it found the testimony relevant to establishing Dellegrazie's ownership of the purse and did not find the testimony unfairly prejudicial.

Here, the district court abused its discretion in admitting this testimony. Although perhaps relevant, the testimony also had minimal-to-nonexistent probative value. To prove robbery, the State did not need to prove the robbers stole the specific contents of Dellegrazie's purse when it had already established that the purse itself had been stolen. Indeed, Dellegrazie could have simply testified that the robbers took her purse containing personal effects.

Yet the risk of unfair prejudice in this case was significant. The district court permitted Dellegrazie to unnecessarily testify to the specific, emotionally charged contents of the purse. Indeed, she testified, at the State's encouragement, that she lost sentimental and irreplaceable items belonging to, and reminding her of, her late four-year-old son. Yet, neither the purse nor its contents were recovered or linked to Warren-Hunt. When, over objection, the district court permits unnecessary testimony such as this that significantly appeals to juror emotion, the district court abuses its discretion because the risk of unfair prejudice substantially outweighs the testimony's probative value.

Although the district court should have excluded this evidence, the district court did not abuse its discretion in denying the motion for mistrial. A district court may grant a motion for a mistrial when "some prejudice occurs that prevents the defendant from receiving a fair trial." *Jeffries v. State*, 133 Nev. 331, 333, 397 P.3d 21, 25 (2017) (quoting *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004)). But the decision to deny a motion for a mistrial rests in "the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion." *McKenna v. State*, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998). A district court's determination as to whether a mistrial is necessary is afforded "special respect" in the context of improperly admitted evidence. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009), *as corrected on denial of reh'g* (Feb. 17, 2010) (quoting *Arizona v. Washington*, 434 U.S. 497, 510 (1978)).

Even though Dellegrazie's testimony was unfairly prejudicial, it was not so prejudicial that it denied Warren-Hunt a fair trial. As explained below, the State did not need this testimony to prove its case, nor does the

record reveal that the State ever relied on that testimony again. The improper testimony does not factor into the State's theory of the case, nor did the State bring it up in closing argument. Consequently, this less-than-one-minute exchange within a 10-day trial, although prejudicial enough to warrant exclusion, did not operate to render the entire trial so prejudicial that it denied Warren-Hunt a fair trial. The district court thus did not abuse its discretion in denying the motion for a mistrial.

Even if a mistrial should have been granted, "where a prosecutor solicits the prejudicial testimony, denial of a defendant's motion for a mistrial will be deemed harmless error where the prejudicial effect of the statement is not strong and where there is otherwise strong evidence of defendant's guilt." *Parker v. State*, 109 Nev. 383, 389, 849 P.2d 1062, 1066 (1993). As described above, the prejudicial effect of Dellegrazie's testimony on the entire trial was not strong because this was a less-than-one-minute exchange unnecessary to the State's case that the State never brought up again or relied upon in closing argument. And as discussed in detail in the sufficiency of the evidence section below, the State amassed significant evidence showing Warren-Hunt committed the charged crimes. As such, even if the district court erroneously denied the motion for mistrial, it would have been harmless error.[3]

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[3]For the same reasons, the State satisfied its burden to show that the district court's improper admission of evidence amounted to harmless error because it did not have a substantial and injurious effect on the trial. *See Randolph*, 136 Nev., Adv. Op. 78, 477 P.3d at 351. Moreover, while Warren-Hunt argued that the district court abused its discretion in both, it failed to respond to the State's argument that any erroneous denial was harmless. As such, this court can construe Warren-Hunt's failure to respond either in a reply brief or anticipatorily in his opening brief as a concession that the

Evidence within the backpack

While searching apartment 1109, officers discovered a backpack containing 14 of the stolen phones in the main compartment and Warren-Hunt's current and valid debit card, medical insurance card, and California vehicle registration documents. Before trial, Warren-Hunt moved to exclude the evidence because, he claimed without citing relevant authority, it improperly shifted the burden onto him to explain how his personal effects ended up in the backpack. The district court denied the motion, holding it constituted circumstantial evidence of Warren-Hunt's involvement in the robbery, especially considering the State charged a co-conspirator liability theory.

Then, at trial, the State's witness called those items found in the backpack "possessory items." Warren-Hunt's counsel objected, arguing that the term might lead the jury to believe that a legal conclusion had already been made that the backpack belonged to Warren-Hunt. The district court sustained in part and overruled in part the objection, requiring the State to make sure that the witness explained what he meant by "possessory" but permitting the State to argue that the backpack belonged to Warren-Hunt because he could always dispute that assertion. Now on appeal, Warren-Hunt argues that the district court abused its discretion in admitting this evidence.

Here, the district court did not abuse its discretion in admitting the backpack or Warren-Hunt's personal effects found within the backpack. The evidence is relevant because the State charged Warren-Hunt with robbery, burglary, and conspiracy, and the evidence has at least some

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State's argument has merit. *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955).

tendency to make more probable a finding that Warren-Hunt placed or had someone place the stolen phones in a backpack he owned or over which he had control. Indeed, the personal effects found within the backpack are of a kind not casually shared with others. That officers found stolen phones in the same backpack containing his own personal effects provides some circumstantial evidence that he owned, possessed, or controlled the backpack and placed, had placed, or approved placement of the stolen phones within it. Moreover, this evidence has strong probative value that any potential unfair prejudice would not substantially outweigh. We therefore cannot conclude that the district court was "manifestly wrong" in admitting evidence showing that Warren-Hunt had personal effects in the same backpack containing the stolen phones.

Testimony regarding the ultimate conclusion

At trial, Warren-Hunt's codefendant's counsel asked Detective Clark if he stood by his statement made during cross-examination not to fingerprint the phones because of a backlog at the evidence lab. Detective Clark responded, "to clarify that answer, there [were] five people that did this robbery, we have identified those five –." Warren-Hunt's counsel then objected, claiming Detective Clark spoke to the ultimate issue of his client's guilt. The district court then stated, "I disagree that it's the ultimate conclusion. However, Detective, you're testifying as to what your investigation – what you believe your investigation revealed; is that correct?" Detective Clark again clarified: "My investigation revealed and led me believe through my training and experience that the five people were involved in this. At that time I believe I – and to this day I believe I have all five of those people identified." The district court subsequently concluded, "that objection is sustained in part and overruled in part."

Now on appeal, Warren-Hunt again argues that the district court improperly allowed Detective Clark to testify regarding the ultimate conclusion of his guilt.

Witnesses "may not give a direct opinion on the defendant's guilt or innocence in a criminal case." *Collins v. State*, 133 Nev. 717, 724, 405 P.3d 657, 664 (2017). They may, however, give an opinion that embraces an ultimate issue or creates an inference of guilt if the testimony is otherwise admissible. *Cf.* NRS 50.295. For example, officers may under certain circumstances properly offer relevant course-of-investigation testimony, including the reasons why an officer arrested someone. *See Collins*, 133 Nev. at 726-27, 405 P.3d at 665-66.

As an initial matter, Warren-Hunt did not properly preserve this issue for appeal because although he contemporaneously objected to the initial comment, he never objected to the clarification Detective Clark gave in response to the district court judge. *See Sipsas v. State*, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986) ("As a general rule, the failure to object, assign misconduct, or request an instruction will preclude review by this court."). Nor did he seek any limiting instruction or note anywhere that he objected to Detective Clark's additional comments. Plain error review consequently applies, and Warren-Hunt must show: "(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." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). "[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.

