

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHELBE RIVERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82918-COA

FILED

APR 20 2022

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

ORDER OF AFFIRMANCE

Shelbe Rivera appeals a judgment of conviction, pursuant to a jury verdict, of one count second-degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Rivera met Juan Rincon for the first time on July 1, 2018.¹ That day, the pair initially intended to go fishing but ended up instead smoking marijuana and walking around downtown Las Vegas together. While sitting near a dumpster, Rincon asked to see Rivera's knife. Rivera perceived Rincon giving him a "funny look" and deduced that Rincon was "scheming." Rivera therefore removed his "large" knife from his backpack and began stabbing Rincon. All told, Rivera stabbed Rincon approximately 28 times in the neck and chest and, in addition, cut him approximately 14 times. The attack resulted in Rincon's death. Thereafter, Rivera disposed of his bloodied shirt, threw his knife in a dumpster, and left the scene.

Later that day, officers with the Las Vegas Metropolitan Police Department (LVMPD) were called to the scene of the stabbing and discovered Rincon's body. At the scene, officers found a fishing pole, a couple of buckets, a suitcase, and a pink-and-gray backpack. An officer also

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

located Rivera's knife in the dumpster. Inside the backpack, officers found a package and several documents bearing Rivera's name.

The following day, Officer Christina Martinez responded to a nuisance call at a Best Buy electronics store. She found Rivera outside of the store, shirtless. Officer Martinez noticed what appeared to be blood on Rivera's pants and asked him about it. Rivera acknowledged that it was blood and explained he had been in a fight with a "random guy." In response to Officer Martinez's inquiries into his mental health, Rivera explained that he was schizophrenic and took medication related to that disorder. Unaware that Rivera was a person of interest in Rincon's homicide, Officer Martinez took Rivera to eat at a Burger King and then took him to a homeless shelter.

In the following days, homicide Detective Eric Ravelo obtained surveillance footage from a building near the scene of the stabbing. The footage showed Rincon and Rivera walking together. Rincon carried the two buckets found at the scene of his death. Rivera, wearing the pink-and-gray backpack, pulled the suitcase later found at the scene. Footage taken some time later showed Rivera walking alone, shirtless, and without any of the items visible in the first video. Detective Ravelo also reviewed body camera footage from Officer Martinez's interaction with Rivera on July 2 outside of the Best Buy. And the detectives discovered Rivera's fingerprints on the two buckets found at the crime scene.

Based the foregoing, Detective Ravelo notified LVMPD's Criminal Apprehension Team to arrest Rivera. Ten days after Rincon's death, the Criminal Apprehension Team arrested Rivera at a homeless shelter. After informing Rivera of his *Miranda* rights and receiving Rivera's consent to talk, Detective Ravelo asked Rivera about his involvement in

Rincon's death. Rivera admitted that he pulled out his knife from his backpack and stabbed Rincon but could not remember how many times he did so. He also told Detective Ravelo that Rincon never fought back. And he told Dr. Herbert Coard, the State's expert witness, in an interview regarding Rivera's sanity, that Rincon did not have a weapon.

Rivera was charged by way of a criminal information with one count of murder with use of a deadly weapon—a category A felony. *See* NRS 200.010; NRS 200.030; NRS 193.165. Rivera filed a notice, pleading not guilty by reason of insanity, and stating his intention to seek a verdict of guilty but mentally ill should a jury eventually find him guilty of any offense.

At trial, it was undisputed that Rivera killed Rincon with a knife, so the trial focused on the conflicting testimony about whether Rivera was criminally insane. Dr. Coard, a forensic psychologist, testified as to his conclusion that Rivera was in a delusional state at the time of the stabbing. Nevertheless, Dr. Coard believed Rivera understood the wrongfulness of his actions. Dr. Coard based this conclusion on Rivera's actions after killing Rincon, including disposing of the knife, removing his bloodstained shirt, and fleeing the scene. Dr. Coard further concluded that Rivera understood the wrongfulness of his conduct on July 1 based on his attempts to avoid apprehension by law enforcement including failing to tell Officer Martinez the full story about the blood on his pants. Rivera had also acknowledged the wrongfulness of his conduct and apologized for it during a pre-trial interview with Dr. Coard regarding Rivera's sanity.

The defense called Dr. Mark Chambers, a clinical and forensic psychologist, as its expert witness. Dr. Chambers also concluded that Rivera was delusional but understood the nature of his conduct. However,

Dr. Chambers concluded that Rivera did not understand the wrongfulness of his conduct. He based his conclusion on the fact that Rivera claimed to be in fear for his life and that there was no other rational motivation for his actions.

At the conclusion of a five-day trial, the jury found Rivera guilty but mentally ill of second-degree murder with use of a deadly weapon. The district court sentenced Rivera to 25 years in prison with parole eligibility after ten years. The court added a consecutive term of incarceration of 15 years with parole eligibility after five years, for the use of a deadly weapon. Rivera now appeals the judgment of conviction, raising multiple issues. We address each in turn.

Sufficient evidence supports Rivera's conviction

Rivera acknowledges on appeal that he stabbed Rincon to death and that both parties agree that he was schizophrenic and in a delusional state at the time he did so. However, Rivera argues the State's expert, Dr. Coard, "wrongfully relied upon the fact that Rivera did not experience delusions of specific subsidiary facts [that] would justify his conviction that it was necessary to kill Rincon." Rivera argues the State led the jury to believe that he could only establish his insanity defense if he believed he was acting in self-defense. The State counters that Rivera's schizophrenia does not necessarily mean he could establish an insanity defense. The State argues a reasonable juror could reach the same outcome as Rivera's jury and therefore Rivera was properly convicted.

"Where . . . there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." *Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). In reviewing a challenge to the sufficiency of the evidence, we must decide "whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). “[W]here there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.” *Stewart v. State*, 94 Nev. 378, 379, 580 P.2d 473, 473 (1978); *see Rose*, 123 Nev. at 202-03, 163 P.3d at 414 (providing that this court will not reweigh the evidence or substitute its judgment for that of the jury). Similarly, “[i]t is the jury’s province to determine whether a defendant is legally insane.” *Hudson v. State*, 108 Nev. 716, 720, 837 P.2d 1361, 1364 (1992). A jury may rely on both direct and circumstantial evidence to reach its verdict. *Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

Here, Rivera bore the burden of establishing by a preponderance of the evidence the affirmative defense of insanity by showing that: (a) at the time he stabbed Rincon he was in a delusional state due to a disease or defect of the mind; and (b) due to that delusional state Rivera either (1) did not know or understand the nature and capacity of his act or (2) did not appreciate that his conduct was wrong, meaning not authorized by law. *See* NRS 174.035(6). Both the State and the defense expert witnesses testified that Rivera was in a delusional state when he stabbed Rivera. However, the jury heard competing testimony on NRS 174.035(6)(b)—whether Rivera understood the nature and capacity of his act or whether he appreciated the wrongfulness, meaning unlawfulness, of his conduct.

Rivera argues that there is “some suggestion” that he could only have met his burden of establishing NRS 174.035(6)(b)(2) if he believed Rincon was threatening him with a weapon and Rivera therefore believed

he was acting in self-defense. However, Dr. Coard based his conclusion that Rivera understood the nature of his act on his attempts to avoid detection from law enforcement. Rivera also acknowledged that he appreciated the wrongfulness of his conduct in his interview with Dr. Coard. And beyond the expert testimony, the jury could have relied on other circumstantial evidence to conclude that Rivera had not established his insanity defense by a preponderance of the evidence. *See Wilkins*, 96 Nev. at 374, 609 P.2d at 313. Therefore, the jury acted within its province by considering the circumstantial evidence, Rivera's own admissions, and weighing the credibility of the competing expert witnesses, *see Stewart*, 94 Nev. at 379, 580 P.2d at 473, and by determining that Rivera had not established his insanity defense, *see Hudson*, 108 Nev. at 720, 837 P.2d at 1364. As such, sufficient evidence supported Rivera's conviction.

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

Rivera next argues that the prosecutor committed misconduct multiple times during the trial. 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 prosecutor'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.

First, Rivera argues the prosecutor improperly referred to Rincon's death as "murder" at trial.² He argues the prosecutor "subverted the presumption of innocence" and implied the State had already proven its murder case by "repeatedly injecting" the word "murder" into the proceedings. He also argues the prosecutor improperly injected her personal opinion into the case by referring to the stabbing as murder. He does not argue that the alleged error substantially affected the jury's verdict. The State counters that prosecutors are allowed to pursue their theory of the case—here, that Rivera murdered Rincon. The State further argues that any error did not substantially affect the jury's verdict.

Preliminarily, Rivera has pointed to no Nevada authority for the proposition that referring to the death of a victim as "murder" is misconduct. Additionally, Rivera has not addressed the second element of *Valdez*—whether any error substantially affected the jury's verdict. 124 Nev. at 1188, 196 P.3d at 476. Nor did he submit a reply brief countering the State's argument that any error did not substantially affect the jury's verdict. We therefore consider Rivera's lack of argument as a concession that there is merit to the State's position. *See 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

²The prosecutor referred to the stabbing as a murder twice without drawing an objection from Rivera. When the prosecutor referred to the stabbing as a murder a third time, Rivera objected on the basis that the killing should be classified as a homicide rather than a murder. The district court did not rule on the objection because the prosecutor volunteered to rephrase the question. The prosecutor later referred to the stabbing as a murder a fourth time without any objection.

challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

As to the merits of Rivera's argument, the prosecutor's references to murder did not constitute misconduct here. First, Rivera admitted he stabbed Rincon. His plea to the murder charge was not guilty by reason of insanity, implying he was not disputing the fact that he killed Rincon with a knife. And, most importantly, during his opening statement, Rivera's own counsel stated that "this is a very simple, straightforward case even though it is very serious, it is a murder." Rivera therefore cannot object to the alleged error on appeal. *See Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) (recognizing that where a defendant participates in the alleged error, he is estopped from raising any objection on appeal). Therefore, based on the facts of this case, the prosecutor did not commit misconduct by referring to the stabbing as murder.

Second, Rivera argues that the following comment was improper for multiple reasons. During her rebuttal closing argument, the prosecutor stated:

And what I think is also important is Dr. Chambers' argument that if there's a lack of rational motivation, that's not part of your analysis. It's simply not. I understand that as humans we want to know why someone might kill another human, but I can tell you this, in ten years of being a D.A., I have never been able to answer that question when I handle a murder case.

Rivera objected to the comment "as bolstering and improper," and the district court sustained the objection. Rivera argues that this comment invited the jury to rely on the prosecutor's experience when analyzing the importance (or lack thereof) of a motive. Further, Rivera argues the comment constituted improper personal-experience testimony. He finally

argues that the assertion that a lack of rational motivation plays no part in an insanity determination is legally false. The State counters that the prosecutor did not misstate the law, and that the description of her personal experience played a minor role in her argument. The State further argues that any error was harmless as it would not have substantially affected the jury's verdict.

Once again, Rivera did not argue in his opening brief that the error substantially affected the jury's verdict, nor did he submit a reply brief to challenge the State's argument that any error did not substantially affect the jury's verdict. We therefore consider Rivera's lack of argument as a concession that there is merit to the State's position. *See Colton*, 71 Nev. at 72, 279 P.2d at 1036.

Nevertheless, as to the merits of Rivera's arguments, the prosecutor did not commit misconduct by explaining that a lack of rational motivation for the stabbing should not factor into the jury's analysis. The jury had heard competing testimony on this matter. Dr. Coard, for the State, testified that he was not able to determine a motive for the killing because "[his] job in conducting a not-guilty-by-reason-of-insanity evaluation does not examine motivation." On the other hand, Dr. Chambers testified that determining why a person did something is "essentially what we're tasked to do" during an insanity evaluation. According to Dr. Chambers, because he could not identify an alternative motive for the stabbing, apart from Rivera's mental illness, it was likely Rivera was legally insane. The State is not required to prove motive when prosecuting a murder. *See generally* NRS 200.010, 200.020, 200.030 (defining murder). Therefore, the prosecutor was apparently trying to clarify that for the jury, in light of the conflicting testimony on the issue, and the comprehensive and

accurate jury instructions. As such, the prosecutor did not commit misconduct by explaining that a lack of a rational motivation is not necessarily part of the jury's analysis.

However, the prosecutor committed misconduct by her comment inviting the jury to rely on her experience as a prosecutor to disregard Dr. Chambers' testimony regarding Rivera's lack of motive. See *Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) (“[B]y invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney.”); see also *Emerson v. State*, 98 Nev. 158, 163-64, 643 P.2d 1212, 1215 (1982) (explaining that prosecutors must not express their personal beliefs as to the guilt of the accused). However, this was the only instance of misconduct during the five-day trial. The comment was brief in nature and the district court sustained Rivera's objection to it. Therefore, the comment did not substantially affect the jury's verdict, especially considering that the jury instructions already included an instruction stating the State was not required to prove motive. See *Rimer v. State*, 131 Nev. 307, 330, 351 P.3d 697, 714 (2015) (recognizing that the district court may cure the harm arising from prosecutorial misconduct by sustaining an objection); *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.”); see also *Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (“A prosecutor's comments should be considered in context, and ‘a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.’” (quoting *United States v. Young*,

470 U.S. 1, 11 (1985)); NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”).

Third, Rivera argues the prosecutor confused and misled the jury by conflating the defenses of not guilty because of insanity and lawful self-defense.³ He argues the State led the jury to believe that Rivera needed to point to factual occurrences giving rise to a belief that he needed to defend himself against Rincon—something perhaps needed to prove self-defense, but not needed to establish insanity. The State counters that the prosecutor was merely trying to explain that the delusional facts perceived by Rivera would have to amount to a legal defense for Rivera to satisfy NRS 174.035(6)—that Rivera did not appreciate the unlawfulness of his conduct. The State explains that this is correct legally, and was supported by Jury Instruction No. 21.⁴ Finally, the State argues that any error would not have substantially affected the jury’s verdict and was therefore harmless.

³The prosecutor stated:

Furthermore, Dr. Chambers’ last answer that he indicated to me was, and I wrote it down, he indicated that if the – the defendant had said that if he, the defendant, did not stab the victim, that the victim is going to stab him, and this is this instruction. He never said the victim was about to stab him. He never said, I saw a knife. He’s talking about a future event. If I had not stabbed the victim, he was going to stab me. Self-defense is not a preemptive defense.

Rivera objected, but the district court overruled his objection without explanation.

⁴Jury Instruction No. 21 reads:

If a defendant was suffering from a delusional state and if the facts as he believed them, while in that

Rivera has cited no legal authority for this argument, nor has he cogently argued it, and we therefore need not consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). And Rivera has again failed to argue in a reply brief the alleged error substantially affected the jury’s verdict or dispute the State’s argument that the prosecutor’s comment was legally correct and, if not, harmless error. Therefore, we consider Rivera’s lack of argument as a concession that there is merit to the State’s positions. *See Colton*, 71 Nev. at 72, 279 P.2d at 1036.

Nevertheless, as to the merits of Rivera’s argument, the prosecutor’s comment was not improper. To establish his insanity defense, Rivera needed to demonstrate that the delusional facts he perceived amounted to a legal defense. *See Finger*, 117 Nev. at 576, 27 P.3d at 84-85 (explaining the difference, in the context of an insanity analysis, between a person suffering a delusion that he is being shot at versus a delusion that someone is “going to get [him]” at some point in the future). Here, Rivera

delusional state would have justified his action, he is insane and entitled to an acquittal. If, however, the delusional facts would not amount to a legal defense, then he is not insane.

This instruction accurately tracks the principles articulated in *Finger v. State*, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001). Indeed, the prosecutor immediately clarified her previous comment, stating:

The reason for this is because when we have a not guilty by reason of insanity, that delusion that the defendant was under must justify his actions. And the only way that those conceptually could be justified is if it were self-defense. That’s why I’m explaining it in this manner.

told Detective Ravelo that he stabbed Rincon because Rincon gave Rivera a mean or dirty look, after asking to see Rivera's knife, leading Rivera to believe Rincon was "scheming." However, Rivera also told Detective Ravelo that Rincon never fought back. And Rivera told Dr. Coard that Rincon did not have a weapon. The jury instructions included multiple instructions on self-defense, but no instructions on any other legal defense indicating Rivera was relying on self-defense to justify his insanity defense. As such, the prosecutor was apparently clarifying Jury Instruction No. 21, which embodied the rule from *Finger*. The prosecutor thus did not commit misconduct and therefore the comment does not warrant reversal. See *Valdez*, 124 Nev. at 1188, 196 P.3d at 476.


Cumulative error does not warrant the reversal of Rivera's conviction

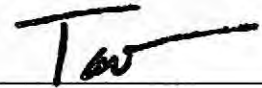
Rivera argues that cumulative error warrants reversal of his conviction. He argues that the question of his guilt was close and that the prosecutor's misconduct was "sufficiently extensive" considering the length of the trial. The State counters that Rivera has not demonstrated multiple errors to cumulate. The State further argues that the question of Rivera's guilt was not close.

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, we look to three factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As a threshold matter, Rivera must demonstrate multiple errors to prevail on his cumulative error claim. See *Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) ("[B]ecause [defendant]

demonstrated a single error . . . there are not multiple errors to cumulate.”). In light of the foregoing, because Rivera has demonstrated only a single instance of misconduct, there are not multiple errors to cumulate and his claim therefore fails. See *Burnside*, 131 Nev. at 407, 352 P.3d at 651. Accordingly, we

ORDER the judgment of conviction AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Marchese Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵Insofar 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.