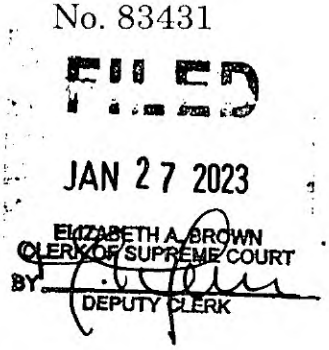
IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL SHADOW BEAR HUTCHINSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83431



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and felon in possession of a firearm. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

A jury found appellant Daniel Shadow Bear Hutchinson guilty of one count of first-degree murder with the use of a deadly weapon and one count of attempted robbery with the use of a deadly weapon for which he received an aggregate sentence of life without the possibility of parole.[1] Hutchinson and his co-defendant, Justin Tyron Jackson, encountered the first victim in downtown Reno, Nevada, and walked with the victim to a vacant lot in a residential neighborhood. Shortly after, witnesses heard a gunshot and saw Hutchinson and Jackson hurriedly leave the vacant lot, abandoning the first victim as he bled out from the gunshot wound that

[1]Hutchinson pleaded guilty to one count of felon in possession of a firearm, which was included in his aggregate sentence.

ultimately caused his death. Following the shooting, Hutchinson and Jackson walked to a homeless encampment by the Truckee River, where they approached a man, a second victim, to acquire drugs or drug paraphernalia. This second victim took Hutchinson and Jackson to a friend, a third victim, who lived at the encampment, whereupon Hutchinson and Jackson entered the third victim's tent and demanded drugs from the second and third victims. In so doing, Hutchinson wielded a knife and Jackson held a gun at the second and third victims. Shortly after, police arrived, apprehended Hutchinson and Jackson, recovering from Jackson the gun used in the murder. Jackson had acquired this gun from Hutchinson, who himself had acquired the gun from a friend. Gunshot residue was also found on Hutchinson's and Jackson's clothing.

On appeal, Hutchinson argues that the district court abused its discretion by excluding from evidence part of a statement the first victim made shortly before he died, failing to sever the attempted-robbery and first-degree murder charges, and failing to sever Hutchinson's trial from Jackson's trial. Hutchinson also argues that prosecutorial misconduct in directing a witness to identify the defendants after the witness identified jurors as the perpetrators and cumulative error warrant reversal. We address each argument in turn.

The district court did not abuse its discretion in excluding from evidence a statement by the first victim regarding his belief of why he was shot, and regardless, any error in the exclusion was harmless

We review a district court's evidentiary decision for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). The district court abuses its discretion when it makes an "arbitrary or capricious" decision or "exceeds the bounds of law or reason." *Jackson v.*

State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, we only reverse a judgment of conviction for an erroneous evidentiary decision if the error was preserved error and "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (quoting *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)).

Hutchinson argues that the district court abused its discretion in excluding on hearsay grounds a statement to police by the first victim in which the victim stated that "[t]hey thought I was leading them to an ambush" in response to a question from police about why he had been shot. Hutchinson also contends that portion of the statement should have been admitted after the State played video before the jury of the question from police that prompted the excluded response, insofar as it permitted the jury to speculate regarding the motive of the shooting.

Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible absent an exception to the hearsay rule. NRS 51.035 (defining hearsay); NRS 51.065(1) (excluding hearsay, except as otherwise provided in the chapter). However, like any other witness, a hearsay declarant "must have had the opportunity to observe the facts so that she had personal knowledge of the matter." *Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993); *see also* NRS 50.025(1)(a) (requiring a witness to have "personal knowledge of the matter"). With such knowledge, a hearsay declarant "may draw inferences that are both rationally based on the observer's perception and helpful to determine a fact in issue," *Brown v. State*, 138 Nev., Adv. Op. 44, 512 P.3d 269, 275 (2022), which may encompass "a summary opinion of another person's behavior,

motivation, or intent," *People v. McFee*, 412 P.3d 848, 863 (Colo. Ct. App. 2016).

Assuming the dying-declaration rule made the first victim's statement admissible, *see Harkins v. State*, 122 Nev. 974, 980, 143 P.3d 706, 709-10 (2006) (noting that a "dying declaration" is an exception to the hearsay rule if the statement was made by the declarant under the belief of imminent death, so long as "the declarant is unavailable as a witness"), the statement nevertheless fails to overcome the personal-knowledge hurdle for its admission. There is no evidence in the record of facts, such as events, behavior, or statements by any of the defendants, which would have been personally observed by the victim, that would allow the victim to rationally conclude that the perpetrators believed they were being led to an ambush. In fact, the evidence showed to the contrary that the victim and the defendants had been friendly with each other up until the shooting, with no indication of an ambush. Moreover, Hutchinson does not argue a self-defense theory, which may have, if argued and proved, revealed the victim's personal knowledge. Although the district court excluded the statement on double-hearsay grounds, *see* NRS 51.067, we therefore find no abuse of discretion in the district court's exclusion of the victim's statement because Hutchinson, as the proponent of the evidence, failed to provide evidence of the victim's personal knowledge of the shooters' states of mind. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (affirming a district court's decision if it "reache[d] the right result, although it [was] based on an incorrect ground").

Nor did the State open the door to admission of the evidence by playing body cam footage of the officer's question to the first victim about

why the two men shot him, as the footage did not create a "false" impression regarding the first victim's response. *See Jezdik v. State*, 121 Nev. 129, 138, 110 P.3d 1058, 1064 (2005) (discussing that a defendant's "false statements on direct examination trigger or 'open the door' to the curative admissibility of specific contradiction evidence"). Indeed, the State did not indicate that the first victim responded to the question. Moreover, the district court gave a limiting instruction to the jury regarding the redactions, mitigating any prejudice from the evidence. *See Tabish v. State*, 119 Nev. 293, 310-11, 72 P.3d 584, 595-96 (2003) (explaining that a limiting instruction on certain state-of-mind evidence could have mitigated "[t]he prejudicial impact"). Accordingly, we conclude that the district court's exclusion of the statement fell within its discretion, as the first victim lacked personal knowledge to comment on the states of mind of Hutchinson and Jackson.

Even if the statement reflected the first victim's personal knowledge and overcame the hearsay rule, any error committed by the district court in excluding the statement was harmless. A rational jury would have still found Hutchinson guilty even had the district court admitted the first victim's statement because of the overwhelming evidence of guilt, including witness testimony, forensic gunshot-residue evidence, and surveillance footage, that established Hutchinson's participation in the murder, and because of the dearth of countervailing evidence that Hutchinson acted in self-defense. *See Belcher v. State*, 136 Nev. 261, 270, 464 P.3d 1013, 1025 (2020) (concluding an error was harmless where the jury would have found the defendant guilty "with or without" an erroneously admitted statement). Thus, we conclude that any error

committed by the district court in excluding the first victim's statement does not warrant reversal.

The district court did not abuse its discretion in declining to sever jointly charged offenses or in holding a joint trial for Hutchinson and Jackson

We apply an abuse-of-discretion standard to the district court's determination of whether to grant severance of joined charges or co-defendants. *Farmer v. State*, 133 Nev. 693, 701-02, 405 P.3d 114, 122 (2017) (joinder of charges); *Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002) (joinder of codefendants). However, "[e]rror resulting from misjoinder" of charges requires reversal only if the improper joinder "had a substantial and injurious effect on the jury's verdict." *Weber v. State*, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005), *overruled on other grounds by Farmer*, 133 Nev. at 698, 405 P.3d at 120.

The district court did not abuse its discretion in declining to sever the attempted-robbery and first-degree murder counts, as they were properly joined under a connected-together theory

Hutchinson argues that the murder and attempted-robbery counts were not properly joined because they neither rested on the same act or transaction nor constituted a single scheme or plan, given that the evidence did not show a robbery of the first victim. While he admits the offenses are cross-admissible, he nevertheless contends that the charges were not connected together. Alternatively, Hutchinson contends that joinder stripped him of the presumption of innocence and denied him his right to simultaneously testify about the attempted-robbery count and remain silent regarding the murder count.

"A proper basis for joinder exists when the charges are 'based on the same act or transaction; . . . or [b]ased on two or more acts or

transactions connected together or constituting parts of a common scheme or plan.'" *Rimer v. State*, 131 Nev. 307, 321, 351 P.3d 697, 708 (2015) (alterations in original) (quoting NRS 173.115). We have clarified that NRS 173.115 establishes several "different theories of joinder." *See Farmer*, 133 Nev. at 698, 405 P.3d at 120. However, some overlap may exist between the theories. *Scott v. Commonwealth*, 651 S.E.2d 630, 635-36 (Va. 2007). Under the connected-together theory, joinder is appropriate where "evidence of either crime would be admissible in a separate trial regarding the other crime." *Weber*, 121 Nev. at 573, 119 P.3d at 120. Evidence of the joined offenses are cross-admissible if they are relevant to a nonpropensity purpose, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." *See id.* (quoting NRS 48.045(2)). The evidence must also be "proven by clear and convincing evidence" and must not present a risk of undue prejudice that substantially outweighs its probative value. *Id.* However, while "unfair prejudice to the defendant" *may* warrant severance of properly joined charges, *Rimer*, 131 Nev. at 323, 351 P.3d at 709 (noting that unfair prejudice "requires more than a mere showing that severance may improve his or her chances for acquittal"), only manifest prejudice that "outweighs the dominant concern of judicial economy" *requires* severance, *id.* at 324, 351 P.3d at 710 (alterations omitted) (quoting *Tabish*, 119 Nev. at 304, 72 P.3d at 591); *see also id.* at 323-24, 351 P.3d at 709 (explaining that manifest prejudice occurs when it renders the trial fundamentally unfair and deprives the defendant of due process).

We conclude the connected-together theory is a proper basis to join the murder and attempted-robbery offenses. As both parties recognize,

evidence of the attempted robbery was relevant to show the identity of the perpetrators of the murder, insofar as that offense led to recovery of the weapon that had been linked to Hutchinson and the first victim. Additionally, the attempted robbery led to recovery of the clothing that Hutchinson wore, which tested positive for gunshot residue and is relevant and probative of his participation in the murder. The attempted-robbery offense was also relevant to show a motive for first-degree murder (i.e., to rob the first victim) as applied to the State's felony-murder theory for that charge. Conversely, the district court correctly concluded that evidence of the murder was admissible to negate any mistake, accident, or self-defense theories regarding Hutchinson's and Jackson's use of weapons at the homeless encampment. These bases establish cross-admissibility of the offenses for the identity, motive, and absence-of-mistake nonpropensity purposes, rendering the offenses "connected together." Accordingly, a proper basis for joinder existed.

Notwithstanding proper joinder, Hutchinson's claims of prejudice do not justify severance. He asserts, without any analysis or examples, that joinder has denied him the presumption of innocence. Even if we do not summarily reject the argument, *see Rhyne v. State*, 118 Nev. 1, 13, 38 P.3d 163, 171 (2002) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal." (quoting *Mazzan v. Warden*, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000))), such a contention ignores Hutchinson's own admissions that he demanded a pipe from and pulled a knife on the men at the homeless encampment. It also ignores incriminating evidence—such as the gunshot residue on his sweatshirt—that Hutchinson shot the murder victim and left him to die. Overwhelming

evidence led to his conviction, and Hutchinson fails to point to anything in the record to support that the jury disregarded the presumption of innocence. And even if, as Hutchinson contends, joinder of the attempted-robbery charge made the jury more likely to believe the State's felony-murder theory, "a mere showing" of improved chances at acquittal is insufficient to establish unfair prejudice. *See Rimer*, 131 Nev. at 323, 351 P.3d at 709.

We also reject Hutchinson's claim of prejudice based on his purportedly stymied desire to simultaneously testify about the attempted robbery but remain silent about the murder. Hutchinson did not meet his burden to make a "detailed showing" that his claim of prejudice is genuine and that it outweighed the considerations of judicial economy that support joining the murder and robbery charges. *See Honeycutt v. State*, 118 Nev. 660, 668, 56 P.3d 362, 367-68 (2002) (requiring "the defendant to present enough information regarding the nature of the testimony he wishes to give on the one count and his reasons for" declining to testify on the other count to enable appropriate consideration of prejudice to the defendant and "economy and expedition in judicial administration"), *overruled on other grounds by Carter v. State*, 121 Nev. 759, 766, 121 P.3d 592, 596 (2005). Lastly, other measures, such as limiting instructions, may be sufficient to cure prejudice from joinder. *See Tabish v. State*, 119 Nev. 293, 304, 72 P.3d 584, 591 (2003) ("When some potential prejudice [from the joinder of charges] is present, it can usually be adequately addressed by a limiting instruction to the jury."). Here, the district court gave an adequate limiting instruction regarding the jury's duty to consider each charge and the evidence in support of each charge separately. Accordingly, the district

court acted within its discretion in declining to sever the first-degree murder and attempted-robbery charges against Hutchinson.

The district court did not abuse its discretion in declining to sever Hutchinson's and his co-defendant's joint trial on the murder offense, as neither his specific trial rights nor the jury's guilty verdict were compromised

Hutchinson argues that the district court erred in denying his motion to sever the joint trial because he faced undue prejudice at Jackson's decision to invoke his speedy-trial rights and Jackson's attempt to implicate Hutchinson in the attempted robbery as the aggressor.

NRS 174.165(1) gives the district court discretion to sever a joint trial if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together." Although "[t]he decisive factor in any severance analysis remains prejudice to the defendant," *Marshall*, 118 Nev. at 646, 56 P.3d at 378-79 (imposing on the district court "a continuing duty at all stages of the trial to grant a severance if prejudice does appear" (internal quotations omitted)), a "general rule favoring joinder" of trials exists, *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995) (discussing that joint trials promote "judicial economy"). Severance is appropriate only where "joint trial compromise[s] a specific trial right or prevent[s] the jury from making a reliable judgment regarding guilt or innocence." *See Marshall*, 118 Nev. at 648, 56 P.3d at 380; *see also Jones*, 111 Nev. at 853, 899 P.2d at 547 (observing that only "*compelling* reasons" justify severance of a joint trial (emphasis added)). Thus, we have emphasized that severance under NRS 174.165(1) "requires more than simply showing that severance ma[kes] acquittal more likely." *Marshall*, 118 Nev. at 647, 56 P.3d at 379. And we "must consider not only the possible

prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials." *Id.* at 646, 56 P.3d at 379.

We conclude that Hutchinson does not demonstrate any prejudice from the joint trial. First, the record does not support Hutchinson's assertion that he and Jackson possessed mutually antagonistic defenses as to the attempted-robbery charge.[2] Hutchinson implicated himself as an aggressor when he confessed to pulling out the knife; Jackson implicated himself as an aggressor when he conceded to possessing the gun. Hutchinson's reliance on isolated questioning by Jackson of one of the attempted-robbery victims is unpersuasive, as the questioning attempted to point out inconsistences in and undermine the second and third victims' testimonies. Moreover, even if Hutchinson had not been the primary or sole aggressor at the second incident, the State's liability theories allowed the jury to hold both men criminally responsible. *See Marshall*, 118 Nev. at 646, 56 P.3d at 378 (explaining that "[d]efenses 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'" (second alteration in original) (quoting *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 122-23 (2002)).

Second, antagonistic defenses, by themselves, do not establish the prejudice sufficient to sever a joint trial. *See id.* at 648, 56 P.3d at 379. Additionally, the alleged prejudice to Hutchinson's attorney's ability to

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[2]Hutchinson does not make a misjoinder argument regarding the joint trial for the first-degree murder charge.

prepare for trial because of Jackson's request for a speedy trial lacks merit where the trial actually began over a year after the arraignment. *See* NRS 178.556(1) (requiring trial to occur "within 60 days after the arraignment" unless a defendant waives a speedy trial). And Hutchinson does not make any argument that the joint trial undermined the jury's ability to render a reliable judgment as to his guilt. Nor does he address how the alleged prejudice to him outweighs the potential prejudice to the State to put on duplicative trials. Finally, as the State points out, the district court instructed the jury to consider the case and evidence against each defendant separately. *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) (observing that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice" resulting from joinder of codefendants). Accordingly, the district court did not abuse its discretion in declining to sever a properly joined trial where Hutchinson failed to show any prejudice.

The prosecutor did not commit reversible misconduct when he directed a witness to look at Hutchinson's and his co-defendant's table after the witness made a misidentification

We employ "a two-step analysis" to review claims 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.* Second, "if the conduct was improper," we engage in a harmless-error analysis that in turn depends on whether the misconduct implicates constitutional rights. *Id.* at 1188-90, 196 P.3d at 476-77. As the issue here involves an alleged error of constitutional dimension, we reverse based on that error only if "the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476.

Relying on cases outlining the scope of permissible out-of-court, pretrial identification procedures affecting the reliability of in-court identifications, Hutchinson argues that the prosecutor used an impermissibly suggestive identification procedure that resulted in irreparable misidentification and constituted improper conduct when he asked one of the attempted-robbery victims if he recognized anyone at the defense table as the perpetrators after the victim had identified that he recognized two jurors.

Although we assess prosecutorial misconduct on a case-by-case basis, our paramount consideration regarding such claims is whether the conduct infected the proceedings with unfairness, and consequently, denied the accused of due process. *See, e.g., Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008); *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005). Regarding pretrial identification procedures, due process is not denied by the admission of an in-court identification that derived from "unnecessarily suggestive" out-of-court pretrial identification procedures if the totality of the circumstances establishes the subsequent in-court identification as independently reliable. *Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016); *see also Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) ("Reliability is the paramount concern."). To that end, we consider "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *see also*

Taylor, 132 Nev. at 322, 371 P.3d at 1045 (adopting the same standard and considering the same factors as the U.S. Supreme Court in *Neil v. Biggers*).

Assuming Hutchinson made a proper objection to the misconduct, and assuming the use of suggestive procedures during trial may constitute prosecutorial misconduct, the totality of the circumstances does not establish that the purportedly suggestive statement by the prosecutor amounted to prosecutorial misconduct severe enough to deny Hutchinson due process and warrant a new trial. *Cf. Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." (quoting *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004))). First, the district court immediately questioned the attempted-robbery victim, which revealed that the witness misidentified the jurors out of confusion over where he needed to look to make the identification, rather than his inability to in fact make that identification. The prosecutor's question also appeared to seek to clarify the witness's confusion.

Second, however, even if the "procedure" adopted by the prosecutor improperly primed the victim to identify the co-defendants, that conduct did not rise to the level of misconduct because it resulted in neither an irreparable misidentification nor a denial of Hutchinson's due process. The attempted-robbery victim's prior descriptions of Hutchinson and Jackson match his eventual identification as the two men who wielded a knife and a gun, respectively, at him and the other victim in an enclosed tent during daylight hours. Moreover, other evidence corroborated the victim's eventual identification, such as testimony from a second robbery victim who identified Hutchinson and Jackson as the perpetrators,

testimony from police who witnessed Hutchinson and Jackson accompany one of the victims to the encampment, and statements from Hutchinson that he pulled out a knife, eventually recovered by police next to one of the attempted-robbery victims' tent, on the men at the encampment. And police arrested both Hutchinson and Jackson at the homeless encampment where the attempted robbery took place. Finally, the attempted-robbery victim faced cross-examination on the misidentification. In sum, the totality of the circumstances establishes that the witness gave an independently reliable identification. Accordingly, even assuming the prosecutor improperly suggested the witness's identification, that conduct does not warrant reversal of the attempted-robbery conviction because it neither led to an unreliable identification nor denied Hutchinson due process.[3]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, J.
Cadish

_____, Sr. J.
Gibbons

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[3]Because we conclude that the district court at most committed one harmless error, Hutchinson is not entitled to reversal under the cumulative-error doctrine. *See Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016) (concluding that one harmless error "cannot cumulate" and justify reversal).

[4]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

PICKERING, J., concurring in part and dissenting in part:

For the reasons expressed in greater detail in Jackson v. State, Case No. 83484, filed December 23, 2022 (Pickering, J., concurring and dissenting in part), I respectfully disagree with the part of the majority's order that affirms the district court's exclusion of the first victim's dying declaration that the men who shot him "thought I was leading them into an ambush." In my view, the statement was admissible as lay opinion deduced from facts the record adequately shows the victim knew firsthand. See 1 McCormick on Evidence § 11, at p.97 (8th ed. 2020).

The question is close but, while I dissent from the majority's finding of no error in the exclusion of the ambush statement, I agree that it was harmless and with the remainder of the majority's analysis. I therefore concur in part and dissent in part.

Pickering, J.
Pickering

cc: Hon. Kathleen M. Drakulich, District Judge
Ristenpart Law
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk