IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLEMON HUDSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82231-COA

ORDER OF AFFIRMANCE

Clemon Hudson appeals a judgment of conviction, pursuant to a jury verdict, of one count conspiracy to commit burglary; one count attempted burglary while in possession of a firearm or deadly weapon; two counts attempted murder with use of a deadly weapon; and one count battery with use of deadly weapon resulting in substantial bodily harm, and a district court order denying his postconviction petition for a writ of habeas corpus except as to the right to a direct appeal under NRAP 4(c). Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Eric Clarkson shared a home with his best friend Willoughby Potter de Grimaldi in Las Vegas.[1] One morning, shortly after 3:30 a.m., Clarkson heard his steel patio furniture scraping across the home's brick patio. Clarkson looked out of his window and observed an African-American man on his patio. Clarkson went to Grimaldi's bedroom to inform him of what he had seen and called 9-1-1 to report someone in his backyard. Through the patio window, Grimaldi observed an African-American man wearing a baseball cap and racking a shotgun. Clarkson and Grimaldi then heard someone banging on their front door, and Grimaldi observed through

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

the living room window a shirtless figure with an afro hairstyle wearing basketball shorts.

Police officers Malik Grego-Smith and Jeremy Robertson responded to the 9-1-1 call. The officers entered the residence and proceeded through the house when, upon arriving at the back door, they saw two individuals with guns outside. One of the officers opened the backdoor and was immediately met with gunfire from outside. Clarkson later described two distinct types of projectiles flying through his living room.

A rifle round struck Officer Robertson in the thigh, fracturing his femur. Clarkson and Grimaldi retreated further into the house while the officers returned fire. Officer Grego-Smith informed dispatch that Officer Robertson had been shot. Multiple officers then responded to the scene, including a K-9 officer.

A police air unit observed Hudson lying in the backyard with a shotgun next to him. An on-ground communications officer commanded Hudson to crawl towards the group of law enforcement. When Hudson did not do so, the K-9 officer deployed Loki, his police dog. Loki bit Hudson on the wrist and began dragging him away from the spot where he had been laying. Seeing Hudson's hands were empty, the officers took him into custody. Steven Turner—Hudson's codefendant in the proceedings below—fled the scene and officers apprehended him approximately three and a half hours later.

Investigators later recovered a rifle, a shotgun, a handgun, and a baseball cap from Clarkson's backyard. Investigators discovered Hudson's DNA on the cap and his latent fingerprints on the shotgun.

Investigators also found Hudson's DNA in blood found on the public sidewalk, Clarkson's patio, and the backyard walkway of the house.

Hudson subsequently admitted to law enforcement that he had gone with Turner to Clarkson's house to steal marijuana, believing no one to be home. Upon discovering the doors to the home locked, the two planned to break the back window. Hudson said he had a shotgun and was wearing a baseball cap. He also admitted to carrying a small handgun but did not explain why he was armed. And he identified a car parked in front of Clarkson's house as belonging to his mother.

Hudson admitted to firing the shotgun at the bottom of a window of the house at least once when the door was opened by an officer. After firing the shotgun, he fell backward. Turner likewise admitted to law enforcement that he went to Clarkson's house to steal marijuana.

Hudson and Turner were charged by way of an amended indictment of the following: one count conspiracy to commit burglary; one count attempted burglary while in possession of a firearm or deadly weapon; two counts attempted murder with use of a deadly weapon; and one count battery with use of deadly weapon resulting in substantial bodily harm. Both pleaded not guilty at the arraignment. Hudson filed a pretrial motion to sever. The State opposed the motion, and the district court denied the motion without prejudice after conducting a hearing on the issue. The district court ruled that the State would provide redacted statements to the defendants at which time Hudson could renew his motion. Hudson renewed his objections to using a redacted version of Turner's confession at trial, and the district court once again denied his motion to sever without prejudice and stated that it would be further redacting the statements.

At the joint trial, the State elicited the certain statements offered against Turner, but allegedly about Hudson, from the detective to whom Turner had confessed. The district court gave a limiting instruction that the jury was only to consider the statements as evidence against Turner. The statements were redacted to omit any direct reference to Hudson. For example, Detective Pazos testified that Turner had stated that "someone came to pick him up;" "the person he was with hopped over the wall first;" and "there was nobody in the car with us." Turner did not testify.

At the conclusion of a ten-day trial, the jury found Hudson and Turner guilty on all five counts. The district court sentenced Hudson to an aggregate sentence of 168 months to 480 months with 1,022 days credit for time served. Hudson did not initially appeal his conviction.

Approximately four months after the judgment of conviction was filed, Hudson filed a petition for a writ of habeas corpus. The district court held an evidentiary hearing to determine whether Hudson had been denied his right to a direct appeal. The court then granted Hudson a direct appeal but denied his other habeas claims of ineffective assistance of counsel. Hudson now appeals the judgment of conviction and the denial of his habeas claims. We address each of his arguments in turn.

The district court did not abuse its discretion in denying Hudson's motion to sever defendants' trial

Hudson argues the district court should have severed his joint trial with Turner. First, he argues there was no way to redact Turner's statements enough to not implicate Hudson, and that Turner's statements constituted a *Bruton* violation.[2] Hudson explains that the *Bruton* violation

[2]*See Bruton v. United States*, 391 U.S. 123 (1968) (holding that a defendant is deprived of his rights under the Confrontation Clause when

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prevented him from exercising his Sixth Amendment right to confrontation by permitting Turner's statements to be admitted without Turner himself testifying, thereby denying Hudson the right to cross-examine Turner.

Next, Hudson argues the district court abused its discretion by denying his motion to sever because his defense was antagonistic to Turner's. He argues Turner's "statement implicated [him] for the attempt murder." Hudson acknowledges that he conceded the burglary and conspiracy to commit burglary counts during closing arguments. However, he argues that the jury would not have found him guilty of attempted murder without Turner's statement.

The State counters that *Bruton* is not implicated where a codefendant's statement is redacted so that it is not facially incriminating. It also argues Hudson's own confession rendered any statements from Turner about him harmless error. The State further argues that each codefendant presented unique defenses against their criminal liability. These defenses, the State concludes, were "not so conflicting and irreconcilable that the jury could infer guilt based only on the conflicts in [the] defenses."

An appellant bears a "heavy burden" to show that the district court abused its discretion in failing to sever a trial. *Rodriguez v. State*, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001). NRS 174.165(1) permits a district court to sever a joint trial where "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together." Individuals who have been indicted together should be tried jointly, "absent compelling

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his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant).

reasons to the contrary." *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). Severance should only be granted where there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Rodriguez*, 117 Nev. at 808, 32 P.3d at 779 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). Ultimately, "the question is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants." *Jones*, 111 Nev. at 854, 899 P.2d at 547.

We first address Hudson's *Bruton* argument. The Sixth Amendment's right of confrontation prevents the use, at a joint trial, of a non-testifying defendant's admission, if it incriminates another defendant. *Bruton*, 391 U.S. at 128. However, where a non-testifying defendant's statement is not incriminating on its face, but rather only when linked with other evidence introduced at trial, then a limiting instruction will cure any prejudice. *Lisle v. State*, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998); *see also Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (holding that the confrontation clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction where the confession is redacted to eliminate any reference to the other defendant's existence); *United States v. Enriguez-Estrada*, 999 F.2d 1355, 1359 (9th Cir. 1993) (extending *Richardson* to allow a defendant's name to be replaced by a neutral word like "individual"), *overruled in part on other grounds by United States v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998). "[A] defendant's own statements may be

considered in assessing whether a *Bruton* error, if any, was harmless." *Rodriguez*, 117 Nev. at 809, 32 P.3d at 779.

Here, Turner's statements did not facially incriminate Hudson. Rather, Turner's statements were only incriminating when linked to other evidence presented at trial. *See Lisle*, 113 Nev. at 692-93, 941 P.2d at 468. Hudson's DNA and fingerprints were found on the baseball cap and shotgun recovered from Clarkson's backyard. His DNA was also found on Clarkson's patio. Hudson himself confessed to going to Clarkson's house to steal marijuana, carrying a shotgun and a handgun, and firing the shotgun at least once. As such, there was no *Bruton* violation, and any prejudice against Hudson caused by admitting Turner's statements was minimal. Further, this prejudice was likely cured by the limiting instructions the district court gave alongside each admitted statement. *See Lisle*, 113 Nev. at 689, 941 P.2d at 466 ("The jury is expected to follow the instructions in limiting evidence for each defendant.").

Hudson next argues his defense was antagonistic to Turner's. "[M]utually antagonistic defenses are not prejudicial per se." *Jones*, 111 Nev. at 854, 899 P.2d at 547. Rather, to be considered prejudicial to the point of required severance, "defenses must be antagonistic to the point that they are 'mutually exclusive.'" *Marshall v. State*, 118 Nev. 642, 645-46, 56 P.3d 376, 378 (2002) (quoting *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 122 (2002)). "Defenses are mutually exclusive when 'the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" *Id.* at 646, 56 P.3d at 378 (quoting *Rowland*, 118 Nev. at 45, 39 P.3d at 123).

Here, Hudson's and Turner's defenses were not "mutually exclusive" so as to require severance. At closing arguments, Turner argued the State had failed to prove that he was on Clarkson's patio or that he had a gun. He further argued the State could not prove there were only two people involved but rather that "there were likely four people involved." On the other hand, even though Hudson did not testify, he argued that he merely intended to go to an empty house to steal some marijuana. Hudson continued that once the gunfire started, he froze in fear because he did not "have murder on the brain" and did not "sign up for a gun fight." He argued it was not his intent to kill anyone and that there was "just no motive" to do so.

These defenses were not mutually exclusive because the jury could have accepted either while still acquitting the other defendant. *See Marshall*, 118 Nev. at 646, 56 P.3d at 378. In other words, the jury could have accepted both defenses and acquitted both defendants. Indeed, had the jury accepted Turner's argument that more individuals were involved, it would arguably have been more likely to acquit Hudson as well. On appeal, Hudson acknowledges this case does not present "a typical 'whodunnit' where two defendants pointed fingers at each other and tried to escape criminal liability altogether." Rather, both defendants admitted they were at Clarkson's house, near the patio, at the time of the crimes and that they had arrived there together. Each then pursued separate defenses to avoid criminal liability for the attempted murder charges. The district court therefore did not abuse its discretion in denying Hudson's motion to sever based on either *Bruton* or the codefendants' separate defenses.

Finally, we consider Hudson's own statements to determine whether a *Bruton* violation, if any, was harmless. *Rodriguez*, 117 Nev. at

809, 32 P.3d at 779. Here, Hudson admitted to going to Clarkson's home to steal marijuana. He admitted to carrying the shotgun and a small handgun. And he admitted to firing the shotgun at least once "at the bottom of the window" of the home moments after the sliding backdoor was opened. These statements are more incriminating than Turner's statements that "someone came to pick him up," and "the person he was with hopped over the wall first." Therefore, any *Bruton* error was harmless considering Hudson's own confession.

The district court did not err in giving the challenged jury instructions

On appeal, Hudson challenges four jury instructions given by the district court. Hudson argues the district court erred in giving, over his objection, jury instruction number 29[3] because the facts of his case are dissimilar to the facts of *Ewell v. State*,[4] from which the instruction is derived. The State counters that *Ewell* stands for the proposition that the prosecution is not required to prove a defendant intended to kill a specific member of a group when he fired at the group. The State argues that it is irrelevant whether the "group" in this case was comprised of Officers Richardson and Grego-Smith in the doorway of Clarkson's home or of the officers in addition to Grimaldi and Clarkson.

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[3]Jury Instruction No. 29 reads:

> During an attack upon a group, a defendant's intent to kill need not be directed at any one individual. It is enough if the intent to kill is directed at the group. The State is not required to prove that a Defendant intended to kill a specific person in the group.

[4]105 Nev. 897, 785 P.2d 1028 (1989).

"District courts have broad discretion to settle jury instructions," and we therefore review a district court's decision to give or not give a specific jury instruction for an abuse of discretion. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "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." *Id.* "[We] evaluate appellate claims concerning jury instructions using a harmless error standard of review." *Barnier v. State*, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). NRS 178.598 states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Here, like the jury instruction in *Ewell*, the jury instruction given by the district court "merely inform[ed] the jury that the state did not have to prove that [Hudson] intended to kill a specific person in the group" that he fired upon to be found guilty of attempted murder. *See Ewell*, 105 Nev. at 899, 785 P.2d at 1029. This accurately and fairly states Nevada law. *Id.* In addition, Hudson admitted to firing the shotgun at the house. Furthermore, Clarkson testified that he was close enough to the back door to see the bullets "fly across [his] living room." The district court relied on this evidence in allowing the jury instruction. A "group" is defined as "a number of individuals assembled together or having some unifying relationship." *See Group, Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). Therefore, Hudson fired into a group of either the two police officers or the two police officers plus Grimaldi and Clarkson. As such, jury instruction number 29 was correct under the law and the district court's decision to give the instruction was not arbitrary or capricious and therefore did not constitute an abuse of discretion. *See Jackson*, 117 Nev. at 120, 17 P.3d at 1000.

Hudson failed to object to the next three jury instructions below and therefore requests that we review them for plain error. To demonstrate plain error, Hudson must show: (1) there was an error; (2) the error was plain or clear; and (3) the error affected the appellant's substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). An error is "plain" if it is clear under current law from a casual inspection of the record. *Id.* "[A] plain error affects a defendant's substantial rights when it causes prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

First, Hudson argues the district court should not have given a flight instruction.[5] He argues no evidence shows that he fled the scene. Rather, Hudson explains he was apprehended at the scene and that he did not move from the time the officers told him to remain where he was. Therefore, according to Hudson, the district court erred by not giving a limiting instruction that the flight instruction applied only to Turner (who did flee the scene) and not to Hudson (who did not). The State concedes Hudson did not flee but argues the jury was entitled to hear the flight

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[5]Jury Instruction No. 38 reads:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

instruction because Turner fled. It further argues the jury could not reasonably have applied the flight instruction to Hudson because there was no evidence that he had fled the scene.

An instruction regarding a defendant's flight is appropriate where it is supported by the evidence. *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 126 (2005), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). Specifically, because "a flight instruction may give undue influence to one phase of evidence, [this court] will carefully scrutinize it to be certain that the record supports the conclusion that appellant's going away was not just a mere leaving but was with a consciousness of guilt and for the purpose of avoiding arrest." *Miles v. State*, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981).

Here, Hudson has not demonstrated there was any error because he never left the scene and therefore there was no "going away" that could have been misconstrued by the jury as flight to begin with. In other words, the district court's flight instruction was inapplicable to Hudson altogether. Hudson has cited no legal authority, nor has he cogently argued why it was plain error for the district court to give the flight instruction—which applied to his codefendant—without a limiting instruction. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). In the absence of legal authority indicating otherwise, any error on the district court's part in giving the flight instruction was not clear under current law from a casual inspection of the record. *See Jeremias*, 134 Nev. at 51, 412 P.3d at 49.

Nevertheless, even assuming arguendo that the district court committed plain error by giving the flight instruction to the jury without a limiting instruction, Hudson has not demonstrated that any such error affected his substantial rights. The testimony given at trial made clear that, rather than flee, Hudson remained at and was apprehended at the scene. Turner, on the other hand, fled the scene and was only apprehended after a three-and-a-half-hour search. Hudson has not pointed to anything in the record that might suggest the jury would mistakenly apply the flight instruction to him. Indeed, the jury could not have done so because there was no "going away" on Hudson's part that might have been misinterpreted as flight. Therefore, even if the district court had committed plain error in giving a flight instruction that did not apply to Hudson, without a limiting instruction, such error was neither prejudicial nor did it cause a "grossly unfair" outcome. *See Jeremias*, 134 Nev. at 51, 412 P.3d at 49.

Hudson next argues the district court's reasonable doubt instruction[6] improperly minimized the State's burden of proof. The State

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[6]Jury Instruction No. 40 reads:

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the crime.
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> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the

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counters that this instruction is statutorily required. *See* NRS 175.211(2). It further notes that the second paragraph of the given instruction comes verbatim from NRS 175.211(1).

Here, the district court gave Nevada's statutory reasonable doubt instruction as set forth and mandated by NRS 175.211. The instruction explicitly stated Hudson was presumed innocent until proven guilty. Additionally, the jury instructions made clear that the State bore the burden of proving Hudson guilty. The supreme court has upheld this precise reasonable doubt instruction on multiple occasions. *See, e.g.*, *Belcher v. State*, 136 Nev. 261, 276, 464 P.3d 1013, 1029 (2020) ("[W]e have repeatedly upheld the constitutionality of [the reasonable doubt] instruction."). Therefore, the district court did not err in giving the reasonable doubt jury instruction, plainly or otherwise.

Finally, Hudson argues the district court's "equal and exact justice" instruction[7] improperly minimized the prosecution's burden of

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> charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
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> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

[7]Jury Instruction No. 50 reads:

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing

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proof. The State counters that the district court's "equal and exact justice" instruction did not deal with the presumption of innocence at all. It further argues that the jury instructions explaining the presumption of innocence correctly stated Nevada law.

Here, the district court gave a jury instruction specifically stating Hudson was presumed innocent unless proven guilty. It also gave multiple instructions making clear that the jury was required to find Hudson guilty beyond a reasonable doubt. The jury instructions also made clear that the State bore the burden of proving Hudson guilty. The supreme court has upheld this "equal and exact justice" instruction on multiple occasions. *See, e.g.*, *Belcher*, 136 Nev. at 276, 464 P.3d at 1029 ("This court has upheld the language used in the . . . equal and exact justice instruction." (internal citations omitted)). Therefore, the district court did not err in giving the equal and exact justice jury instruction, plainly or otherwise.

The State's misconduct does not warrant reversal of Hudson's conviction

Hudson argues the prosecutor committed misconduct when he told the jury that the State could have charged Hudson with four counts of attempted murder based upon transferred intent, an issue not in evidence. He also argues the prosecutor committed misconduct by stating that the jurors would be glad to hear Hudson had been apprehended. The State concedes these statements were improper. Nevertheless, it argues these comments do not warrant reversal in light of the substantial evidence of Hudson's guilt.

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equal and exact justice between the Defendant and the State of Nevada.

We engage in a two-step analysis when presented with a claim of prosecutorial misconduct. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine whether the prosecutor's conduct was improper. *Id.* Then, if the conduct was improper, we determine whether the improper conduct warrants reversal. *Id.* We will not reverse a conviction if the prosecution's conduct was harmless error. *Id.* Where an error is not of a constitutional dimension, it is harmless unless it substantially affects the jury's verdict. *Id.* at 1189, 196 P.3d at 476.

Here, the prosecutor committed misconduct by inviting the jury to consider issues not in evidence when he said the State could have charged Hudson with additional crimes, thereby implying the prosecutor believed Hudson to be guilty of additional, uncharged crimes. *See Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (holding that it is "always improper" for the prosecutor to give a personal opinion regarding a defendant's guilt); *see also Valdez*, 124 Nev. at 1192, 196 P.3d at 478 (recognizing that the prosecutor must "not inject [its] personal opinion or beliefs" into the trial); *Turner v. State*, 136 Nev. 545, 556, 473 P.3d 438, 449 (2020) (concluding it was misconduct for the prosecutor to reference the possibility of additional, uncharged crimes). However, the district court sustained Hudson's objection to this comment and instructed the jury to disregard it. *See Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (concluding the district court's admonishment was sufficient to cure any prejudice caused by a prosecutor's improper comment); *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."). Further, the evidence—including Hudson's confession to firing the shotgun at the house moments after the sliding backdoor was opened—strongly

inculpated Hudson. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 480 ("This error . . . did not infect the trial with unfairness so as to affect the verdict and deny [appellant] his constitutional right to a fair trial."). Therefore, this misconduct does not warrant reversal of Hudson's conviction.

The prosecutor also committed misconduct by inviting the jurors to feel "good" about convicting a defendant who shot a police officer. *See Pantano*, 122 Nev. at 793, 138 P.3d at 484 (holding that it is improper to "appeal[ ] to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction"); *see also Turner*, 136 Nev. at 556, 473 P.3d at 449 (concluding that it was misconduct to invite the jury to feel good about convicting defendants who shoot police officers). However, Hudson did not object to this comment, and we therefore review it for plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Under plain error review, Hudson has not demonstrated his substantial rights were affected by the prosecutor's comment. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Although improper, two fleeting comments made near the end of a ten-day trial do not warrant the reversal of a conviction that was otherwise supported by strong evidence implicating Hudson.[8]

Cumulative error does not warrant reversal of Hudson's conviction

If each error standing alone would not warrant reversal, Hudson argues this court should reverse his convictions for cumulative

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[8]Hudson did not object below to the prosecutor's comment stating it did not matter that Turner and Hudson might not have known who they were shooting at so long as they attempted to kill two human beings. Even assuming arguendo the prosecutor's statement constituted misconduct, Hudson has not demonstrated how that statement impacted his substantial rights to a fair trial. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Therefore, the alleged misconduct would not warrant reversal of Hudson's conviction.

error. The State counters that the question of Hudson's guilt was not close, and that Hudson has failed to demonstrate multiple errors that might warrant relief. Even though the State concludes the gravity of the crimes of which Hudson was convicted was severe, his cumulative error challenge cannot succeed when looking at the totality of the proceedings below.

Even if every error below fails to provide grounds for reversal alone, the cumulative effect of those errors may provide such grounds. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When reviewing a cumulative error claim, this court looks 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).

Here, as to the first *Mulder* factor, the prosecution presented substantial evidence of Hudson's guilt including his DNA on the shotgun, and his own confession to having gone to Clarkson's house to steal marijuana and to shooting the shotgun at the house. We also note Hudson was charged under alternative theories of liability including aiding or abetting Turner and conspiring with Turner. As to the second factor, two errors occurred during Hudson's trial. Each was an incident of prosecutorial misconduct. Although troubling, these two instances of misconduct were brief comments made near the end of a ten-day trial, and they do not warrant the reversal of Hudson's conviction considering the strong evidence that otherwise implicated him, even considering the gravity of the crimes of which he was convicted, under the third *Mulder* factor.

Therefore, we decline to reverse Hudson's conviction based on the two instances of prosecutorial misconduct.[9]

Hudson did not receive ineffective assistance of counsel

Moving now to his postconviction habeas petition, Hudson raises three ineffective assistance of counsel claims. Criminal defendants have a constitutional right to assistance of counsel. U.S. Const. amend. VI. To prevail on an ineffective assistance of counsel claim, an appellant "must demonstrate that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense."[10] *Ennis v. State*, 122 Nev. 694, 705, 137 P.3d 1095, 1102 (2006). To establish prejudice, an appellant must demonstrate that "there is a reasonable probability that the verdict would have been different." *Id.* We may consider the two prongs of this test in any order and need not consider both where an appellant fails to prevail on one of the two. *Id.* We exercise independent review over ineffective assistance of counsel

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[9]Hudson argues the district court erred by allowing "several" armed, uniformed officers to "pack" the courtroom during closing arguments. However, "the mere presence of officers in the courtroom does not demonstrate prejudice." *Turner v. State*, 136 Nev. 545, 549 n.3, 473 P.3d 438, 444 n.3 (2020). Apart from Hudson's brief objection to the officers' presence below there is nothing else to suggest the number of officers present nor that their presence had any impact on the proceedings. Therefore, the record is insufficient to determine the officers' presence deprived Hudson of a fair trial. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("We cannot properly consider matters not appearing in [the] record.").

[10]This test was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant must prove the facts underlying his ineffective assistance of counsel claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004).

claims, however "a district court's factual finding regarding a claim of ineffective assistance of counsel is entitled to deference so long as it is supported by substantial evidence and is not clearly wrong." *Id.*

Hudson first argues that the district court abused its discretion by failing to find he had received ineffective assistance of counsel where his counsel did not object to the district court giving the flight instruction without giving a limiting instruction. Because the flight instruction was entirely inapplicable to Hudson, he argues, there was no strategic justification for failing to object to the instruction. The State counters that any objection to the flight instruction would have been futile because Turner did flee and therefore the district court properly gave the flight instruction that applied to one of the two co-defendants.

Our inquiry in an ineffective assistance of counsel claim begins with "the strong presumption that 'counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* at 704-05, 137 P.3d at 1102 (quoting *Strickland*, 466 U.S. at 689). Here, even assuming arguendo that the giving of the flight instruction without a limiting instruction was error, as we have explained, Hudson has failed to demonstrate that the error affected his substantial rights. He has likewise failed to demonstrate that any failure to object to the instruction prejudiced him for purposes of his ineffective assistance of counsel claim. *See id.* at 705, 137 P.3d at 1102. Hudson has not pointed to anything in the record that might suggest the jury mistakenly applied the flight instruction to him, and the jury could not have done so because there was no "going away" on Hudson's part that might have been misinterpreted as flight. As such, Hudson has not demonstrated "there is a reasonable probability that the verdict would have been different" but for counsel's failure to object to the flight instruction.

Id. We need only determine that Hudson has failed as to at least one of the prongs of his ineffective assistance of counsel claim to dispose of it. *Id.* Because Hudson has failed to demonstrate prejudice, we cannot conclude that the district court abused its discretion in finding that Hudson had not received ineffective assistance of counsel based on his counsel's failure to object to the flight instruction.

Next, Hudson argues that his trial counsel should have objected to the district court's "exact and equal justice" jury instruction and its reasonable doubt jury instruction. At a minimum, Hudson argues, the district court should have granted him an evidentiary hearing on the issue when he raised his ineffective assistance of counsel claims in his habeas proceedings before the district court.[11] The State counters that counsel's objections would have been "an exercise in futility" because both instructions have been upheld by the supreme court on numerous occasions.

"Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims." *Id.* at 706, 137 P.3d at 1103. Here, as we have explained, the supreme court has upheld the exact and equal justice jury instruction and the reasonable doubt jury instruction used by the district court. Any objection to these two jury instructions therefore would have been futile and counsel need not have lodged an objection. *See id.* As such, the district court did not abuse its discretion in finding that

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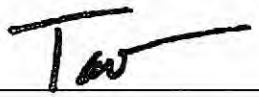
[11]Hudson has failed to cite to any legal authority for the assertion that he was entitled to an evidentiary hearing on his claims, and he has not cogently argued the point. Therefore, we need not consider his argument that the district court should have granted him an evidentiary hearing. *See Maresca*, 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 or lacks the support of relevant authority).

Hudson had not received ineffective assistance of counsel based on his counsel's decision to not object to these two jury instructions because counsel was not deficient nor was there prejudice. Accordingly, we

ORDER the judgment of conviction and the district court's order denying the habeas petition AFFIRMED.[12]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[12]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.