Warren-Hunt has shown that the district court committed an error, one that is both plain from a casual inspection of the record and clear

under current law. Detective Clark largely used proper course-of-investigation testimony to directly address defense counsel's question as to why he did not submit the phones for fingerprinting. *See Collins*, 133 Nev. at 726-27, 405 P.3d at 665-66 (using extrajurisdictional authority to explain that course-of-investigation testimony does not reach the ultimate issue of guilt when explaining the rationale for a decision that defense counsel has criticized). But Detective Clark did not simply explain his *past* rationale for acting as he did; he implicitly testified in his clarification that he *currently* believes that he caught the guilty parties when he said: "At that time I believe I – and to this day I believe I have all five of those people identified." Detective Clark thus testified to his *existing* opinion of Warren-Hunt's guilt, which is an implicit suggestion that the jury should find him guilty. Such comments have been disavowed. *Id.* (noting that even course-of-investigation testimony cannot "amount to an opinion, direct or implied, that the jury should find [the defendant] guilty"). Indeed, Detective Clark's final comment does not help explain the question asked: why he did not immediately fingerprint the phones. The district court thus impermissibly allowed Detective Clark to testify to the ultimate issue of Warren-Hunt's guilt when the detective offered his current opinion.

Warren-Hunt has not, however, shown how this brief exchange within a 10-day trial affected his substantial rights or caused actual prejudice by creating a "grossly unfair" outcome. *See Jeremias*, 134 Nev. at 51, 412 P.3d at 49. Indeed, as we subsequently explain, the jury had sufficient evidence to convict without Detective Clark's improperly admitted testimony. Substantial, corroborating evidence tied Warren-Hunt to the crime, and he has provided no argument showing that the State relied upon this testimony or that it otherwise used it to affect the outcome.

Furthermore, Warren-Hunt was free to argue the evidence to the jury that the State failed to fingerprint the phones. Therefore, because Warren-Hunt has not shown how the comment prejudiced him, there was no plain error.

Whether the district court abused its discretion in denying Warren-Hunt's proposed jury instruction or erred in denying his motion for mistrial

Warren-Hunt next claims that the State failed to preserve evidence when it failed to perform a DNA or fingerprint analysis of the stolen phones. The State argues that this should be analyzed as a failure-to-gather claim. Warren-Hunt argues that the district court abused its discretion in denying his proposed jury instruction that would have allowed the jury to presume that had the State performed a fingerprint or DNA analysis on the stolen phones, the resulting evidence would have been favorable to his case. He likewise argues that the district court erred when it denied the mistrial he requested during trial due to the State's grossly negligent conduct in failing to fingerprint. We address both the failure-to-preserve and failure-to-gather arguments.

As an initial matter, Warren-Hunt claims he moved for a mistrial, but he in fact moved to dismiss the case. However, moving to dismiss the case during a criminal trial is generally procedurally improper and the district court likely would have erred in granting it. *See State v. Combs*, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000); *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see also Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived); *Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49 (holding that unpreserved errors are waived). We therefore only review his argument regarding the rejected jury instruction.

We review a district court's determination whether to issue a jury instruction for an abuse of discretion or judicial error. *Higgs v. State*,

126 Nev. 1, 21, 222 P.3d 648, 661 (2010). "Due process requires the State to preserve material evidence." *Steese v. State*, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). To prove a failure-to-preserve claim, Warren-Hunt had to show either bad faith from the State or prejudice from the loss of evidence. *Higgs*, 125 Nev. at 21, 222 P.3d at 660-61. Where the State does not benefit from the failure to preserve the evidence, there is no prejudice. *Id.* The defendant must also provide more than some "hoped-for conclusion" from the absent evidence or that it would have been merely "helpful in preparing [a] defense." *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). It must be "direct exculpatory evidence," not simply evidence that could have supported alternate theories. *See Wood v. State*, 97 Nev. 363, 366-67, 632 P.2d 339, 341 (1981); *see also Chapman v. State*, 117 Nev. 1, 6, 16 P.3d 432, 435 (2001), *holding modified on other grounds by Abbott v. State*, 122 Nev. 715, 138 P.3d 462 (2006).

While due process requires preserving all material evidence, "police officers generally have no duty to collect all potential evidence from a crime scene." *See Daniels v. State*, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (quoting *State v. Ware*, 881 P.2d 679, 684 (N.M. 1994)). So to merit dismissal or a favorable jury instruction on a failure-to-gather claim, Warren-Hunt had to show that the evidence was material *and* the result of either gross negligence or bad faith. *Steese*, 114 Nev. at 491, 960 P.2d at 329.[4] Evidence is material when there is a "reasonable probability that, had

[4]While a defendant can succeed by showing either gross negligence or bad faith, the remedy depends upon the classification. *See Daniels*, 114 Nev. at 267, 956 P.2d at 115. For gross negligence, the defendant is limited to a jury instruction presumption that the non-gathered evidence would have been favorable whereas dismissal may be permitted in cases of bad faith. *Id.*

the evidence been available to the defense, the result of the proceedings would have been different." *Daniels*, 114 Nev. at 267, 956 P.2d at 115. Warren-Hunt must do more than speculate that the evidence might have been favorable to his case; he must provide evidence showing it would have made a difference. *See Randolph*, 117 Nev. at 987, 36 P.3d at 435; *see also Guerrina v. State*, 134 Nev. 338, 347, 419 P.3d 705, 713 (2018).

Here, we need not decide which test the district court should have used because Warren-Hunt's argument fails under either test. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 724, 380 P.3d 836, 840 (2016) ("As a general principle, we practice judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand."). First, Warren-Hunt cannot succeed under a failure-to-gather claim because he has not cogently argued how the evidence is material; he has not demonstrated that there was a reasonable probability that the fingerprint analysis would have revealed what he wanted it to or that it would have made a difference had it been there. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an argument lacking cogent argument or support of relevant authority).

Second, Warren-Hunt cannot succeed on a failure-to-preserve claim because he never argued prejudice on appeal, and the only argument he presented on appeal (bad faith), he never argued to the district court. *See Powell,* 127 Nev. at 161 n.3, 252 P.3d at 672 n.3; *see also Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49. Even considering the claim, however, the State did not use the lack of fingerprints to bolster its case, nor has Warren-Hunt shown that he is more than merely hopeful the evidence would be helpful

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Mere negligence warrants no remedy even if the evidence would have been material. *Id.*

rather than directly exculpatory. Accordingly, the district court did not abuse its discretion in denying Warren-Hunt's proposed jury instruction and it did not err in denying his motion to dismiss.

The State did not commit prosecutorial misconduct

On appeal, Warren-Hunt argues that the prosecution committed misconduct in two ways: (a) by quantifying the reasonable doubt standard and (b) by vouching for its witness.

The reasonable doubt standard

In her 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.

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

We review allegations of prosecutorial misconduct through a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we must decide if the prosecutor's conduct was improper. *Id.*

If it is improper and a nonconstitutional error, we will reverse only 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). We "will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476.

Prosecutors may not "quantify, supplement, or clarify the statutorily prescribed standard for reasonable doubt" nor may they "explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt." *Evans v. State*, 117 Nev. 609, 631-32, 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). But they can argue the evidence fails to meet that standard and respond to issues and arguments the defense raised in its closing argument. *Id.*; *Greene v. 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. Warren-Hunt's counsel and his codefendant's counsel listed a number of "unanswered questions" in their closing arguments 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 failed 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).[5]

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[5]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

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. *See 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 Warren-Hunt objected to the State's comments, the district court admonished the jury that it had a written reasonable doubt instruction. The State therefore did not commit misconduct, and even if it did, the error would have been harmless because it was mitigated by the jury instructions.

Vouching for its witness

At trial, the prosecutor asked one of her witnesses, the store manager, if he wanted to be there, when they first met, and if the prosecutor had to come find him. The prosecutor also asked him if she had given him some transcripts and statements and then asked "[w]hat did I tell you about why I was giving [the transcripts] to you?" Warren-Hunt's counsel then objected on both hearsay grounds and improper vouching. The district court sustained the objection as to the form of the question and asked the prosecutor to rephrase the question. The prosecutor rephrased the question without further objection from Warren-Hunt's counsel. Now, on appeal,

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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.*

Warren-Hunt argues that the district court abused its discretion when it allowed the State to vouch for its witness's credibility and continue the same line of questioning after the objection.

Prosecutors cannot vouch for witness credibility. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Vouching occurs when the prosecution provides "personal assurances of the witness's veracity." *Browning*, 120 Nev. at 359, 91 P.3d at 48 (quoting *United States v. Kerr*, 981 F.2d 1050, 1053 (9th Cir. 1992)). Prosecutorial misconduct will be deemed harmless, however, if the district court sustains an objection to the misconduct, the improper comments are merely passing comments, or there is overwhelming evidence of guilt. *See Rimer v. State*, 131 Nev. 307, 330, 351 P.3d 697, 714 (2015); *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

Here, Warren-Hunt has not cogently argued how the prosecutor vouched for her witness in the portion to which he objected, nor did he explain how the prosecutor's questioning was improper or why it merits reversal. We accordingly decline to review his claim. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6 (explaining that this court need not consider an appellant's argument that is not cogently argued). Regardless, any error would have been harmless because Warren-Hunt objected, the district court sustained the objection, and the jury was properly instructed to disregard the comment; this cured any misconduct. *See Rimer*, 131 Nev. at 330, 351 P.3d at 714; *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions.").

Similarly, Warren-Hunt did not object to the additional comments he now alleges constituted vouching, never argued plain error, and

never explained why those comments were either improper or require reversing his conviction. Therefore, we decline to review his arguments. *See Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49; *see also Maresca*, 103 Nev. at 673, 748 P.2d at 6.

The district court did not abuse its discretion in denying Warren-Hunt's pretrial motion to compel discovery

Before trial, Warren-Hunt sought to compel discovery under *Brady v. Maryland*, 373 U.S. 83 (1963) and NRS Chapter 174. The district court, however, denied his motion as vague and overbroad and imposed a meet-and-confer requirement before compelling further discovery. Although Warren-Hunt made an offer of proof regarding specific potential statements from identifiable people, the district court nonetheless required Warren-Hunt to meet and confer before it would grant a motion to compel. In so ruling, the court found that much of Warren-Hunt's requests could be resolved through a file review with the State, which he had not yet done. The prosecutor also represented that she was willing to do a file review, would answer any requests he had via email, and that she had already provided the specific statements mentioned. Warren-Hunt now argues on appeal that the district court abused its discretion and violated due process when it denied his motion.

We review a "district court's resolution of discovery disputes for an abuse of discretion." *Means v. State*, 120 Nev. 1001, 1007, 103 P.3d 25, 29 (2004). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "District courts enjoy broad discretion in the realm of discovery disputes" and they have "discretionary authority to control discovery." *State v. Second Judicial Dist. Court (Ojeda)*, 134 Nev. 770, 772-73, 431 P.3d 47, 50 (2018).

Here, Warren-Hunt failed to cogently argue or provide supporting authority showing the district court abused its discretion or violated his due process rights, or in any way caused him prejudice, which alone merits dismissal of his argument. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6; *see also* NRS 178.598. Further, Warren-Hunt did not follow EDCR 3.24(a) (permitting a party to make an oral discovery request at the initial arraignment). Regardless, district courts have substantial, inherent control over discovery, and a district court does not abuse that discretion merely by requiring parties to meet and confer before compelling discovery when it finds, and the facts indicate, that such a mechanism may resolve the issue without further judicial intervention. Therefore, the district court did not abuse its discretion in denying Warren-Hunt's pretrial motion to compel discovery. *Cf.* NRCP 37(a)(1); EDCR 2.34(d).

The jury had sufficient evidence to convict Warren-Hunt beyond a reasonable doubt on all charges

Warren-Hunt next argues that the jury lacked sufficient evidence to convict him beyond a reasonable doubt on all charges. Under a sufficiency of the evidence claim, we evaluate 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)). We do not reweigh the evidence or make credibility determinations on appeal. *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 set low.

Here, the jury had sufficient evidence to convict Warren-Hunt on all charges. The grand jury indicted Warren-Hunt, and the district court properly instructed the jury on all charges, including three different theories of liability: directly committing the acts, aiding or abetting others in the commission of the acts, and participating in a conspiracy with the intent that the crimes be committed. Viewing the record evidence in the light most favorable to the prosecution, as we must, sufficient evidence supports the convictions.

Three masked men, at least one armed with a gun, entered a Verizon store, yelled threats, took inventory phones, and took customers' property. Those three robbers exited the store and approached a waiting Ford vehicle with a paper, green-and-white DriveTime placard for a license plate; two people were in the waiting Ford and one of them let the three robbers into the vehicle before it immediately left. The Ford belonged to Warren-Hunt.

Officers monitored the Ford's movements using the tracker placed with the phones until the tracker stopped at a specific apartment building. Officers soon arrived on scene and watched Warren-Hunt move the positively identified getaway car from one spot within the parking lot to a covered parking spot that obscured aerial surveillance and then enter apartment 1109. They then watched Warren-Hunt exit apartment 1109, remove the DriveTime placard and place it in the car, sit in the car for several minutes, and then attempt to drive out of the apartment complex in a roundabout fashion after seeing officers had blockaded the exit. When officers stopped the car and took Warren-Hunt into custody, they discovered

within his car the DriveTime placard, $1,000 in $100 bills (the amount and denominations stolen from a customer during the robbery), a cell phone taken during the robbery, and Warren-Hunt's valid California license plates and license.

In total, five people were involved in the robbery, and officers observed exactly five people exit apartment 1109, including Warren-Hunt. One of the occupants who exited apartment 1109 with Warren-Hunt did so discreetly, and officers arrested him in his nearby apartment, where they discovered a purse stolen during the robbery. Another individual jumped out the back window and escaped officers despite giving chase and calling for him to stop. The remaining two individuals exited after a six-hour standoff with the police.

Officers then discovered incriminating evidence in a subsequent search of the apartment: 29 of the stolen phones tied and hidden in a bedsheet, a hoodie matching one worn by one of the robbers, a knife hidden in the dryer that matched one worn by one of the robbers, a handgun, and two hidden or shredded pairs of shoes that matched the shoes of two robbers. They also found a backpack containing 14 of the stolen phones in the main compartment and Warren-Hunt's debit card, medical insurance card, and California vehicle registration documents within the small compartment.

Based on this substantial circumstantial evidence, a rational jury could have concluded that Warren-Hunt committed the charged crimes under one or more of the alternative theories of liability. *See Rose*, 123 Nev. at 202, 163 P.3d at 414. Therefore, sufficient evidence supports Warren-Hunt's conviction.

The cumulative errors below did not deny Warren-Hunt a fair trial

Warren-Hunt finally argues that all the errors below cumulatively denied him a fair trial. Although individually harmless below, the cumulative effect of those errors may require reversal. *Hernandez*, 118 Nev. at 535, 50 P.3d at 1115. When reviewing a cumulative error claim, we look to three factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Although sufficient evidence to convict will not bar a cumulative error claim, *see Valdez*, 124 Nev. at 1196, 196 P.3d at 481, we will nonetheless deny a cumulative error claim if there is overwhelming evidence, compelling evidence, or if we can say with a degree of certainty that the result would have been the same without the improper evidence. *Id.*; *Rose*, 123 Nev. at 211, 163 P.3d at 419; *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Although the gravity of the crimes and the resulting sentence were serious, the errors committed were minor, only marginally helpful to the State, and brief in duration. The State otherwise had compelling evidence, as explained above, to convict Warren-Hunt without the errors and thus the issue of guilt was not close. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk