IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER LLOYD FOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84524-COA

FILED

MAR 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Christopher Lloyd Fox appeals from a judgment of conviction entered pursuant to a jury verdict of attempted robbery. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Fox first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt because it rested on the victim's recollection of a very brief event. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The evidence produced at trial revealed the following. The victim was working at a restaurant and took trash to the dumpster behind the building. As she was performing that task, a person, whom she later identified as Fox, approached her and grabbed her arm. She stated that the grip on her arm was hard and that Fox told her to give him the keys to her car. She responded that she did not have a car. Fox then let go of her arm

and left the area. In addition, surveillance video depicted Fox in the vicinity of the dumpster before and after the incident involving the victim.

The jury could have reasonably inferred from the evidence presented that Fox committed attempted robbery. *See* NRS 193.153(1); NRS 200.380(1). While Fox contends that the victim's testimony concerning the event was not reliable, it was for the jury to determine the weight and credibility to give to conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Therefore, we conclude that Fox is not entitled to relief based on this claim.

Second, Fox argues that the district court erred by declining to instruct the jury on misdemeanor battery as a lesser-related offense of attempted robbery. "The district court has broad discretion to settle jury instructions, and this court 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). Additionally, a defendant is not entitled to instruction on a lesser-related offense because "[t]o allow a conviction on a crime that the State has not even attempted to prove is not a reliable result." *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006).

Here, the district court rejected Fox's request for an instruction on misdemeanor battery as a lesser-related offense, and we conclude that the district court did not abuse its discretion by so doing. To the extent that Fox urges this court to overrule *Peck* and permit instructions on lesser-related offenses, this court cannot overrule Nevada Supreme Court precedent. *See People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App.

2007), *as modified* (Aug. 15, 2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court." (quotation marks and internal punctuation omitted)); *see also Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (observing stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court"). Therefore, we conclude that Fox is not entitled to relief based on this claim.

Third, Fox argues that the prosecutor committed prosecutorial misconduct by vouching for the credibility of the victim during rebuttal argument by offering her personal opinions concerning the victim's truthfulness and demeanor. "The prosecution may not vouch for a witness; such vouching 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 quotation marks and punctuation omitted). Moreover, prosecutors may not "inject their personal beliefs and opinions into their arguments to the jury." *See Aesoph v. State*, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986). In reviewing claims of prosecutorial misconduct, we determine whether the prosecution's conduct was improper, and if so, whether the improper conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Fox preserved this claim for appellate review, and therefore, we review any improper conduct for harmless error. *See id.* at 1188-90, 196 P.3d at 476-77.

During its rebuttal argument, the prosecutor stated her opinion that the victim appeared to still be scared of Fox as a result of the attempted robbery. Fox objected and argued that the State's comments constituted improper vouching for the credibility of the victim. The district court

sustained Fox's objection and directed the State to rephrase its rebuttal argument. The State subsequently followed the district court's order. Because the district court sustained Fox's objection, it directed the State to rephrase its argument, and the State also complied with the district court's order, we conclude that any misconduct was rendered harmless. Therefore, Fox is not entitled to relief based on this claim.

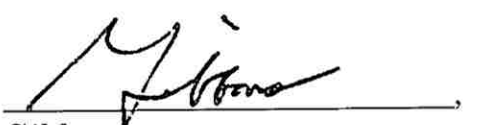
Fourth, Fox argues that the State improperly referenced facts not in evidence when it asserted during rebuttal argument that the victim looked at Fox with fear during her trial testimony. Fox did not argue before the district court that the State referenced facts that were not admitted into evidence. Thus, Fox is not entitled to relief absent a demonstration of plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018); *Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (recognizing that, in order to properly preserve an objection, a defendant must object at trial on the same ground he asserts on appeal). To demonstrate plain error, Fox must show "(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 [his] substantial rights." *Jeremias,* 134 Nev. at 50, 412 P.3d at 48 (internal quotation marks omitted).

In closing arguments, "a prosecutor may not make statements unsupported by evidence produced at trial." *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). However, the "jury had the ability to observe the witness's demeanor and judge her credibility," *Lipsitz v. State*, 135 Nev. 131, 138, 442 P.3d 138, 144 (2019), and it is not clear from a casual inspection of the record that the challenged statements were not supported by the victim's behavior during her trial testimony. Fox thus fails to demonstrate that the challenged statements amounted to error that was

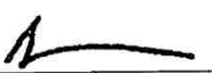
plain from the record. Accordingly, we conclude that Fox is not entitled to relief based on this claim.

Finally, Fox argues that cumulative error entitles him to relief. Because Fox fails to demonstrate there were multiple errors, he fails to demonstrate he is entitled to relief based on cumulative error. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Mary Kay Holthus, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk