IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERARDO ALCARAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83485-COA

ORDER OF AFFIRMANCE

Jerardo Alcaraz appeals a judgment of conviction, pursuant to a jury verdict, of one count unlawful acts related to human excrement or bodily fluid. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

One night, Alcaraz arrived at the Humboldt General Hospital, in the custody of Officer Heather Cahill of the Winnemucca Police Department.[1] Officer Cahill asked an EMT, Bruce Baker, to hold the hospital door open for her, informing him that Alcaraz was threatening to bite, kick, and spit on her. Officer Cahill repeated Alcaraz's threats a second time to Baker and to Kyle Jones, a hospital security officer, and also explained that Alcaraz was refusing to exit the patrol car.

At some point, presumably after being forcefully removed from the patrol car, Alcaraz ended up on the ground on his stomach. Officer Cahill leaned over Alcaraz with her left leg on his side to control him as he resisted. During the struggle, Alcaraz turned his head and spit on Officer Cahill's knee.

Alcaraz was charged by way of an amended criminal information with one count of unlawful acts related to human excrement or bodily fluid,

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

a gross misdemeanor. *See* NRS 212.189. Alcaraz pleaded not guilty. Over the course of a two-day trial, the State presented as witnesses Officer Cahill, EMT Baker, Security Officer Jones, and another hospital employee, Brittanie Lopez. Alcaraz did not testify.

At the conclusion of the trial, Alcaraz proposed a jury instruction on attempt[2] and a jury instruction on misfortune or accident.[3] The district court rejected each instruction. As to the attempt instruction, the court explained that the statute did not expressly provide for a lesser crime such as attempt. The district court also ruled that an instruction on attempt did not appear to be applicable. As to the misfortune or accident instruction, the court similarly ruled that it did not "appl[y] in this case from the evidence as it's been presented at trial."

The jury found Alcaraz guilty. The district court then sentenced Alcaraz to 364 days in jail. The court suspended all but 45 days of the sentence and placed Alcaraz on probation for 12 months. Alcaraz now appeals from the judgment of conviction. We address each of his arguments in turn.

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[2]Alcaraz's rejected jury instruction reads:

> When an offense has been proved against a defendant and there exists a reasonable doubt as to which of two or more offenses he is guilty, he shall be convicted only of the lesser included offense.
>
> Attempted Unlawful Acts Related to Human Excrement or Bodily Fluid is a lesser included offense of Unlawful Acts Related to Human Excrement or Bodily Fluid.

[3]Alcaraz's rejected jury instruction reads: "A person who commits an act through misfortune or accident does not thereby commit a crime."

The district court did not abuse its discretion by not giving Alcaraz's proposed jury instructions

Alcaraz argues the district court abused its discretion by rejecting his proposed jury instructions on attempt and on misfortune or accident. He argues there was evidence to support giving each instruction. The State counters that there was no evidence to support giving either instruction.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A district court's failure to instruct on a defendant's theory of the case that is supported by the evidence warrants reversal, unless such error is harmless. *Newson v. State*, 136 Nev. 181, 185, 462 P.3d 246, 250 (2020); *see also Cortinas v. State*, 124 Nev. 1013, 1023-25, 195 P.3d 315, 322-23 (2008) (discussing when an instructional error may be reviewed for harmlessness). Where there is no supportive evidence for an instruction, however, it should not be given. *Williams v. State*, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975). This includes instructions on lesser-included offenses, which must also be supported by the evidence. *Collins v. State*, 133 Nev. 717, 727, 405 P.3d 657, 666 (2017).

Here, the record is insufficient to determine whether the evidence supported either of Alcaraz's proposed instructions. On appeal, Alcaraz has only provided the portion of the trial transcript that includes the district court settling jury instructions and the parties' closing arguments. Alcaraz has not supplied the transcript of the witnesses' testimonies, the body camera footage alluded to during closing arguments, nor any other evidence. In other words, Alcaraz has only provided arguments of counsel, rather than evidence, for our review. *See Lord v. State*, 107 Nev. 28, 33, 806

P.2d 548, 551 (1991) (noting, with approval, that "the jury was instructed that argument by counsel is not evidence"); *Klein v. State,* 105 Nev. 880, 884, 784 P.2d 970, 972-73 (1989) (emphasizing that "the prosecutor began his closing argument by reminding the jury of the court's instruction that nothing counsel might say during the trial was to be considered as evidence in the case" in concluding that there was no prosecutorial misconduct). As such, we need not address Alcaraz's argument as to the denial of his proposed jury instructions. *See* NRAP 30(b)(3) (requiring an appellant to include in his appendix "any . . . portions of the record essential to determination of issues raised in [the] appeal"); *Johnson v. State,* 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (explaining that an appellant must provide an adequate appellate record); *see also Riggins v. State,* 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials "are presumed to support the district court's decision"); *rev'd on other grounds by Riggins v. Nevada,* 504 U.S. 127 (1992).

Furthermore, because the record on appeal is lacking, it is unclear whether the evidence supported Alcaraz's requested instructions. Alcaraz argues the following evidence was presented during trial: (1) Alcaraz made a "hocking" sound; (2) witnesses observed fluid on the hospital floor; (3) Officer Cahill observed fluid on her boot; (4) video of the incident did not record Alcaraz spitting at the officer; and (5) the fluid allegedly observed was never photographed, preserved, or tested. However, he does not indicate where in the record this alleged evidence is found, nor have we located it. *See* NRAP 3C(e)(1)(C) ("Every assertion in the fast track statement regarding matters in a . . . transcript or other document shall cite to the page number and volume number, if any, of the appendix that supports the assertion.").

We therefore lack necessary context for when or how that evidence was introduced to determine whether it supports Alcaraz's theory of the case.

Alcaraz did not testify. Therefore, there is no direct testimony from him that he merely attempted to spit on Officer Cahill or that he accidentally spit at Officer Cahill. On appeal, he has not pointed to any portion of the record indicating that any of the witnesses testified, on direct or cross examination, that Alcaraz only attempted to spit on Officer Cahill or that it might have been an accident. Indeed, when settling jury instructions, the State specifically pointed out that Officer Cahill had testified Alcaraz spitting on her could not have been an accident. And neither Alcaraz nor the State mentioned whether the spitting was merely an attempt or accidental during closing arguments. Because Alcaraz has failed on appeal to include any evidence supporting his proposed jury instructions, we cannot conclude that the district court abused its discretion in rejecting the proposed instructions or that there was prejudicial error.[4] *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Williams*, 91 Nev. at 535, 539 P.2d at 462. Moreover, even if we consider Alcaraz's representation as to what the evidence shows, that evidence largely supports the State's case, not his.

Alcaraz has not demonstrated plain error as to the prosecutor's comment on his silence

Alcaraz next argues that the prosecutor violated Alcaraz's right to remain silent by alleging that Alcaraz had failed to deny that he had spit

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[4]In light of our disposition, we do not reach the merits of the State's assertion that Nevada recognizes no such crime as attempted violation of unlawful acts related to human excrement or bodily fluids.

at Officer Cahill.[5] The State counters that the prosecutor referred to a moment when Officer Cahill told her sergeant that Alcaraz had spit on her, and Alcaraz, who was within earshot, remained silent. The State argues that because Alcaraz was not remaining silent in the face of police interrogation after receiving a *Miranda* warning the prosecutor's comment did not violate Alcaraz's right to remain silent. The parties agree that Alcaraz did not object to the prosecutor's comment below. We therefore review it for plain error.

To demonstrate plain error, Alcaraz must show: (1) there was an error; (2) the error was plain or clear; and (3) the error affected his substantial rights. *See 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.

As a preliminary matter, Alcaraz has failed to cite any relevant authority or cogently argue his point as to the improper nature of the prosecutor's comment on his silence regarding an offense for which it appears that he had not yet been arrested. Therefore, we need not address his argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that courts need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Additionally, Alcaraz does not argue any of the elements of plain error. Thus, even if the prosecutor's comment was improper, on appeal Alcaraz has not demonstrated that his substantial rights were affected by causing "prejudice

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[5]During closing arguments, the prosecutor stated, "[Officer Cahill] even tells Sergeant Morton when he arrives, he spit on me. What else did you, [the jury], hear? Defendant was in earshot, and he did not deny that."

or a miscarriage of justice." *See Jeremias*, 134 Nev. at 51, 412 P.3d at 49. Alcaraz has not pointed to anything in the record that suggests that the jury was prejudiced by the prosecutor's comment. *See generally Anderson v. State*, 121 Nev. 511, 516-17, 118 P.3d 184, 187 (2005) (stating that a prosecutor's comments on a defendant's post-arrest silence are harmless beyond a reasonable doubt if they are merely passing in nature). And, as explained above, Alcaraz has not provided a full record on appeal, making it impossible for us to weigh the prosecutor's comment against the evidence presented at trial. Because Alcaraz has failed to demonstrate that the prosecutor's comment caused prejudice or a miscarriage of justice, we cannot conclude that reversal is warranted based on the alleged plain error.

In sum, Alcaraz has failed to establish on appeal that the evidence supported his proposed jury instructions. He also has not demonstrated on appeal that the prosecutor's comment on his silence was improper or that it affected his substantial rights. Therefore, even if the prosecutor's comment was improper, it does not warrant reversal of Alcaraz's conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[6]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[6]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.

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk