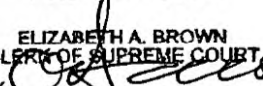


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AARON THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33985-COA
FILED
FEB 15 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING*

Aaron Thomas appeals from a judgment of conviction, pursuant to a jury verdict, of one count of second-degree murder and two counts of discharging of a firearm within a structure. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

On January 1, 2021, Thomas was attending a New Year's Eve party for the Gerson Park Kingsmen (GPK) gang of which he was allegedly a member.¹ A shooting occurred at the party killing Lazareo Jones (Lazareo), a member of the rival Hustlers Taking Over (HTO) gang.² When Lazareo arrived at the party, he approached Little Newbie, a member of GPK, and tapped him on the chin. Little Newbie reacted by pulling out a gun and the two began fighting over the gun. During the altercation, Lazareo's sister, Sidney Jones (Sidney), who was in the vicinity, witnessed two muzzle flashes appearing to have emanated from Thomas who was standing between five and ten feet away from Sidney. Lazareo immediately fell to the ground and subsequently died from multiple gunshot wounds at

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

²We note that the record reflects that HTO is a subset of the West Coast Bloods gang.

the hospital. Due to reports of a shooting, law enforcement arrived at the scene and during their investigation retrieved expended cartridge casings from the vicinity of where Lazareo had fallen.

Law enforcement continued to investigate the shooting, including conducting surveillance during a funeral of a known GPK member where Thomas was observed wearing GPK's gang color, green. Three weeks after the shooting, law enforcement interviewed Sidney, who identified Thomas as the shooter in a photo lineup, and a warrant was issued for Thomas's arrest. A search warrant was also executed on the vehicle Thomas was driving. The search revealed a box of bullets that had the same caliber and manufacturer as casings found at the scene of the shooting. A grand jury returned an indictment charging Thomas with one count of murder with use of a deadly weapon and five counts of discharge of a firearm from or within a structure or vehicle.

Before the trial in September 2021, the State moved to admit evidence of gang-affiliation, which Thomas opposed. The court conducted a *Petrocelli*³ hearing on the motion on the first day of trial. Detective Marcus Cook, who had responded to the scene of the shooting, testified that there had been a gang rivalry between GPK and HTO for the past ten years. Detective Cook testified he learned that because Lazareo knew many of the GPK members at the party, he felt safe attending. He also explained the significance of gang colors and having witnessed Thomas wearing green, the GPK gang color during a GPK funeral. He also described the gang-affiliation evidence he had found on Thomas's Facebook page, supporting that Thomas was a member of GPK. The State argued its theory of the case, that Lazareo was shot because he entered the party wearing his rival gang's color, red.

³*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

The district court granted the State's motion to allow evidence of Thomas's gang affiliation, finding among other things that the affiliation was relevant to the underlying charges, and that the evidence of the rivalry between GPK and HTO provided context for purposes of motive and intent. The district court specifically excluded criminal history or prior bad acts of Thomas that were gang related.

At trial, the State called Theresa Graziano, the crime scene analyst, who testified regarding the evidence collected, including the shell casings. Dr. Ben Murie, the coroner, testified as to the cause and manner of Lazareo's death being homicide by multiple gunshot wounds. Dr. Murie indicated that no soot or stippling was found on Lazareo's clothing or body, which would be expected if any bullet from the gun had been discharged within a foot of the victim. Sidney testified as to witnessing the muzzle flashes from Thomas, who was standing several feet away from Lazareo, and to her identification of Thomas as the shooter. Detective Cook testified as to Lazareo being a member of the rival gang as well as his high status as the founder of HTO. Detective Cook also testified as to the location of the party and the rivalry between the gangs. He further testified as to why witnesses from the party were reluctant to talk to law enforcement. Detective Cook testified about the concept of "snitches get stitches" and how "if somebody tells on a crime, they will—harm will come to them." Video obtained from another GPK member's Facebook page showed Thomas at the New Year's Eve party.

When settling jury instructions, the defense and the State agreed to the instructions. However, during discussions, Thomas's counsel asked whether first degree murder could even apply due to a lack of premeditation and suggested that this was a "defense of others" murder case. The district court gave Thomas's counsel until the following morning

to provide legal authority to the court to support a defense of others murder instruction, but Thomas's counsel did not do so. Further, he failed to raise the issue the next day and specifically did not request a defense of others jury instruction, or alternatively a self-defense instruction.

On the fourth day of trial, Alexis Edmond, who had previously given a statement to law enforcement regarding her description of the shooter, which did not match Thomas's appearance, appeared at the courthouse to testify accompanied by her stepfather.⁴ However, before Edmond testified, Thomas's counsel represented to the district court that she was present with her stepfather, who had expressed concerns for Edmond's safety because she had to testify at trial. Despite these concerns, Edmond testified that she did not see the shooter at the party and denied making any statement to law enforcement describing the shooter. Thomas's counsel chose not to impeach Edmond with her prior statement regarding her description of the shooter, which potentially would have been exculpatory evidence for Thomas. After Edmond testified, Thomas's counsel moved for a mistrial based on Edmond's failure to testify consistent with her prior statement. The court held a bench conference between the State and Thomas's counsel and inquired as to the basis for the mistrial. Thomas's counsel explained that he had to negotiate with Edmond's stepfather to obtain her testimony and did not impeach her due to concerns about her testimony. The district court was not persuaded by Thomas's counsel's rationale for his failure to impeach Edmond with her prior inconsistent

⁴We note that the record reflects that Edmond was under subpoena and that a material witness warrant was also issued to assure her appearance at trial due to concerns that she had been avoiding service of the trial subpoena and would not appear to testify. However, on the fourth day of trial, Edmond did willingly appear at court to testify.

statement on the identification of the shooter and denied Thomas's request for a mistrial. Following closing arguments, the case was submitted to the jury.

During jury deliberations, the jury requested to review Sidney's testimony in its entirety.⁵ The district court, without notifying counsel, sent a note back to the jury stating, "We are beginning another jury trial this morning and will need to utilize the courtroom for a few hours. Please continue to deliberate and we will check back in with you at a later time." The court did not check in with the jury before the jury reached a verdict approximately one and one-half hours later. Before taking the verdict, the district court notified counsel about the existence of the note, indicating that "[w]e let them know with a note back that they needed to continue deliberating and that we would—we would be able to get the video and that we were in the process of picking another jury, but that we'd be able to get the video and get that to them." Thomas did not object to the district court's failure to advise counsel of the note before communicating with the jury, nor did he object to taking the verdict without giving the jury the opportunity to review Sidney's testimony. Thomas also did not move for a mistrial, based on the district court's communication to the jury without counsel's knowledge and input, *before* the verdict was rendered, nor for a new trial after the verdict was known on this basis. The jury found Thomas guilty of second-degree murder and two counts of discharging a firearm from or

⁵We note that the record reflects that the jury previously asked to review Detective Cook's testimony during deliberations and was given the opportunity to do so. Thus, the jury would have understood that it was permitted to rehear testimony independent of the jury instruction that addresses readbacks.

within a structure or vehicle.⁶ Thomas's sentencing hearing was set for December 7, 2021.

At the sentencing hearing, Thomas's counsel requested that the court continue sentencing due to the late notice of errors contained in the presentence investigation report (PSI), the need to meet with Thomas regarding the PSI, to seek corrections to the PSI, and also to have time to file a sentencing memorandum. The district court gave Thomas time to consult with his attorney by phone but did not continue the hearing. When the matter was recalled approximately one-half hour later, Thomas's counsel argued the inaccuracies contained in the PSI. The court acknowledged the inaccuracies related to several items including the number of times Thomas was incarcerated and indicated that it would not consider the inaccurate information when rendering its sentence. The district court sentenced Thomas to ten years to life on count one with a consecutive term of eight to twenty years for the use of a deadly weapon, a consecutive sentence of two to ten years for count two, and a sentence of two to ten years on count three to run concurrently with count two. Thus, Thomas's aggregate sentence was twenty years to life with parole eligibility in twenty years.

On appeal, Thomas argues that (1) there was insufficient evidence to support Thomas's two convictions for discharge of a firearm, (2) the district court erred by wrongfully admitting gang-affiliation evidence, (3) the district court erred by refusing a requested jury instruction as to defense of others, (4) the district court erred by improperly communicating with the jury, (5) the district court erred by refusing to continue the sentencing and failing to correct Thomas's PSI, (6) the district court erred in denying a

⁶We note that five counts of discharge of a firearm from or within a structure were submitted to the jury, but the jury returned a guilty verdict on only two counts.

motion for a mistrial when Thomas's counsel failed to impeach a defense witness, and (7) cumulative error warrants reversal of his convictions.

Conversely, the State argues that Thomas's convictions for discharging a firearm were supported by substantial evidence, the district court did not err in admitting gang-affiliation evidence, refusing to give a defense of others instruction, communicating with the jury, and in denying the motion for a mistrial, nor did the court abuse its discretion in denying Thomas's motion for a continuance of the sentencing hearing. Therefore, the State argues that there were no errors to cumulate. We address Thomas's arguments on appeal in turn.

The evidence was insufficient to support Thomas's felony convictions for discharge of a firearm

In reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The appellate court "cannot sustain a conviction where the record is wholly devoid of evidence of an element of a crime." *Batin v. State*, 118 Nev. 61, 64-65, 38 P.3d 880, 883 (2002).

Additionally, NRS 202.287 states

1. A person who is in, on or under a structure or vehicle and who maliciously or wantonly discharges or maliciously or wantonly causes to be discharged a firearm within or from the structure or vehicle:

(a) If the structure or vehicle is not within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons, is guilty of a misdemeanor.

(b) If the structure or vehicle is within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

In *Ogunbanwo v. State*, the Nevada Supreme Court held that the evidence was insufficient to support the appellant's convictions on the discharging-a-firearm counts, when the State failed to provide proof of an ordinance designating the area as a populated area. *Ogunbanwo v. State*, No. 79723, 2021 WL 4238749, at *1 (Nev. Sept. 16, 2021) (Order Affirming in Part, Reversing in Part and Remanding). Although the State provided evidence of a grocery store's address and the occupied status of the surrounding area, evidence of an ordinance designating the area as populated was not offered, admitted, or judicially noticed. *Id.* at *1.

Here, like in *Ogunbanwo*, the State provided circumstantial evidence as to where the shooting was located but failed to specifically provide an ordinance designating the area as populated. See NRS 202.287(1)(b) (prohibiting discharging a firearm in a structure "within an area designated by city or county ordinance as a populated area for the purpose of prohibiting the discharge of weapons"). Therefore, the evidence was insufficient to support Thomas's convictions on counts two and three of discharging a firearm, and these convictions must necessarily be reversed.⁷

⁷To the extent the State argues for the first time in its answering brief that each conviction should be reduced to a misdemeanor, we are not persuaded and agree with Thomas that the jury was not instructed as to the availability of a misdemeanor charge pursuant to NRS 202.287, nor was the option of a misdemeanor conviction available on the verdict form. We also

The district court did not err in admitting gang-affiliation evidence

“The decision to admit gang-affiliation evidence rests within the discretion of the trial court.” *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004). In deciding whether to admit such evidence, the court must assess whether the evidence is (1) relevant, (2) proven by clear and convincing evidence, and (3) probative and not outweighed by unfair prejudice. *Id.* The Nevada Supreme Court held in *Butler* that a trial court did not err in admitting gang-related evidence when admitted to show a nonpropensity purpose under NRS 48.045(2)⁸, when the trial court held a pretrial hearing

note that the Nevada Supreme Court in *Ogunbanwo* reversed analogous charges without considering whether to reduce the charges to misdemeanors, although we recognize that in *Ogunbanwo* the State on appeal did not specifically request a reduction of the charges. See *Ogunbanwo*, 2021 WL 4238749, at *1.

⁸NRS 48.045 provides that

1. Evidence of a person’s character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) Evidence of a person’s character or a trait of his or her character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;

(b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and

(c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support

to assess the relevance of the evidence and evaluate its probative value, relative to its prejudicial effect, and where the court appropriately instructed the jury on the appropriate scope of the evidence before deliberations. *Id.* at 889, 102 P.3d at 78-79; *see also Petrocelli*, 101 Nev. at 51-52, 692 P.2d at 507-08 (providing that the district court must hold a hearing when the State seeks to admit prior bad act evidence), *superseded by statute on other grounds as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823-24 (2004).

Here, the district court held a hearing pursuant to *Petrocelli* on the first day of trial to determine the admissibility of Thomas's and Lazareo's gang-affiliations and concluded that the State proved by clear and convincing evidence that Thomas was a GPK member, that his gang-affiliation was relevant to motive and intent for the underlying charges and that its probative value was not substantially outweighed by the danger of unfair prejudice. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("Gang-affiliation evidence may be relevant and not substantially outweighed by unfair prejudice when it tends to prove motive."); *cf. Qualls v. State*, 114 Nev. 900, 901-04, 961 P.2d 765, 766-67 (1998) (concluding that the district court erred by failing to hold a *Petrocelli* hearing to determine whether evidence of a defendant's gang-affiliation was admissible). It is clear from the record that the district court recognized the potential

his or her credibility, within the limits provided by NRS 50.085.

2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

prejudicial effects of gang-related evidence and specifically indicated that this evidence was highly probative as to motive and intent. *See Lara*, 120 Nev. at 180, 87 P.3d at 530.⁹

Thus, evidence related to the location of the party, the feud between the two gangs, and Lazareo's gang-affiliation was not admitted to impugn Thomas's character in violation of NRS 48.045, but to help the jury to better understand the dynamics of gang affiliation. For example, Detective Cook's testimony supported that Lazareo's gang-affiliation was well-known by the members of GPK, and that Thomas would have recognized Lazareo as an HTO gang member due to the gang color he was wearing at the party. This evidence was relevant and was not unfairly prejudicial in light of its high probative value. *See* NRS 48.035 (providing for admission of relevant evidence when the probative value is not outweighed by unfair prejudice); *Lay v. State*, 110 Nev. 1189, 1192, 1195, 886 P.2d 448, 449-50, 452 (1994) (concluding that the gang affiliation evidence, which included evidence of the defendant's and victim's gang affiliations and the rivalry between the gangs was admissible).

To the extent Thomas is also arguing that the district court erred in admitting into evidence the State's witness's references to "snitches get stitches" as being beyond the type of gang-related evidence permitted by the court, Thomas failed to object to such statements below. *See* NRS 47.040(1)(a); *Riddle v. State*, 96 Nev. 589, 591, 613 P.2d 1031, 1033 (1980) (stating that contemporaneous objection is required to preserve an issue for

⁹We note that the record reflects that the district court offered to provide a limiting instruction as to this evidence, but Thomas's counsel declined. *See Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001) (noting that the defense may decline a limiting instruction "for strategic reasons").

appeal). Likewise, Thomas failed to object to the State's references to such evidence during voir dire and closing argument. Therefore, to obtain relief for these asserted errors, Thomas must demonstrate plain error by showing: (1) there was an error; (2) the error was plain or clear; and (3) the error affected his substantial rights. *Jeremias v. State*, 134 Nev. 46, 50, 52, 412 P.3d 43, 48-49 (2018). “[A] plain error affects a defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice” *Id.* at 51, 412 P.3d at 49. However, because Thomas also failed to argue the necessity of plain error review on appeal, we are within our discretion not to undertake it. *Id.* at 52, 412 P.3d at 48-49.

But even if we were to review for plain error, we are not persuaded that Thomas’s substantial rights were affected by the “snitches get stitches” comments as they were not direct references to Thomas but general references to the impact of gang affiliation, which helped explain the general lack of willingness of witnesses to talk with law enforcement. *See McNair v. State*, No. 78871, 2022 WL 575744, at *3 (Nev. Feb. 24, 2022) (Order of Affirmance) (“We are not convinced that the investigator’s testimony regarding R.R.’s general reluctance to cooperate and testify was improper, particularly where the investigator did not imply that appellant engaged in witness intimidation.”). Therefore, we conclude that the district court did not commit plain error in admitting the evidence of gang-affiliation, including the references to “snitches get stitches,” nor were the State’s comments during voir dire and closing argument plainly erroneous.

The district court did not err in not providing a defense of others jury instruction where there were insufficient grounds to support the instruction

District courts have broad discretion to settle jury instructions, and this court generally “reviews the district court’s decision for an abuse of that discretion or judicial error.” *Crawford v. State*, 121 Nev. 744, 748, 121

P.3d 582, 585 (2005). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Id.* (internal quotation marks omitted). “[A] defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it, regardless of whether the evidence is weak, inconsistent, believable, or incredible.” *Hoagland v. State*, 126 Nev. 381, 386, 240 P.3d 1043, 1047 (2010). However, the district court is not required to instruct the jury on a defense when the evidence is legally insufficient to sustain an element of the defense. *Id.*

Here, Thomas’s counsel did not specifically request a defense of others instruction. “Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant’s right to a fair trial.” *McKenna v. State*, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998). Thomas has not shown how he suffered patent prejudice when no credible evidence at trial supported a defense of others jury instruction. *See Allen v. State*, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981) (“The test for the necessity of instructing the jury is whether there is any foundation in the record for the defense theory.”); *see also Palmer v. State*, No. 67565, 2018 WL 679541 (Nev. Jan. 25, 2018) (Order of Affirmance) (holding that there was no evidence of a prejudicial error entitling the defendant to alternative jury instructions when the defendant presented no credible evidence to support a second degree murder or attempt jury instruction). Therefore, the district court did not err in not giving a defense of others instruction, as Thomas did not provide any evidence to support such an instruction, nor did he specifically request the instruction.

The manner of the district court's response to the note from the jury was an error but did not affect Thomas's substantial rights

“[T]he court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury.” *Manning v. State*, 131 Nev. 206, 211, 348 P.3d 1015, 1019 (2015). The district court errs when it fails to notify counsel before communicating on a substantive matter. *Daniel v. State*, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003). We agree with Thomas that the district court erred in this case when it responded to the jury's request for a playback of Sidney's testimony, without notifying counsel.

Although both Thomas and the State rely on the three-factor harmless error test in *Manning*¹⁰ to analyze whether the district court's error in this case warrants reversal, and we agree that those three factors are relevant when evaluating prejudice from an error of this nature, we cannot review for harmless error in this case. The supreme court engaged in harmless error review in *Manning* because the appellant preserved his objection to the error by filing a timely motion for a new trial. Here, Thomas failed to object to the district court's procedure of communicating with the jury before advising counsel, he did not object to the verdict being read without giving the jury the opportunity to review Sidney's testimony once he was advised of the jury's request, and he did not file any motion for a new trial based on the error. Because Thomas failed to preserve any objection in

¹⁰The three factors are “(1) the probable effect of the message actually sent; (2) the likelihood that the court would have sent a different message had it consulted with appellants beforehand; and (3) whether any changes in the message that appellants might have obtained would have affected the verdict in any way.” *Manning*, 131 Nev. at 212, 348 P.3d at 1019 (internal quotation marks omitted).

this case, we can only review for plain error. *Jeremias*, 134 Nev. at 52, 412 P.3d at 49.

To warrant relief for plain error, Thomas would have to show that the court's error violated his substantial rights, causing "actual prejudice or a miscarriage of justice." *Id.* But we are not persuaded that Thomas's substantial rights were affected by the error, in light of the three factors deemed relevant in *Manning*. First, the most likely effect of the court's message was that the jury understood it could continue deliberating until it was convenient for the court to get them the video. The jurors had already received a playback of Detective Cook's testimony and would have understood that they could watch Sidney's testimony again once the courtroom was free. Second, it is unlikely the court would have sent a different message had it consulted with counsel; as in *Manning*, the instruction was simple, it contained no legal instructions, and it simply directed the jury to continue deliberations until the courtroom was free. *See Manning*, 131 Nev. at 212, 348 P.3d at 1019. Finally, Thomas did not establish that any changes to the message would have affected the verdict. Even if the jury had been given immediate access to a playback of Sidney's testimony in another courtroom, Thomas cannot show that the verdict would have been any different, in light of the substantial evidence of guilt in this case. Therefore, while we agree that the court erred in failing to consult counsel regarding the jury's request to review Sidney's testimony, we disagree that it constitutes plain error because Thomas has not shown that the error affected his substantial rights. *See Jeremias*, 134 Nev. at 50, 52, 412 P.3d at 48-49.

The district court did not abuse its discretion by not continuing the sentencing hearing

“This court reviews the district court’s decision regarding a motion for continuance for an abuse of discretion.” *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). “Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). If an appellant fails to demonstrate that he was prejudiced by a district court’s denial of a continuance, the court’s denial is not an abuse of discretion. *Id.*

Here, any claim by Thomas that the PSI affected his sentence is negated by the fact the district court gave Thomas and his counsel the opportunity to verbally correct and supplement the PSI at sentencing.¹¹ See *Higgs*, 126 Nev. at 9, 222 P.3d at 653; see also *Barr v. State*, No. 78295, 2020 WL 5634157, at *3 (Nev. Sept. 18, 2020) (Order of Affirmance) (concluding that the district court abused its discretion when it declined to continue the appellant’s sentencing because that prevented him from thoroughly reviewing the PSI for all potential errors, but that this error did not amount to prejudice as the record as a whole supports that the district court’s sentencing was based on the accurate information presented at sentencing); cf. *Thomas v. State*, 88 Nev. 382, 385, 498 P.2d 1314, 1316 (1972) (explaining that a district court can impose a legally sound sentence even when there

¹¹We note that the record reflects that the verdict was reached on September 27, 2021, and the PSI was prepared on November 15, 2021. Thomas’s sentencing hearing was on December 7, 2021. Therefore, Thomas had time to prepare for sentencing, and as noted, the district court afforded Thomas and his counsel the opportunity to verbally correct and supplement the PSI at sentencing.

are inadequacies in sentencing forms produced by the Division of Parole and Probation).

Because the district court afforded Thomas the opportunity to explain and correct any inaccuracies in his PSI before rendering judgment, and agreed not to consider the inaccurate information, Thomas did not suffer prejudice at sentencing. Further, the court specifically represented that it was not basing the sentence on the inaccurate information contained in the PSI. Thomas does not allege that the sentencing was erroneous such that it did not comply with the statutory requirements. *See Blankenship v. State*, 132 Nev. 500, 509, 375 P.3d 407, 413 (2016) (explaining that an error in a sentencing form does not amount to “impalpable or highly suspect evidence” unless it tainted the PSI sentencing recommendation considered by the district court). Moreover, the record reflects that Thomas’s sentence was within the prescribed statutory range for his convictions and enhancements. *See* NRS 200.010, 200.030, 193.165 (second degree murder with use of a deadly weapon); NRS 202.287 (discharge of firearm from or within a structure or vehicle). Therefore, the district court did not abuse its discretion by not continuing the sentencing hearing.

Nevertheless, the district court noted that there were inaccuracies contained in the PSI, and given our disposition, we necessarily remand for the district court to correct the PSI. *See Stockmeier v. State, Bd. of Parole Comm’rs*, 127 Nev. 243, 250, 255 P.3d 209, 213, 214 (2011).

