IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALAN JOSEPH DAVID HONEYESTEWA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82351-COA

ORDER OF AFFIRMANCE

Alan Joseph David Honeyestewa appeals from a judgment of conviction, pursuant to a jury verdict, of open murder with the use of a firearm and/or deadly weapon, attempted robbery with the use of a firearm or deadly weapon, invasion of the home with possession of a firearm and/or deadly weapon, burglary with the use of a firearm or during which a firearm is obtained, conspiracy to commit robbery, conspiracy to commit burglary, and conspiracy to commit invasion of the home. Fourth Judicial District Court, Elko County; Nancy Porter, Judge.

Jennifer Stanger and Brad Smith were in a relationship and lived together.[1] While Smith was away one weekend, three people came over to hang out with Stanger, including Tieres Lopez. Ronnie Sorenson, a close friend of both Stanger and Smith, also came over later. During that time, Stanger showed the group Smith's gun collection that he kept in a safe in the bedroom. Lopez took a particular interest in one of the guns and wanted Stanger to sell it to him, but she refused.

The next week, Sorenson came across Lopez and Lopez divulged to Sorenson that he was planning a home invasion the next day at Smith's

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

home to steal his guns and tools. Smith and Stanger were supposed to be gone that day because Stanger had agreed to check into a rehabilitation center for her drug abuse. Sorenson tried discouraging Lopez, and when apparently unsuccessful, warned Smith and Stanger.

Smith and Stanger delayed checking Stanger into the rehabilitation center by one day. On the fateful evening, Lopez, Honeyestewa, and Taylor Miller—all clad in dark clothing—walked to Smith's home. Lopez pounded on the door, kicked it in, and barged inside. Lopez immediately reached the bedroom door, just five to ten feet within the home, and kicked it open. Honeyestewa, who had in his waistband a Springfield XD .40 caliber subcompact pistol, followed Lopez into the home. Lopez walked in the dimly illuminated bedroom brandishing a Taurus 9 mm pistol and yelled at Stanger and Smith something along the lines of, "Do you know who I am? Get the f[] on the ground. You got me all f[]ed up." Stanger screamed and dove to the floor on her side of the bed while Smith jumped to his side of the bed, grabbing his own Springfield XD .40 caliber pistol he had nearby.

Shooting commenced and both Honeyestewa and Smith were shot several times. Honeyestewa was wounded and collapsed near the front door while Smith lay wounded in the front room. Lopez dragged Honeyestewa out of the home to a car that Miller had brought to the front of the home after Lopez dragged Honeyestewa out of the home.

Police officers arrived within minutes of the shooting, finding Stanger distraught and Smith unresponsive and badly wounded. Smith was given emergency medical attention, and placed in an ambulance, but died during transport to the hospital from his multiple gunshot wounds.

Miller, Lopez, and Honeyestewa all departed before officers arrived. However, at some point, Lopez and Miller left the badly wounded Honeyestewa at another location. A woman who heard screams found Honeyestewa. She tried bandaging one of his wounds with her shirt then called 9-1-1 but, as she did, Honeyestewa told her not to call the cops because he was afraid he would get in trouble. She hung up, Honeyestewa took her phone, and when 9-1-1 called back, he told dispatch it had the wrong number. After the woman took Honeyestewa to her cousin's house, the cousin called 9-1-1 whereupon an ambulance arrived and provided emergency medical services to Honeyestewa. Officers later took Honeyestewa into custody.

During the subsequent investigation, officers seized the handguns used by Smith, Honeyestewa, and Lopez along with dozens of discharged bullets. Officers later learned that Smith had fired at least 12 bullets, the gun belonging to Honeyestewa had fired at least 12 bullets, and the gun belonging to Lopez had been fired at least once. At least one of the bullets fired from Honeyestewa's gun penetrated Smith's upper abdomen. DNA analysis confirmed that, of those present during the shooting, only Honeyestewa had held the handgrip portion of his gun.

A grand jury indicted Honeyestewa on multiple felony and gross misdemeanor charges, including murder and conspiracy. After a 12-day trial, a jury convicted him on all charges. The district court subsequently sentenced him to life in prison with a minimum aggregate

prison term of 32 years. Now on appeal, Honeyestewa makes various arguments—each of which we address in turn.[2]

The district court did not improperly exclude testimony

Honeyestewa argues that the district court abused its discretion when it excluded statements that his alleged coconspirator and former codefendant, Lopez, made to Honeyestewa's private investigator in anticipation of trial, after Lopez refused to testify at trial. Honeyestewa claims that the court should have prohibited Lopez from exercising his Fifth Amendment right not to testify because he had already been convicted and sentenced, thus allowing him to treat Lopez as a hostile witness, ask leading questions, and impeach Lopez with prior inconsistent statements. Regardless, Honeyestewa claims, the court should have found that Lopez's statements—although hearsay—qualified as a party coconspirator exemption or a statement against interest exception.

We review a district court's decision to exclude evidence as hearsay for an abuse of discretion. *Coleman v. State*, 130 Nev. 229, 239, 321 P.3d 901, 908 (2014). Honeyestewa, however, failed to provide this court

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[2]Honeyestewa appears to argue that the district court erred when it denied his motion to dismiss for failure to gather evidence without ever explicitly considering his motion and making specific factual findings. However, he has not provided this court any authority that district courts must expressly deny each motion with specific factual findings and, therefore, we need not consider this claim. *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 the support of relevant authority). Furthermore, any error would have been harmless because Honeyestewa claimed that the State failed to gather evidence, but the court's ruling on the State's motion to continue allowed the State to gather that evidence, which then became available to Honeyestewa. *See generally* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

with the alleged statements from Lopez. He provided the district court with an audio recording of the 19-minute interview during which the statements were made, but it is not clear that he followed the procedures the district court required to preserve it in the record. At the very least, he did not transmit that audio recording to this court on appeal. We therefore cannot review what we do not have. *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("We cannot properly consider matters not appearing in that record."). Because Honeyestewa bore the burden of creating an adequate record and failed to do so, *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."),[3] we normally presume that the audio recording would have supported the district court's determination. *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991), *reversed on other grounds by, Riggins v. Nevada*, 504 U.S. 127 (1992) (noting that because appellant bears the burden of providing an adequate record on appeal, "the missing portions of the record are presumed to support the district court's decision.").

Regardless, even without the benefit of the alleged out-of-court statements in question, Honeyestewa's claims fail. The district court properly treated Lopez as an unavailable witness because he refused to testify, the court ordered him to testify and, when he did not, the court held him in contempt. *See* NRS 51.055(1)(b) (defining a witness as "unavailable"

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[3]*See also* NRAP 30(b)(1) ("Copies of all transcripts that are necessary to the . . . review of the issues presented on appeal shall be included in the appendix."); NRAP 30(b)(3) ("[A]ppellant's appendix to the opening brief *shall include* . . . any other portions of the record *essential to determination* of issues raised in appellant's appeal." (emphases added)).

when he or she is "[p]ersistent in refusing to testify despite an order of the judge to do so").[4]

To admit the statements, therefore, Honeyestewa had to fit them within a hearsay exemption or exception. But neither the hearsay exemption nor exception Honeyestewa offered in this case are meritorious. First, we do not even need to consider Honeyestewa's argument that the court should have admitted Lopez's hearsay statements under the party coconspirator exemption because he raised that argument for the first time in his reply brief. *LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014) ("Because the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief, we decline to consider this argument."). Even so, his claim lacks merit because Lopez's statements could not possibly have been made either during the conspiracy or in furtherance of it because he made the statements post-arrest, post-conviction, and post-sentencing for that conspiracy and shortly before Honeyestewa's trial. *See Johnstone v. State*, 93 Nev. 427, 428, 566 P.2d 1130, 1130-31 (1977); *see also Wood v. State*, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999) (holding that statements "to a third party who is not then a member of the conspiracy are in furtherance of the conspiracy only

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[4]Because Lopez did not testify at trial and was consequently not subject to cross-examination, he could not have made statements at trial that would have been inconsistent with the statements he allegedly made during his interview with Honeyestewa's private investigator. His statements thus could not have been used to impeach him or admitted under the hearsay exception for prior inconsistent statements. *See* NRS 51.035(2) (stating that an out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing *and* is subject to cross-examination concerning the statement" (emphasis added)); NRS 50.135(2)(b) (detailing that extrinsic evidence of a prior inconsistent statement is inadmissible unless the opposing party has an "opportunity to interrogate the witness").

if they are designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy's objectives").

Second, Lopez's statements also could not qualify as a statement against interest. To qualify as a statement against interest, Honeyestewa had to show that Lopez was unavailable as a witness and that the statement "[s]o far tended to subject [Lopez] to civil or criminal liability" at the time Lopez made the statement. NRS 51.345(1)(b). If, however, Lopez's statement helped exculpate Honeyestewa, then Honeyestewa would have needed to offer "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." NRS 51.345(1). Thus, "the statutory test for determining the admissibility of statements against penal interest under NRS 51.345 is whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." *Walker v. State*, 116 Nev. 670, 676, 6 P.3d 477, 480 (2000). Moreover, NRS 51.345(2) expressly states that this exception "does not make admissible a statement . . . offered against the accused made by a codefendant or other person implicating both himself or herself and the accused." *See also Wood*, 115 Nev. at 349, 990 P.2d at 790.

The district court here found that Lopez's statements implicated both himself and Honeyestewa and thus failed under NRS 51.345(2) as a statement against interest. Because we do not have in the record the precise statements Honeyestewa claims should have been admitted, we presume that the court did not abuse its discretion in finding they implicated Honeyestewa and Lopez. *See Riggins*, 107 Nev. at 182, 808 P.2d at 538. And to the extent, if any, that Lopez's statements do exculpate Honeyestewa, Honeyestewa did not offer the district court or this court any

evidence to corroborate those statements and demonstrate their reliability, nor provide even an explanation as to why those statements would be reliable as required. *See* NRS 51.345(1); *see also 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 the support of relevant authority).[5] Therefore, the district court did not abuse its discretion in excluding testimony about Lopez's purported statements.

The district court did not err in not sua sponte performing a Batson *inquiry when the State peremptorily excused the only Native American member of the jury*

Honeyestewa argues that the district court denied him a fair and impartial jury when it did not sua sponte perform a *Batson* inquiry when the State peremptorily excused the only Native American juror during voir dire. *Batson v. Kentucky*, 476 U.S. 79 (1986). Honeyestewa did not object to the State's peremptory strike.

When an appellant argues that the State improperly exercised its peremptory challenge in violation of the Equal Protection Clause, we "accord[ ] great deference to the district court's factual findings regarding

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[5]Furthermore, the State argued that even if the court should have admitted Lopez's statements, such an error would have been harmless—an argument Honeyestewa neither anticipatorily repudiated in his opening brief nor addressed in his reply brief. *See Deutscher v. State*, 95 Nev. 669, 685, 601 P.2d 407, 417 (1979) (noting hearsay errors are subject to harmless error analysis); *see also Polk v. State*, 126 Nev. 180, 183, 233 P.3d 357, 359 (2010) (recognizing that a respondent has an obligation to respond to a properly briefed error and failure to respond risks an appeals court finding respondent's claim forfeit); *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

whether the proponent of a strike has acted with discriminatory intent, and we will not reverse the district court's decision unless clearly erroneous." *Watson v. State*, 130 Nev. 764, 775, 335 P.3d 157, 165 (2014) (internal citation and quotation marks omitted). But if the appellant failed to object below to the allegedly improper exercise of a peremptory challenge, appellate review of the matter is waived. *Rhyne v. State*, 118 Nev. 1, 11, 38 P.3d 163, 170 (2002). Therefore, we can only exercise discretionary review of Honeyestewa's claim for plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

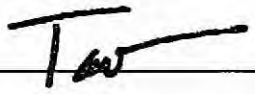
"Before this court will correct a forfeited error," Honeyestewa must show "(1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Id.* (internal quotation marks omitted). "[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 (internal quotation marks omitted).

Here, Honeyestewa failed to object below to the allegedly improper conduct, never made a plain error argument in his briefing, failed to provide authority showing district courts have a sua sponte duty to perform a *Batson* inquiry for an unobjecting defendant, and implicitly conceded that any error was not plain under Nevada law. Moreover, he never cogently explained how the district court's failure to intervene would have affected his substantial rights particularly when the record reveals a nondiscriminatory basis for the challenge. We therefore decline to review his argument and, even if we did review it, he would have failed to

demonstrate plain error.[6] *See id.* at 50, 52, 412 P.3d at 48-49; *see also Maresca*, 103 Nev. at 673, 748 P.2d at 6. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
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cc: Hon. Kriston N. Hill, District Judge
Kirsty E. Pickering Attorney at Law
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

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[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.