IN THE SUPREME COURT OF THE STATE OF NEVADA

DERRICK LAMONT BUSH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83819

FILED

FEB 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge. Appellant Derrick Lamont Bush raises four contentions on appeal.[1]

First, appellant contends that the district court erred in admitting testimony about his prior possession and use of a firearm. Although the admission of prior uncharged conduct is disfavored, NRS 48.045(2) permits the admission of such evidence when it is relevant to a non-propensity purpose, like establishing knowledge. *Newman v. State*, 129 Nev. 222, 230, 298 P.3d 1171, 1177-78 (2013). Before admitting such evidence, the State must establish that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Appellant concedes that the evidence is relevant

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

assessment absent compelling evidence to the contrary. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004) (refusing to reweigh the credibility of witnesses on appeal); *Watkins v. State*, 93 Nev. 100, 101, 560 P.2d 921, 921 (1977) (explaining that inconsistencies in witness testimony "raise a question of credibility to be determined by the finder of fact," not a question of sufficiency of the evidence). In addition to Hughes' testimony, the district court relied on appellant's admission in recorded jail calls that suggested that photographs and videos depicting the May outing existed. Accordingly, the district court did not abuse its discretion in admitting evidence of uncharged conduct. *See Fields v. State*, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009) (reviewing admission of prior uncharged conduct for abuse of discretion).

Second, appellant argues that the district court erred in denying his motion to dismiss based on pretrial prosecutorial misconduct without conducting an evidentiary hearing. He contends that the district attorney improperly instructed Hughes not to discuss the case with anyone and that detectives intimidated Michael Wheless, the owner of the recovered firearm.

We conclude that appellant did not allege sufficient facts to show misconduct or resulting substantial prejudice to warrant dismissal. *See Lay v. State*, 110 Nev. 1189, 1198, 886 P.2d 448, 454 (1994) ("Dismissal of an indictment on the basis of governmental misconduct is an extreme sanction that should be utilized infrequently," and to warrant dismissal "the defendant must show substantial prejudice."). During Hughes' *Petrocelli* hearing testimony, she indicated that a deputy district attorney advised her that she should not speak to anyone about the trial. Preventing witnesses

but argues that the State did not prove the prior conduct by clear and convincing evidence because the principal witness did not testify consistently. We disagree.

At the *Petrocelli*[2] hearing, appellant's former girlfriend, Patrice Hughes, testified that in May, while shooting recreationally, she observed appellant possess and fire a weapon similar to the one recovered during his September arrest. She also testified that she had seen appellant driving the white Ford in which he was arrested several months before his arrest. Appellant asserts this testimony is not credible because Hughes had not testified about the May outing at either the preliminary hearing or the first trial and her preliminary hearing testimony indicated she had only seen him driving the car twice in the days before his arrest. The district court concluded that her testimony was not contradictory. That conclusion is entitled to deference as it is supported by the record. *See Bongiovi v. Sullivan*, 122 Nev. 556, 575, 138 P.3d 433, 447 (2006) (affording facts found by clear and convincing evidence "great deference" that will not be reversed "absent manifest error"). Hughes was not asked at either the preliminary hearing or the first trial about whether she had seen appellant handle the weapon. Her preliminary hearing testimony about seeing appellant in the Ford was not clearly inconsistent with the *Petrocelli* hearing testimony given her explanation that she understood the time frame encompassed by the examination during the preliminary hearing to be limited to the days immediately preceding appellant's arrest. The district court was in the best position to assess her credibility and this court will not substitute its own

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

from speaking with defense investigators is arguably improper. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (recognizing that a prosecutor should "refrain from improper methods calculated to produce a wrongful conviction"); *Steese v. State*, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998) (recognizing that a prosecutor may not dissuade a witness from testifying through misrepresentation). However, as she explained during questioning, Hughes did not interpret this admonition as preventing her from speaking with defense counsel. Further, no one from the defense had attempted to discuss the trial with her since that admonition. And the district court heard the motion to dismiss five months before trial and during that hearing the court offered to order the district attorney to advise Hughes that she may speak with defense investigators before trial. As the record does not indicate that Hughes refused to speak to the defense based on the admonition, appellant did not demonstrate that he suffered substantial prejudice warranting dismissal.

As to Wheless, witness intimidation by the State "can warrant a new trial if it results in a denial of the defendant's right to a fair trial." *Rippo v. State*, 113 Nev. 1239, 1251, 946 P.2d 1017, 1025 (1997). Although Wheless conveyed to appellant's counsel that he felt intimidated by the tone and demeanor of the detectives questioning him, ultimately he said he would testify if subpoenaed. Accordingly, the district court did not abuse its discretion in denying the motion to dismiss. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing motion to dismiss indictment for abuse of discretion).

Third, appellant contends that the district court erred in denying his motion to suppress evidence of a firearm discovered during an

inventory search of the vehicle he was driving at the time of his arrest. He argues that the inventory search was merely a ruse to look for incriminating evidence.

An inventory search carried out in good-faith compliance with "standardized official department procedures" is a well-established exception to the Fourth Amendment's warrant requirement. *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994) (citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)); *see also Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (recognizing that police may exercise discretion to conduct inventory search when that discretion is exercised according to standard criteria). An officer's compliance with standard procedures ensures that an inventory search is truly "designed to produce an inventory" and is not just "a ruse for a general rummaging . . . to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990).

We conclude that the district court's finding that the search of the car was a legitimate inventory search conducted in accordance with department procedures is supported by the record and is not clearly wrong. *See Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008) (providing that a challenge to the constitutionality of a search presents mixed questions of law and fact, and this court reviews the factual findings for clear error and the application of law to those findings de novo). According to testimony elicited at the suppression hearing, officers determined after appellant's arrest that he was not the registered owner of the vehicle he was driving. As the owner was not present, officers began an inventory search of the vehicle before impounding the vehicle. Officers memorialized the items impounded by noting the property in a written

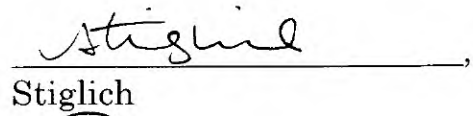
report and on bodycam footage, which the court found provided an accurate inventory of the items cataloged during the inventory search. *See State v. Nye*, 136 Nev. 421, 423, 468 P.3d 369, 371 (2020) (recognizing that valid inventory search must produce an accurate inventory of the items found). Notably, where the written report listed general descriptions, the bodycam footage provided a more accurate depiction of the property observed. *Cf. id.* at 424, 468 P.3d at 371 (holding that the more broadly property is described during the search, the less likely the search would be considered a valid inventory). Based on the testimony of the officer who performed the inventory search, a review of his bodycam footage, and the documentation memorializing the inventory, the district court concluded that the inventory search was reasonable. *See United States v. Betterton*, 417 F.3d 826, 830 (8th Cir. 2005) (providing that officer testimony as to police department impound policy is sufficient to establish the procedures). We agree. Accordingly, the search did not violate the federal and state constitutions, and the district court did not err by denying appellant's motion to suppress. *See* U.S. Const. amend. IV; Nev. Const. art. 1, § 18; *Diomampo v. State*, 124 Nev. 414, 432, 185 P.3d 1031, 1042 (2008).

Fourth, appellant contends that the district court erred in setting bail at an unattainable amount. Because appellant has been convicted and is serving his sentence, this claim is moot. *See Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020) (recognizing that bail and pretrial issues "become moot once the case is resolved by dismissal, guilty plea, or trial"). Appellant does not argue that he can overcome mootness. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013) (recognizing that a

party may overcome mootness of an issue by showing "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important").

Having considered appellant's contentions and concluding that they do not warrant relief, we

ORDER the judgment of conviction AFFIRMED.



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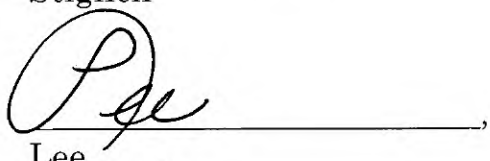

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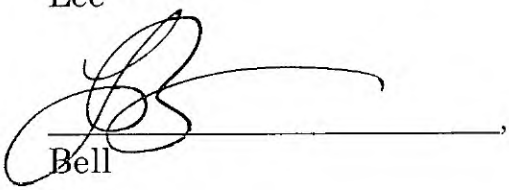

_____, J.
Bell

cc: Hon. Jasmin D. Lilly-Spells, District Judge
The Law Firm of C. Benjamin Scroggins, Esq.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk