

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID ALLEN HICKS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83975-COA

FILED

FEB 15 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

David Allen Hicks appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under the age of 16. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In January 2020, M.E., a fifteen-year-old child and ward of the State of Nevada, left Child Haven<sup>1</sup> with two other children.<sup>2</sup> The children walked from Child Haven to the Fremont Street Experience, visiting several kiosks on their way to the Adventuredome at Circus Circus Hotel and Casino, before making a last stop at Treasure Island. Afterwards, they took the bus home, but had to walk from the bus stop to Child Haven.

On their way to Child Haven, a man, later identified as Hicks, offered them soda. M.E. crossed the street to retrieve the drinks and brought them back to the others. When they finished their drinks, M.E.

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<sup>1</sup>Child Haven is a facility run by the State in Las Vegas and provides housing for children when they have nowhere else to live. While children are encouraged to remain in the facility, the workers at Child Haven are not permitted to require children to remain at the facility, so apparently, they may come and go as they wish.

<sup>2</sup>We recount the facts only as necessary for our disposition.

walked back across the street to Hicks and walked with him to his apartment around 11:00 p.m. The others waited for M.E. for twenty minutes before they began knocking on apartment doors in the complex trying to find M.E. They were unsuccessful, and the two other children returned to Child Haven without M.E.

In his apartment, Hicks gave M.E. methamphetamine and had sexual contact with her. M.E. left Hicks' apartment the next morning and walked back to Child Haven where she reported the incident. The police were called, and M.E. was interviewed by Detective Milligan. During the interview, M.E. identified the location of the apartment where the incident took place. Swabs of biological material were taken from M.E. during a medical examination and Hicks' DNA was found on the swabs from M.E.'s mons pubis and right breast.

While M.E. was being examined, Detective Milligan learned the name of the individual that lived in the apartment that M.E. identified. Using this information and a picture from Hicks' driver's license, Detective Milligan created a photo lineup and displayed it to M.E. M.E. picked out Hicks as the man who had sexual contact with her. Using this information, Detective Milligan obtained a search warrant and arrested Hicks.

Hicks was ultimately charged with six counts of lewdness with a child under the age of 16 and one count of coercion. Hicks pleaded not guilty, and the matter proceeded to trial. The trial lasted seven days. During trial, M.E. testified and admitted to lying to Detective Milligan during an interview immediately after the incident occurred. This was also apparent from the testimony given by Detective Milligan during trial when certain parts of M.E.'s testimony were contradicted by prior statements

made by M.E. to the detective. Detective Milligan also testified about the training he received on conducting forensic interviews.

The State also called Shade Rotibi, a forensic interviewer who had previously interviewed M.E. multiple times in 2019 regarding a previous sexual assault to testify about M.E.'s behavior during her 2019 interviews. Hicks objected to Rotibi's testimony and argued that her testimony was not relevant. The district court overruled Hicks' objection, and the jury heard Rotibi's testimony about M.E.'s previous behavior during a 2019 forensic interview.

The evening before closing arguments, the district court reminded counsel that the judge had to catch a plane the following afternoon and inquired about the time that each side would require for their closing argument. The State anticipated spending 30 minutes on its closing argument and using another 20 to 30 minutes on its rebuttal. Hicks planned on using 1.5 hours for his closing argument. The court expressed that it would be tough for the judge to catch the plane if Hicks used 1.5 hours for his closing argument. The following morning, the district court informed Hicks that his closing argument would be limited to one hour. Although Hicks received this information 45 minutes before beginning his closing argument, he did not object at that time. To the contrary, Hicks' attorney informed the court that he would be setting a timer so he could manage his time appropriately. Hicks' attorney did not object when the court told him he needed to begin wrapping up his argument. Instead, Hicks waited until after the jury retired to deliberate before raising any objection to the court's limitation on his closing argument.

The jury returned a guilty verdict for two counts of lewdness with a child under the age of 16. The two counts corresponded to M.E.'s

body parts where Hicks' DNA was found. Hicks received two 4-to-10-year sentences in prison to be served consecutively along with a special sentence of lifetime supervision.

On appeal Hicks raises four issues. First, he argues that the district court abused its discretion by allowing Rotibi to testify. Second, he argues that the district court committed plain error by allowing Rotibi and Detective Milligan to provide expert testimony. Third, he argues that the district court abused its discretion by limiting his closing argument. Fourth, he argues that the State committed plain error by engaging in prosecutorial misconduct by vouching for M.E.'s credibility and inflaming the passions of the jury during its closing argument.

*Hicks did not provide a proper appellate record for this court to evaluate his argument that the district court abused its discretion when it allowed Rotibi to testify, but, even if the district court abused its discretion, Hicks' substantial rights were not prejudiced*

Hicks argues that the district court abused its discretion by allowing Rotibi, a forensic investigator who interviewed M.E. prior to the events in this case, to testify. The State responds that Rotibi provided relevant lay testimony that helped describe the manner of M.E.'s disclosures.

We review the district court's decision to admit or exclude evidence for an abuse of discretion or manifest error. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). "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." *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Hicks objected to the relevance of Rotibi's testimony at trial. Hicks' objection was overruled after an unrecorded bench conference, and Rotibi was allowed to testify.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015. Collateral facts are facts that are not directly connected with the issue in dispute. *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004). Therefore, collateral facts are not relevant. Hicks argues that Rotibi’s testimony was not relevant because the testimony was about a collateral matter and was used to bolster M.E.’s credibility. The State responds that Rotibi’s testimony was relevant because it provided context for M.E.’s interview with Detective Milligan. Additionally, the State argues that Rotibi’s testimony was properly limited by the district court when the district court prevented Rotibi from testifying about M.E.’s truthfulness.

Knowledge of forensic interviews and M.E.’s past experiences with forensic interviews appear to not be directly connected to the issue of Hicks’ guilt, but without a record of the bench conference it is hard for this court to determine if the district court abused its discretion. It was Hicks’ responsibility to make an adequate appellate record. *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). This court cannot properly consider matters that do not appear in the record. *Id.* The court recorder did not transcribe the bench conference in question. Hicks had the ability to submit any differences between the record produced in the district court and the discussions that occurred in the district court so that the record could be conformed accordingly. *See id.*; NRAP 10(c). Hicks failed to do so. Accordingly, we conclude that we cannot properly review this issue.

Nevertheless, even if Rotibi’s testimony was not relevant and should not have been admitted, this error does not warrant a reversal or remand. *See* NRS 47.040(1) (“[E]rror may not be predicated upon a ruling

which admits or excludes evidence unless a substantial right of the party is affected . . . .”); NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). Despite Hicks’ claims that Rotibi’s testimony bolstered M.E.’s credibility, the jury declined to convict Hicks on most charged counts and only convicted him of the two counts that were corroborated by DNA evidence. *See, e.g., Davis v. State*, No. 78950-COA, No. 79767-COA, 2020 WL 6197302, at \*4 (Nev. Ct. App. Oct. 21, 2020) (Order of Affirmance). Therefore, Hicks fails to demonstrate how the Rotibi’s testimony affected his substantial rights.

*The district court did not commit plain error when it allowed Rotibi and Detective Milligan to testify*

Hicks argues that Rotibi and Detective Milligan were improperly allowed to testify as expert witnesses. Hicks admits that he did not object to their testimony at trial, so plain error review is all that can be considered on appeal. The State responds that neither Rotibi nor Detective Milligan testified as expert witnesses because they only testified to objective observations and Hicks did not object below.

Since Hicks failed to object to the witnesses’ testimony below, this alleged error may only be reviewed for plain error because “the failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal.” *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To succeed under plain error review, Hicks “must demonstrate that: (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 the defendant’s substantial rights.” *Id.* “[A] plain error affects a defendant’s 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 citations omitted).

Hicks argues that Rotibi and Detective Milligan both testified as expert witnesses because they testified about forensic interviews and their experience conducting forensic interviews. It is undisputed that Rotibi and Detective Milligan were not disclosed by the State as expert witnesses; however, the State argues that both witnesses only offered admissible lay testimony.

Forensic interviewers are not necessarily expert witnesses. *See Abbott v. State*, 122 Nev. 715, 728, 138 P.3d 462, 471 (2006). A forensic interviewer acts as an expert witness when they analyze the facts or state that there was evidence of bias or that the victim was coached. *Id.* If a forensic interviewer merely states what occurred during the interview, they are not acting as an expert witness. *Id.*; *see also* NRS 50.265 (defining permissible opinion testimony from lay witnesses). Hicks does not argue that Rotibi or Detective Milligan analyzed facts or stated that there was evidence of bias or that the witness was coached. Instead, Hicks argues that presenting their credentials to the jury was error. Hicks provides no relevant authority to support that presenting Rotibi's and Detective Milligan's credentials was an error, so we need not consider Hicks' argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Accordingly, we conclude that the district court did not err, plainly or otherwise, by allowing Rotibi and Detective Milligan to testify.

Even if allowing the witnesses to testify was an error, and the error was plain, Hicks has failed to show that this error affected his substantial rights. Hicks argues that the State used Rotibi's testimony and Detective Milligan's testimony to bolster M.E.'s testimony. It is undisputed

that M.E. was not truthful when initially speaking to Detective Milligan after the incident about her prior drug use. M.E. admitted this during trial. Detective Milligan's testimony made it clearer that M.E. lied to him during the initial interview. This did not bolster M.E.'s testimony but, instead, it made the testimony more doubtful since it revealed a problem with credibility. Here the jury evaluated and weighed M.E.'s testimony and did not find Hicks guilty on all counts—only the two offenses corroborated by DNA evidence, thereby repelling the notion that there was a “grossly unfair” outcome. Accordingly, we conclude that even if an error occurred, Hicks has not shown his substantial rights were affected; therefore, there is no plain error.

*The district court did not abuse its discretion by limiting Hicks' closing argument*

Hicks argues, citing *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985), that the district court abused its discretion when it limited his closing argument. The State responds that the district court did not abuse its discretion because the circumstances in Hicks' case are different from the facts in *Collier*.

At the outset, we note that Hicks failed to object to the time limitation until after closing arguments were completed and the jury had already retired to deliberate, so this alleged error must be reviewed for plain error because “the failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal.” *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Hicks has failed to argue plain error on appeal, so we need not address this argument. *See id.*

However, if we consider the merits of Hicks' argument, we review a district court's decision to limit closing argument for abuse of discretion. *Collier*, 101 Nev. at 482, 705 P.2d at 1132. An abuse of



discretion occurs if the district court's decision is arbitrary or capricious. *See Crawford*, 121 Nev. at 748, 121 P.3d at 585. The district court did not limit the State's closing; however, the State only planned on using one hour to close, which was the same amount of time the court afforded to Hicks. Hicks originally planned to use 1.5 hours to close but was told on the morning of closing arguments that he would be limited to one hour. Admittedly, while the district court's decision to limit Hicks' closing argument to one hour appears to have been made for personal reasons, that does not necessarily make the decision to limit argument an abuse of discretion requiring reversal.

Hicks' argument relies on *Collier* and the Nevada Supreme Court's conclusion that a one-hour limitation during a jury trial death penalty hearing that included testimony from more than 30 witnesses was an abuse of discretion. *See Collier*, 101 Nev. at 482, 705 P.2d at 1131-32. However, the court in *Collier* remarked that "[i]n another case, it might well have been reasonable to impose a one-hour time limitation." *Id.* at 482, 705 P.2d at 1132. Unlike *Collier*, Hicks' trial only had 12 witnesses and some of these witnesses only provided foundational testimony for the admission of video evidence. Additionally, unlike the defendant in *Collier*, Hicks was not facing a death sentence or even a sentence of life imprisonment. Plus, Hicks did not make an offer of proof as to what he would have argued, had the court given him additional time, and Hicks admits he was able to make his primary arguments regarding DNA transfer. The court in *Collier* also drew attention to the multiple errors arising from prosecutorial misconduct that defense counsel had to address during closing argument in an attempt to repair any potential prejudice added to the proceedings. *Id.* at 483, 705 P.2d at 1132. The court concluded that these cumulative errors

(prosecutorial misconduct *and* limited closing argument) required that the case be remanded for a new penalty hearing. *Id.* As discussed below, there was no prosecutorial misconduct during Hicks' trial and no cumulative error to warrant reversing Hicks' conviction.<sup>3</sup>

These factual differences distinguish *Collier* from the case before this court and Hicks admittedly had sufficient time to present his theory on DNA evidence before quickly wrapping up his argument. We also note that Hicks did not object until after the State's rebuttal closing argument and he did not ask for more time or for a mistrial. Accordingly, we conclude that the district court did not abuse its discretion when it limited the time Hicks had to make his closing argument.

*Hicks has not demonstrated plain error during the State's closing argument*

Hicks argues that the State improperly vouched for M.E. during closing arguments and tried to garner sympathy for M.E. by inflaming the jury's sympathies. The State responds that Hicks did not object below and the prosecutor did not misstate evidence and did not inflame the jury's sympathies.

Hicks failed to object during the trial, so this alleged error must be reviewed for plain error because "the failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal." *Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Additionally, when an

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<sup>3</sup>We also note that the Nevada Supreme Court has upheld time restrictions on closing arguments before. *See Manley v. State*, 115 Nev. 114, 125 979 P.2d 703, 710 (1999) (concluding that limiting closing argument to two hours and not permitting defense counsel an additional ten minutes to argue when the State had slightly more time and the jury had already begun deliberations when the defense requested additional time was not an abuse of discretion).

appellant fails to object to alleged prosecutorial misconduct at trial, this court reviews for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). “Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing ‘actual prejudice or a miscarriage of justice.’” *Id.* (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). “[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.” *Green*, 119 Nev. at 545, 80 P.3d at 95.

Hicks identifies eight statements made by the prosecutor that he claims improperly vouched for M.E. “[V]ouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness’s veracity.” *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotations omitted). However, a prosecutor “may argue inferences from the evidence and offer conclusions on contested issues.” *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (internal quotations omitted). We note that four of the statements Hicks now challenges are merely repetitions of testimony that was given at trial. We also note that three of the remaining statements are inferences drawn from the evidence presented during trial. Hicks argues that the remaining remark allowed the State to take responsibility for M.E.’s inability to answer some questions during testimony; however, Hicks provides no support for his argument that this is prosecutorial misconduct. Therefore, the alleged misconduct is not plain from a casual inspection of the record. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48; *see also Maresca*, 103 Nev. at 673, 748 P.2d at 6 (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of

relevant authority). Accordingly, we conclude that no error occurred, plain or otherwise.

Even assuming the State committed plain error, Hicks has failed to show that any error affected his substantial rights. Hicks was acquitted of every charge that was not supported by DNA evidence. Hicks has failed to argue that any vouching by the prosecutor affected the jury's ability to analyze the DNA evidence and weigh that against the evidence they heard during trial. Therefore, we conclude that his substantial rights were not violated because Hicks has not shown there was actual prejudice or a miscarriage of justice. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477.

Hicks also argues that the State improperly inflamed the jury's sympathies when the prosecutor told the jury to "hold Hicks accountable." We note that Hicks failed to object to this statement below. The State responds that the prosecutor did not argue that the jury needed to return a guilty verdict, only that everyone needs to be held accountable for their actions.

A prosecutor may not blatantly attempt to inflame the jurors by urging them to approach their duties in anger and give their community what it needs by giving a killer what he deserves. *Collier*, 101 Nev. at 479, 705 P.2d at 1129-30. The State did not go as far as suggesting a verdict in this context and did not urge the jury to approach the decision-making process from a particular emotional state. We also note that the Nevada Supreme Court has held that it is not improper for a prosecutor to argue that "everyone in a civil society needs to be held accountable for their decisions." *Porter v. State*, No. 81276, 2021 WL 5276340, at \*2 (Nev. Nov. 10, 2021) (Order of Affirmance). Accordingly, we conclude that there was

no error, and even if there was, Hicks has failed to demonstrate that the error was plain.

Even if this court were to conclude that there was an error, Hicks failed to show that his substantial rights were affected. Hicks argues that the outcome of the trial would have been different if the prosecutor had not made these remarks but fails to provide support for this argument. Additionally, the jury did not find Hicks guilty on all counts, which suggests that it carefully and deliberately approached each charge and weighed the evidence before arriving at a decision.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

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<sup>4</sup>Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Susan Johnson, District Judge  
Jonathan E. MacArthur, P.C.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk