

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TED MICHAEL DONKO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

TED MICHAEL DONKO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

✓
No. 81075-COA

No. 83037-COA

FILED

APR 20 2022

ELIZABETH A. SPOWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ted Michael Donko appeals from a judgment of conviction in 81075-COA and an amended judgment of conviction in 83037-COA, pursuant to a jury verdict, of two counts of battery with use of a deadly weapon resulting in substantial bodily harm; three counts of attempt murder with use of a deadly weapon; assault with a deadly weapon; discharging a firearm at or into occupied structure, vehicle, aircraft or watercraft; and ownership or possession of a firearm by prohibited person. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

On October 1, 2019, a shooting occurred outside a residence.¹ The shooter aimed at three individuals, injuring two of them. Multiple witnesses described the shooter as wearing a red shirt and escaping in a Toyota vehicle. Law enforcement arrived on the scene and discovered a matching vehicle a few blocks from the shooting. A red shirt was also located on a sidewalk near the vehicle. Officers from the Las Vegas Metropolitan

¹We do not recount the facts except as necessary for our disposition.

Police Department (LVMPD) impounded and searched the vehicle finding a license plate located between the seat and console, a bullet, and an unspent round of ammunition—which was a Win 40 Smith & Wesson cartridge—located on the passenger floor. The license plate was processed for prints. The prints, upon processing, revealed a match with Donko's left middle finger. The red shirt was also processed for DNA and revealed a mixture of two DNA profiles, which included Donko's DNA profile. Donko was charged with two counts of battery with use of a deadly weapon resulting in substantial bodily harm; three counts of attempt murder with use of a deadly weapon; assault with a deadly weapon; discharging a firearm at or into occupied structure, vehicle, aircraft or watercraft; and ownership or possession of a firearm by prohibited person.

After viewing a photo lineup, Deandre Woods, who was present at the shooting, identified Donko as the shooter, and he stated he was "95 percent" sure of his identification.² The case proceeded to a jury trial. Allison Rubino, a LVMPD forensic analyst, testified at trial that Donko's DNA profile was included in 99 percent of the DNA mixture, with the remaining one percent from an unknown contributor. Detective Marin, one of the law enforcement officers who responded to the scene, testified that the cartridge found in the Toyota vehicle was of the same type as the shell casings found at the scene of the shooting. At trial two witnesses identified Donko as the shooter involved in the incident. One of the witnesses, Genaro Ramos, who was called by the State, testified as to what he witnessed on the day of the shooting. He said he heard gunshots, saw a car speed by, and witnessed a

²Notably, Woods testified at the eventual trial as to seeing Donko the night before the shooting, wearing a red shirt and inquiring about someone named "Shorty," the same name mentioned by Donko the following day before he started shooting.

white male in a red shirt exit the vehicle. In his initial testimony, Ramos did not make an identification of Donko as the shooter, nor was he asked to do so during direct or cross-examination. After he testified and was in the hallway of the courthouse ready to leave, he privately told the prosecutor that he realized he could in fact identify Donko as the shooter. After Ramos initially testified, the State called Woods to testify. Woods identified Donko as the shooter, consistent with his pre-trial identification of Donko. During a break in Woods's testimony, the court held a bench conference with the State and Donko's counsel. During this conference, the State informed both the court and Donko's counsel that it would be recalling Ramos as a witness. Neither the defense nor the court inquired as to the State's purpose in recalling Ramos, nor did Donko's counsel object.

Ramos was recalled and testified that he had told the prosecutor in the hallway that he could identify Donko as the shooter but was nervous about doing so because "[t]he guy that I saw is the guy that I was going to point him, [sic] that that was the guy that I saw coming out of the car." Donko's counsel immediately objected, and the district court held a bench conference. Donko's counsel said that the identification was "improper," given that Ramos failed to identify Donko during his initial testimony. Donko's counsel asked the court to strike the identification. The State responded by indicating that there was nothing objectionable about Ramos's testimony concerning the hallway conversation with the prosecutor as it was accurate and with his identification of Donko. The district court stated that defense counsel's objection to Ramos's in-court identification was "not a legal objection," that there was nothing inadmissible about Ramos's testimony, and that Donko's counsel would be able to cross-examine Ramos regarding the identification. Donko's counsel then orally requested a mistrial for the same reasons previously discussed. The district court denied the oral motion

for a mistrial, finding that there was no legal reason to exclude Ramos's testimony regarding his in-court identification of Donko as the shooter, and that a mistrial was not warranted. Donko's counsel cross-examined Ramos regarding his identification. On the last day of trial, Donko testified in his own defense, against the advice of counsel. Based on the record, Donko's decision to testify was not related to Ramos's identification. During the State's closing argument, the prosecutor commented on Donko's inability during cross-examination to explain why certain physical evidence linking him to the shooting was found at the scene.

Ultimately, the jury convicted Donko on all counts. At sentencing, the district court imposed an aggregate sentence of 144-378 months. A judgment of conviction reflecting the aggregate total sentence of 144-378 months was filed. At sentencing, the district court also asked the State whether it was seeking restitution, and the State responded that the victims preferred that the court focus on sentencing Donko to time in prison rather than a restitution amount. The district court responded that it would retain jurisdiction to impose restitution but did not specify an amount. The defense did not object. Thus, the original judgment of conviction stated that the district court would retain jurisdiction for the purpose of imposing future restitution.

Subsequently, the State of Nevada Department of Corrections sent correspondence to the Clark County District Attorney's Office, stating that it believed there was a discrepancy in the judgment of conviction, as the calculations should have reflected an aggregate sentence of 168-438 months. The State then filed a motion to correct the aggregate sentence, arguing that the total aggregate sentence, based on the sentences given for each conviction, as incorporated into the judgment of conviction, should have reflected an aggregate sentence of 168-438 months. The district court held a

hearing on the State's motion. While Donko agreed that 168-438 months may have accurately reflected the total aggregate sentence based on the individual sentences set forth in the judgment of conviction, he argued it was the district court's intention to only impose an aggregate sentence of 144-378 months, as set forth in the judgment of conviction, so that the individual sentences would need to be adjusted accordingly. The court issued a minute order, finding that the aggregate sentence was miscalculated on the day of sentencing, but that the district court's individual sentences for each conviction, including which would run consecutively, was correct. Therefore, the district court corrected the aggregate sentence to 168-438 months, and an amended judgment of conviction was filed. The amended judgment of conviction, entered after the notice of appeal was filed in 81075-COA, did not state that the district court would retain jurisdiction for restitution. Donko filed a second notice of appeal, 83037-COA, to preserve his appellate rights regarding the district court's modification of the aggregate sentence in the amended judgment of conviction.

On appeal, Donko argues that the district court (1) abused its discretion and thereby violated Donko's Fourth, Sixth, and Fourteenth Amendment rights by admitting Ramos's in-court identification; (2) erred in amending Donko's aggregate sentence; (3) improperly retained jurisdiction over restitution; (4) violated his Fifth, Sixth, and Fourteenth Amendment rights by rejecting his proposed defense jury instructions; (5) allowed the State to violate his Fifth, Sixth, and Fourteenth Amendment rights based on prosecutorial misconduct during closing; (6) allowed his conviction to stand based on insufficient evidence; and (7) created cumulative error requiring reversal of his conviction. The State contends that Ramos's in-court identification was permissible, and it is the role of the jury to weigh the credibility of Ramos's testimony. The State also argues that the correction

to Donko's aggregate sentence was permitted by statute. The State argues that reversal is not warranted regarding the district court retaining jurisdiction for restitution, as it was not included in the amended judgment of conviction and is therefore moot. In response to the remainder of Donko's arguments, the State argues that the claims of improper denial of jury instructions, prosecutorial misconduct, insufficient evidence, and cumulative error are without merit. We address each of Donko's arguments on appeal in turn.

First, Donko argues that the district court abused its discretion by admitting Ramos's in-court identification testimony because Ramos failed to identify Donko as the shooter during his initial testimony and the admission of Ramos's in-court identification when he was recalled as a witness deprived Donko of due process. "[A] district court's decision to admit or exclude evidence [is reviewed] for an abuse of discretion." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Similarly, the trial court's judgment in denying a mistrial will not be overturned absent an abuse of discretion. *Rudin v. State*, 120 Nev. 121, 142, 86 P.3d 572, 586 (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).

Absent an allegation that an in-court identification was tainted by an improper pretrial identification process, an in-court identification is not subject to suppression but rather must be evaluated for credibility by the jury. *Steese v. State*, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998). It is well established in this State that it is the function of the jury to weigh the credibility of the identifying witness. *Wise v. State*, 92 Nev. 181, 183, 547 P.2d 314, 315 (1976); *see also Browning v. State*, 104 Nev. 269, 274, 757 P.2d 351, 354 (1988) (concluding that the in-court identification was admissible,

and a witness's failure to previously make an identification is a factor to be weighed by the trier of fact, but such inability does not render an in-court identification inadmissible). The Supreme Court of the United States has established that ordinary safeguards built into the trial system provide sufficient due process for in-court identifications. See *Perry v. New Hampshire*, 565 U.S. 228, 237, 245-47 (2012) (stating that these safeguards include the Sixth Amendment right to confront the eyewitness; the right to effective assistance of counsel, "who can expose the flaws in the eyewitness' testimony during cross examination . . . and closing arguments"; and the State's burden of proving the crime beyond a reasonable doubt).

We conclude that the district court did not abuse its discretion in admitting Ramos's in-court identification of Donko. Ramos did not make a pretrial identification of Donko, but rather Ramos identified Donko during his testimony after he was recalled as a witness at trial. Accordingly, the credibility and weight of Ramos's testimony is "within the province of the jury." *Wise*, 92 Nev. at 183, 547 P.2d at 315. Donko, through counsel, cross-examined Ramos, thus satisfying due process as to Ramos's in-court identification of Donko.

Additionally, the district court did not abuse its discretion in denying Donko's oral motion for a mistrial pursuant to Ramos's identification because Donko was not unfairly prejudiced by Ramos's in-court identification so as to render his trial unfair. See *Nunnery v. State*, 127 Nev. 749, 785, 263 P.3d 235, 259 (2011) (affirming denial of mistrial despite surprise testimony that the defendant may have been involved in other crimes); *Summers v. State*, 122 Nev. 1326, 1335, 148 P.3d 778, 784 (2006) (affirming denial of mistrial despite surprise testimony that defendant threatened a witness's life). Accordingly, we are not persuaded by Donko's argument that Ramos's

in-court identification harmed his defense, such that the district court should have granted a mistrial.³

Second, Donko argues that the district court abused its discretion in amending Donko's judgment of conviction after he started serving his sentence, thereby improperly increasing his aggregate sentence and violating his protection from double jeopardy. A claim that a conviction violates the Double Jeopardy Clause generally is subject to de novo review on appeal. *Davidson v. State*, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008); *Ebeling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004). NRS 176.565 states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

Here, the district court did not amend the sentence on any individual conviction, but simply corrected a clerical error pertaining to the calculation of the aggregate sentence. Donko's argument that this error is not a "clerical error" is unpersuasive. *See Devlin v. State*, No. 73518, 2019 WL 4392531, at *1 (Nev. Sept. 12, 2019) (Order of Affirmance) (holding that a district court can correct such clerical mistakes, when a district court entered an amended judgment of conviction correcting an aggregate sentence

³Donko fails to demonstrate that he was denied a fair trial, and therefore, the district court did not abuse its discretion in denying a mistrial. *See Rudin*, 120 Nev. at 142, 86 P.3d at 586. The State presented strong evidence of Donko's guilt, including independent eyewitness testimony of Woods identifying Donko as the shooter, the bullet casings from the scene matching those found in the Toyota vehicle, the fingerprint match, and Donko's DNA was obtained from a red shirt found in the same neighborhood, consistent with what multiple witnesses described the shooter as wearing. Thus, any error in denying Donko's oral motion for a mistrial was harmless. *See generally* NRS 178.598.

from 11 years to 12 years). Here, the district court modified the aggregate sentence language to comport with the individual sentences originally imposed at sentencing. Therefore, the district court corrected its previous miscalculation of the aggregate sentence to be consistent with the individual sentences set forth in the judgment of conviction. Thus, we are not persuaded that the district court abused its discretion in amending Donko's judgment of conviction to correct the aggregate sentence.

Third, Donko contends that the district court erred in retaining jurisdiction over restitution in an amount to be determined later in violation of NRS 176.033(3); *see also Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993) (concluding that judgments of convictions that impose restitution in an uncertain amount to be determined in the future are clearly an error). However, Donko concedes in his reply brief that this issue is moot, given that the amended judgment of conviction, filed on May 25, 2021, no longer included language indicating that the district court would retain jurisdiction to impose restitution. Given that this issue is moot, we decline to exercise our discretion and consider the merits of this issue. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020) (noting that the appellate court will generally decline to hear a moot case).

Fourth, Donko contends that the district court abused its discretion when it rejected his proposed jury instructions and revision to the verdict form. Specifically, he states that the district court should have permitted instructions that (1) modified the reasonable doubt instruction, (2) addressed reasonable interpretations of evidence, (3) addressed "reasonable doubt and subjective certitude on the part of jurors," (4) included negatively-

worded or inverse instructions pursuant to *Crawford v. State*⁴, and (5) placed “not guilty” before “guilty” on the verdict form.

“The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.” *Crawford*, 121 Nev. at 748, 121 P.3d at 585. “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.* (internal quotation marks omitted). This court, however, reviews de novo “whether an instruction is a correct statement of the law.” *Clancy v. State*, 129 Nev. 840, 845, 313 P.3d 226, 229 (2013).

NRS 175.211 provides the statutorily mandated language for a reasonable doubt instruction, which does not include the language requested by Donko. To the extent Donko argues under *Crawford* the district court abused its discretion when it rejected his proffered other negatively-worded or inverse instructions, we note “the district court may refuse a jury instruction on the defendant’s theory of the case which is substantially covered by other instructions.” *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Donko fails to demonstrate that his proposed inverse instructions went to a specific theory of his case and were not merely duplicative of the court-approved instructions. Additionally, district courts do not err by refusing to accept duplicitous, misleading, or inaccurate jury instructions. *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005); *see also McDermott v. State*, No. 79296, 2020 WL 6743121 (Nev. Nov. 13, 2020) (Order of Affirmance) (concluding that because the proffered instruction was otherwise covered by the reasonable-doubt instruction, there was no abuse of discretion by the district court in refusing to give it). Although the district

⁴121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

court could have properly given the inverse instructions, we cannot conclude that the court reversibly erred. The instructions it did give were accurate and any error was harmless beyond a reasonable doubt. *See Guitron v. State*, 131 Nev. 215, 229-31, 350 P.3d 93, 102-03 (Ct. App. 2015).

Donko's contention that the district court also abused its discretion in denying his request to place "Not Guilty" before "Guilty" is also unpersuasive, as the Nevada Supreme Court has affirmatively rejected this argument. *See Yandell v. State*, No. 78259, 2020 WL 4333604, at *4 (Nev. July 27, 2020) (Order of Affirmance) (rejecting the appellant's argument that "not guilty" should have been listed first on verdict form because there was no case adopting the "position that the 'not guilty' [option] must be listed before the 'guilty' option on a verdict sheet" (internal quotation marks omitted)).

Fifth, Donko contends that the district court erred in allowing the State to commit prosecutorial misconduct, through improper burden-shifting, when the State argued in closing that during cross-examination Donko failed to provide an explanation for his DNA being present on the red shirt found at the scene and for his fingerprint being found on a license plate located inside the Toyota vehicle. When reviewing claims of prosecutorial misconduct, this court considers whether the conduct was improper and, if it was, whether it warrants reversal or was harmless. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. A prosecutor does not improperly shift the burden of proof by arguing that the "defense failed to substantiate its theories with supporting evidence." *Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015); *see also Paschal-Campos v. State*, No. 77812, 2020 WL 1531436 (Nev. Mar. 27, 2020) (Order of Affirmance) (holding that

the State did not improperly shift the burden when it commented on the defendant's inability to substantiate her theory of the case with evidence).

Here, Donko testified in his defense and the State properly cross-examined him about his DNA being identified on the red shirt and his fingerprint lifted from a license plate located inside the vehicle found near the scene. Donko attempted to suggest that he was not the shooter, but he did not persuasively refute the physical evidence suggesting otherwise during cross-examination, resulting in the State arguing during closing that Donko "[g]ives no viable explanation" for the physical evidence obtained at the scene. The State was permitted to comment on the defendant's failure to explain physical evidence that directly tied him to the shooting. *See Evans*, 117 Nev. at 630, 28 P.3d at 513 (noting that the State may comment on the credibility of witnesses based on the evidence presented and "comment on the failure of the defense to counter or explain evidence presented"). The State here simply commented on the lack of support or explanation for Donko's assertion that he was not the shooter. Further, the jury was properly instructed that the State had the burden of proof. Accordingly, the State did not impermissibly shift the burden of proof or engage in prosecutorial misconduct during closing.

Sixth, Donko contends that the State failed to prove that Donko committed the charged crimes beyond a reasonable doubt. When determining if sufficient evidence was presented to support the verdict, this court "will inquire 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." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (internal quotation marks omitted). Here, there is sufficient evidence, viewed in the light most favorable to the prosecution, which would allow a rational trier of fact to find

the essential elements of the crime beyond a reasonable doubt. The State offered overwhelming witness testimony as well as physical evidence that all tied Donko to the shooting, such as DNA evidence and fingerprint evidence. Given this evidence and testimony, the jury could reasonably have found that Donko committed the crimes beyond a reasonable doubt.⁵

For the foregoing reasons, we

ORDER the amended judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵Donko contends that cumulative error warrants reversal. Even where multiple errors are harmless individually, their cumulative effect may violate a defendant's right to a fair trial. *Valdez*, 124 Nev. at 1195, 196 P.3d at 481. Although the district court may have possibly erred in refusing some of the inverse jury instructions, it was only a *possible* trial error, and any error in retaining jurisdiction for the purpose of imposing restitution, was rendered moot in the amended judgment of conviction. Likewise, the district court's failure to grant Donko's oral motion for a mistrial was harmless in light of the overwhelming evidence of guilt. Therefore, Donko fails to show that a cumulative error analysis requires reversal based on two possible trial errors, each of which we conclude were harmless.

To the extent Donko raised other arguments on appeal that are not specifically addressed herein, we have considered the same and conclude that they do not warrant relief.