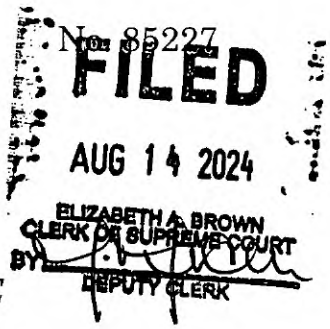
IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELL FERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85227



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in the possession of a firearm, first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, conspiracy to commit robbery, robbery with the use of a deadly weapon, two counts of attempted robbery with the use of a deadly weapon, and ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Appellant Angell Fernandez was convicted by a jury and sentenced to serve an aggregate prison term of 31 years to life following a home invasion in which one of the home's occupants was shot to death. Fernandez appeals his judgment of conviction, arguing that the district court committed multiple reversible errors, the State committed prosecutorial misconduct necessitating reversal, and the State failed to present sufficient evidence to convict him of certain charges beyond a reasonable doubt. We disagree and affirm.

The district court did not abuse its discretion in denying Fernandez's motion to dismiss on speedy trial grounds

Fernandez argues that the district court erred by denying his motion to dismiss on speedy trial grounds. "We review a district court's decision to grant or deny a motion to dismiss an indictment based on a speedy trial violation for an abuse of discretion." *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 730 (2019). In *Barker v. Wingo*, the United States Supreme Court provided a list of factors for courts to balance in determining whether a defendant has been deprived of his right to a speedy trial. 407 U.S. 514 (1972). These factors are "[1] [the] [l]ength of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant" as a result of the delay. *Id.* at 530. Here, the length of the delay was considerable, and Fernandez asserted his right repeatedly. However, the record shows that the majority of the delay was caused by court closures as a result of the COVID-19 pandemic, while other factors contributing to the delay included changes in counsel and court scheduling conflicts. Those delays were largely neutral or justifiable rather than deliberate. *See id.* at 531 (distinguishing between deliberate, neutral, and justifiable delays). Further, Fernandez has not credibly demonstrated prejudice resulting from the delay. The district court considered the reason for each delay, weighed the *Barker* factors, and concluded that dismissal was not required. Thus, we conclude that the district court did not abuse its discretion by denying Fernandez's motion to dismiss.

The district court committed harmless error by allowing a witness to testify remotely

Fernandez claims his Sixth Amendment right to confront the witnesses against him was violated when the district court allowed State witnesses to testify remotely. "Whether an evidentiary ruling violated the

defendant's rights under the Confrontation Clause is a question of law we review de novo." *Lipsitz v. State*, 135 Nev. 131, 136, 442 P.3d 138, 143 (2019). Remote testimony by way of videoconferencing satisfies the right to confrontation only if (1) the district court finds that permitting a witness to testify remotely is necessary to further a compelling public policy interest, and (2) the testimony is otherwise reliable. *Id.* (citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990)).

In *Newson v. State*, we held that general concerns related to the COVID-19 pandemic were insufficient to allow for remote testimony. 139 Nev., Adv. Op. 9, 526 P.3d 717 (2023). Instead, a district court must make witness-specific findings as to why remote testimony would further a public policy interest. *Id.* at 719. We also held that generally convenience, efficiency, and cost-savings do not justify permitting witnesses to testify remotely. *Id.*

Here, the district court permitted remote testimony from Philip Blumenthal, the owner of a pawnshop in San Francisco, to which a codefendant sold a necklace that was stolen during the home invasion. The State requested remote testimony so that Blumenthal would not have to shut down his business for the day. After noting general COVID-related concerns, the district court ruled that Blumenthal could testify remotely because "that's very quick testimony." This does not satisfy the requirements for remote testimony under *Lipsitz* and *Newson*. Without a witness-specific finding as to why allowing Blumenthal to testify remotely would further a compelling public policy interest, the district court erred.

But where a Confrontation Clause error has occurred, "reversal is not required if the State could show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Medina v.*

State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (internal quotation marks omitted). Here, Blumenthal's testimony was largely cumulative, as there was additional evidence showing Fernandez's codefendant in possession of the stolen jewelry. Additionally, Fernandez provides no argument explaining how he may have been prejudiced by Blumenthal's remote testimony. Therefore, we conclude that the error was harmless and is not grounds for reversal.[1]

There was no abuse of discretion in the district court's other evidentiary rulings

Fernandez assigns error to other evidentiary rulings of the district court. We review a district court's evidentiary rulings for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Citing *United States v. Figueroa-Lopez*, Fernandez argues that the district court erred in allowing a police officer to testify "regarding countersurveillance techniques." 125 F.3d 1241 (9th Cir. 1997). We find Fernandez's reliance on *Figueroa-Lopez* to be misplaced. In *Figueroa-Lopez*, the officers' testimony was not ultimately about what type of activity constitutes a countersurveillance technique—it was about identifying an *experienced criminal* based on certain activities they tend to engage in, with one of those activities being countersurveillance. *Id.* at 1246. Here, the

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[1]Another witness, Julieanne Forrester, also testified remotely even though no adequate public policy reason was given. However, the district court gave Fernandez the option to call Forrester in person, but he chose not to do so. We consider this to be invited error. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (noting "that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it. In most cases application of the doctrine has been based on affirmative conduct inducing the action complained of, but occasionally a failure to act has been referred to." (footnote omitted) (quoting 5 Am. Jur. 2d *Appeal and Error* § 713 (1962))).

officer's testimony did not discuss Fernandez's attempts at countersurveillance driving in order to establish that Fernandez was an experienced criminal—he essentially noted that Fernandez was driving in an unusual manner that appeared as though he was checking to see if he was being followed. Such testimony "is within an ordinary range of knowledge and capable of perception by the average [lay] person" and, thus, does not require an expert's explanation. *Brown v. State*, 138 Nev. 464, 469-70, 512 P.3d 269, 276 (2022). Therefore, we conclude that the district court did not abuse its discretion by allowing it to come in as lay testimony.

Fernandez next argues that evidence related to messages and phone calls made through the application TextNow was not properly authenticated and the district court abused its discretion by admitting the evidence. We conclude that there was adequate corroborating evidence for the jury to infer that Fernandez created the messages and made the phone calls at issue and, therefore, the district court did not abuse its discretion in admitting the evidence. *Cf. Rodriguez v. State*, 128 Nev. 155, 161, 273 P.3d 845, 849 (2012) (recognizing that text messages are admissible if there is "[c]ircumstantial evidence corroborating the sender's identity").

There was no prosecutorial misconduct

Fernandez claims the State committed misconduct by misleading the jury about the evidence. When considering claims of prosecutorial misconduct, we engage in a two-step analysis: we determine (1) whether the prosecutor's conduct was improper, and (2) if the conduct was improper, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Upon reviewing the transcript, we conclude that the prosecution did not commit misconduct by misleading the jury about the evidence, and the district court properly ruled on each objection.

Fernandez also claims the prosecution improperly shifted the burden of proof during its rebuttal closing argument. Fernandez did not provide record evidence that he objected below, and thus we review for plain error. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (noting a "failure to object precludes appellate review . . . unless it rises to the level of plain error"). In reviewing the record, we conclude that the prosecution did not shift the burden to Fernandez to produce evidence of his innocence, but merely pointed out that there was a lack of credible evidence supporting Fernandez's theory that his wife was pressured by police into offering a false identification. *See Menendez v. Terhune*, 422 F.3d 1012, 1034 (9th Cir. 2005) (noting that "[a] prosecutor may, consistent with due process, [comment] on the defendant's failure to present evidence supporting the defense theory"). Thus, we conclude that there was no prosecutorial misconduct.

There was sufficient evidence supporting the attempted robbery convictions

Fernandez argues that there was insufficient evidence to support a guilty verdict on the two counts of attempted robbery with the use of a deadly weapon against P.P. and M.M. In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is 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." *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (emphasis and internal quotation marks omitted). Here, we conclude that the State provided sufficient evidence for any rational trier of fact to conclude that Fernandez committed attempted robbery with the use of a deadly weapon against P.P. and M.M. NRS 200.380(1); NRS 193.153(1). Evidence was presented showing that Fernandez and his codefendants planned to rob the home's occupants, they entered the home

with guns and began the process of robbing the occupants, but the near-immediate shootout halted that process before they had the chance to complete the robberies against P.P. and M.M.

There is no cumulative error

Finally, Fernandez argues that cumulative error requires reversal. *See Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Because the only error was the district court allowing Blumenthal to testify remotely, and because that error was harmless, there is no cumulative error.[2] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.

Stiglich

Pickering, J.

Pickering

Parraguirre, J.

Parraguirre

[2]Fernandez raises multiple additional arguments on appeal but failed to adequately brief these arguments. Therefore, we decline to address any of Fernandez's remaining arguments. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting issues lacking "relevant authority and cogent argument" need not be addressed by this court).

cc: Hon. Jacqueline M. Bluth, District Judge
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