The district court did not abuse its discretion in denying a mistrial when Thomas’s counsel failed to impeach a defense witness

A denial of a motion for a mistrial is reviewed for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 346, 213 P.3d 476, 489 (2009); *see also Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (“A defendant’s request for a mistrial may be granted for any number of reasons

where some prejudice occurs that prevents the defendant from receiving a fair trial.”). 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).

Here, Thomas’s argument centers around his trial counsel’s failure to impeach Edmond, and how he was prejudiced by counsel’s actions.¹² A claim of error related to an attorney’s alleged ineffectiveness must be raised in a postconviction habeas petition. *See Gibbons v. State*, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981) (holding that a claim for ineffective assistance of counsel is properly challenged in postconviction relief because factual issues are best determined in the district court). Despite Thomas’s argument that the district court should have granted a mistrial, he fails to cite to any authority demonstrating that a mistrial is warranted under these circumstances. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (recognizing “[i]t is appellant’s responsibility to present

¹²We note that Thomas’s counsel did not impeach Edmond with her purported statement to law enforcement while she was testifying, and we do not have Edmond’s statement to law enforcement in the record to confirm the inconsistency. It is the appellant’s burden to provide all materials essential to the decision of issues presented on appeal. *See* NRAP 30(b); *Thomas v. State*, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004). Even if we did have Edmond’s statement, we are not persuaded that Thomas has shown an abuse of discretion in denying the mistrial because strong evidence was presented at trial that supported the jury’s verdict: Sidney’s testimony identifying Thomas as the shooter, evidence of Thomas at the party, evidence that flashes were seen emanating from Thomas at the moment of the shooting consistent with gunfire, the coroner’s testimony that the gunshots were fired more than a foot away from Lazareo, and evidence that the car Thomas was driving contained a box of bullets that had the same caliber and manufacturer as casings found next to Lazareo’s body. *See, e.g., Lord v. State*, 107 Nev. 28, 33, 806 P.2d 548, 551 (1991) (concluding that the improper testimony did not prejudice the defendant’s substantial rights in light of “other strong evidence of guilt”).

relevant authority and cogent argument”). Therefore, the district court did not abuse its discretion in denying the motion for a mistrial, as Thomas fails to demonstrate that a mistrial was warranted, and we decline to address a claim of ineffective assistance of counsel on direct appeal because an evidentiary hearing may be needed to address factual issues. *See Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (“[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary.”), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018); *see also Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (noting that to demonstrate an ineffective assistance of counsel the defendant must prove the “disputed factual issues underlying [the] ineffective-assistance claim by a preponderance of the evidence”).

Cumulative error does not warrant reversal

Even where multiple errors are harmless individually, their cumulative effect may violate a defendant’s right to a fair trial. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 480-81 (2008). “When evaluating a claim of cumulative error, [this court] consider[s] the following 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.” *Id.* at 1195, 196 P.3d at 481 (internal quotation marks omitted). But when errors are insignificant or nonexistent, the errors do not warrant cumulative error review. *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting “insignificant or nonexistent” errors do not warrant reversal based on cumulative error); *see also United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (“[C]umulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.”);

Carroll v. State, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016) (concluding that one error “cannot cumulate” and justify reversal).

Here, without reaching the merits of the errors, we determine that cumulative error does not apply because we are reversing the discharge-of-a-firearm convictions on counts two and three, and only one error remains. See *Belcher v. State*, 136 Nev. 261, 279, 464 P.3d 1013, 1031 (2020) (holding that cumulative error did not apply where one of the appellant’s robbery convictions was reversed, and only one error remained). The only remaining error—the district court’s unilateral response to the jury note—is not subject to cumulative error review. Therefore, Thomas fails to demonstrate that a cumulative error analysis applies.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

¹³Insofar as Thomas raises other arguments that are not specifically addressed herein, 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. Jacqueline M. Bluth, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk