IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85934

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict of two counts of sexual assault. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

In 1994, C.D. was sexually assaulted in her apartment. She was sleeping when she awoke to an unknown person holding a metal object to her head. The unknown individual sexually assaulted C.D. and then left through the living room window. C.D. underwent a sexual assault examination, and no charges were ultimately filed.

In 1996, T.H. was sexually assaulted outside her townhouse. She was approached by an unknown individual who had his sweatshirt sleeve pulled over his hand to imitate a gun. The individual sexually assaulted her and then ran away. T.H. underwent a sexual assault examination. No charges were filed.

More than twenty years later, a CODIS database hit matched appellant Jerome Brown's DNA to two sexual assault examination kits. Brown's buccal swabs were obtained while he was in custody in North Carolina, and the DNA within his swabs was compared with the DNA found within C.D.'s and T.H.'s sexual assault examination kits. The DNA in the kits was consistent with Brown such that the probability of

misidentification was approximately one in 1.57 nonillion (a number to the 30th power).

At trial, C.D. testified in person and identified Brown as the perpetrator. T.H. testified through simultaneous two-way audiovisual technology but did not identify Brown. The jury convicted Brown on both counts.

It was error to allow T.H. to testify remotely but not reversible error

Brown contends T.H. should not have been permitted to testify remotely, absent a finding that doing so was necessary to further an important public policy. "[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be reviewed de novo." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal quotation marks omitted). "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Nevada has adopted "the test set forth in *Maryland v. Craig*, 497 U.S. 836, 850 (1990), to determine whether a witness's testimony at trial via two-way audiovisual transmission violates a defendant's right to confrontation." *Lipsitz v. State*, 135 Nev. 131, 132, 442 P.3d 138, 140 (2019). The *Craig* test provides that "two-way video testimony may be admitted at trial in lieu of physical, in-court testimony only if (1) it is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured." *Id.* (internal quotation marks omitted). "[T]he procedure [may] be used only after the trial court hears evidence and makes a case-specific finding that the procedure is necessary to further an important state interest." *Id.* at 136-37, 442 P.3d at 143 (internal quotation marks omitted). "[N]either general concerns related to the COVID-19 pandemic nor concerns of convenience, efficiency, or cost-savings justify permitting the remote testimony . . . ." *Newson v.*

State, 139 Nev., Adv. Op. 9, 526 P.3d 717, 722 (2023). Importantly, findings must be specific "as to why the pandemic *necessitate[s]* remote testimony." *See id.* (emphasis added).

"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." *Id.* at 722-23 (internal quotation marks omitted). The court considers "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case." *Id.* at 723 (internal quotation marks omitted).

The State moved for T.H. to appear at trial through audiovisual transmission, and Brown opposed. Related to T.H.'s COVID-19 concerns, the State argued that T.H. "is a woman who is terrified to leave her house, that's her prerogative and she lives in Florida. And she has said, I cannot get on a plane because, I mean, she's nearly 60, she's in that class of people and that's her right." The district court granted the State's motion, finding that the jury would be better able to see T.H. because she would not be wearing a mask, and T.H. would be enlarged on giant TV screens so the jury would be better able to weigh her nonverbal communication. The district court also reasoned the case was not an identification case and that the State had represented that T.H. was afraid to travel, afraid to board a plane, afraid of COVID-19, and in a vulnerable population group. In addition, the district court granted the motion based on the totality of the circumstances and "because I think the technology has improved." It noted that Brown

never objected to T.H. appearing through audiovisual testimony at the preliminary hearing, which "seemed to go just fine."

We conclude that the district court impermissibly allowed T.H. to testify remotely. In this, we reject the district court's reasoning that remote testimony was justified because of technological advances, the fact that the case was not an identification case, and the fact that audiovisual technology was used in the preliminary hearing. Further, although the district court noted COVID-19-related concerns specific to T.H., the district court failed to make specific findings as to why T.H.'s fears made her remote testimony *necessary* to "curtail the spread of the COVID-19 virus[,] . . . protect the public health[;]" or further another important public policy. *Newson*, 139 Nev., Adv. Op. 9, 526 P.3d at 719. The district court found that T.H. was in a vulnerable population group, but it did not find why her age necessitated that she testify remotely. Even accepting the State's representation that T.H. was nearly 60 years old, as the district court did (the record reflects T.H. was 50 years old at the time of the motion), T.H. would not fall within those for whom remote appearance was presumptively approved of under the Eighth Judicial District Court rules at that time. *See In the Administrative Matter Regarding All Court Operations in Response to Covid-19*, Administrative Order (AO) 21-04 at 8 (describing those vulnerable to COVID-19 as those considered vulnerable under the then-current CDC guidelines including "persons who are over 65, pregnant, or suffering from an underlying health condition"). Thus, we conclude the district court erred by failing to make case-specific findings that T.H.'s remote testimony was necessary to further an important state or public policy interest, as required under *Newson*, *Lipsitz*, and *Craig*.

Regarding whether reversal is warranted, T.H.'s testimony was not particularly important to the prosecution's case because T.H. never identified Brown, and Brown did not contest the fact of assault—he only contended that he did not sexually assault the victims. The prosecution's case was strong overall because Brown's DNA was found in T.H.'s and C.D.'s sexual assault kits. In addition, in-person testimony was heard from T.H.'s friend, who T.H. spoke with immediately after she was attacked; the detective who interviewed T.H. days after she was sexually assaulted; the nurse who examined T.H.; and personnel who analyzed the DNA samples. Thus, we conclude that T.H.'s testimony was cumulative, her testimony was considered with other corroborating testimony, and the DNA evidence was central to convicting Brown. Accordingly, the State has shown beyond a reasonable doubt that the error was harmless, and reversal is not warranted on this basis.[1]

The State violated Brown's right against self-incrimination, but the error was harmless

Brown next argues that the North Carolina officer's testimony that he refused to consent to a search for his DNA violated his right against

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[1]Brown contends that any justification related to COVID-19 was moot because the hearing was held in September 2021 and trial in September 2022, the district court abandoned the issue where another witness testified in person despite a previous request to testify remotely, the State was obligated to file a new motion if T.H.'s concerns still warranted remote testimony, and the district court was obligated to readdress the order permitting T.H.'s remote testimony in light of the changed circumstances. We determine that Brown failed to cogently argue these contentions and therefore decline to address this 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).

self-incrimination. When an appellant fails to object below, this court reviews the issue for plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("Before this court will correct a forfeited error, an appellant 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.") (citing *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). In Nevada, "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 50-51, 412 P.3d 49. (citing *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); Black's Law Dictionary 1149 (10th ed. 2014) (defining miscarriage of justice). "[U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search." *Maryland v. King*, 569 U.S. 435, 446 (2013). "[T]he State may not introduce evidence of a defendant's refusal to submit to a warrantless search, or argue it to the jury as evidence of guilt." *See Ramet v. State*, 125 Nev. 195, 199, 209 P.3d 268, 270 (2009).

The State's direct examination of the officer included the following exchange:

> Q. Okay. And when you told–during the course of your conversation with Mr. Brown, did you tell him that you were going to take a buccal swab for his DNA?
>
> A. Yes.
>
> Q. . . . [W]hen you told him that, was he cooperative?
>
> A. No.
>
> Q. Did you have a valid search warrant to get his buccal swab for his DNA?

A. I did.

On cross-examination, Brown's counsel asked the officer how long it took for her to collect Brown's buccal swab, and she replied, "When I first approached him about it and I told him that I had a search warrant for it, he was very uncooperative." When Brown's counsel asked in what way was Brown uncooperative, the officer replied "[j]ust refusal to open his mouth or refusal to give me his DNA . . . [n]othing was aggressive towards me, if that's what you're asking." During closing argument, the State also reiterated that Brown was uncooperative when the officer attempted to collect his buccal swab. Brown did not object to this testimony or argument.

We conclude the State's questioning about whether Brown consented to the buccal swab was improper because it was irrelevant and was improperly used by the State to argue and imply Brown's refusal was evidence of guilt. *Ramet*, 125 Nev. at 199, 209 P.3d at 270. Accordingly, we conclude that allowing the State's questions pertaining to Brown's refusal to consent to the search was plain error. We further conclude, however, that Brown has not shown this line of questioning affected his substantial rights, considering the strength of the DNA evidence against Brown. *Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

No relief is warranted on Brown's Fourth Amendment claim

Brown argues that the search warrant was illegally executed because the North Carolina officer who executed it lacked jurisdiction over his crimes. Brown did not object below nor did the district court ever address this issue below. Thus, we review for plain error that "affected the defendant's substantial rights." *Green*, 119 Nev. at 545, 80 P.3d at 95 (2003) (internal quotation marks omitted).

Unfortunately, Brown failed to provide the allegedly illegal search warrant in the record. Moreover, because the issue was not raised

below, it is also unclear from the record why Brown was in custody in North Carolina nor does the record explain the circumstances surrounding Brown's arrest or the allegedly illegal search. Thus, we conclude Brown failed to provide a sufficient record, rendering appellate plain error review impossible. *See* NRAP 30(b)(3); *Thomas v. State*, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004) (noting that it was improper for counsel to fail to "provide this court with an adequate record"); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Accordingly, we conclude Brown has not shown plain error related to the warrant.

Brown's right to self-representation was not violated because his request was equivocal

Brown contends that his right of self-representation was violated because he sought to represent himself, his request was neither unequivocal nor untimely, he was never disruptive, and he was competent to waive the right to counsel. A district court may "deny a defendant's request for self-representation where the request is untimely, the request is equivocal, the request is made solely for the purpose of delay, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel." *O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 44 (2007) (internal quotation marks omitted). We "will not substitute [our] evaluation for that of the district court judge's own personal observations and impressions . . . . [to] overturn [a] factual determination." *Tanksley v. State*, 113 Nev. 997, 1002, 946 P.2d 148, 151 (1997) (citation omitted).

On the first day of jury selection, Brown asserted that he did not want Phillips as his attorney. Brown stated, "I just feel safe [sic] represent myself at this point." The next day, Brown stated, "Right—I'll

keep—I'll keep saying this, because I'm not trying to go to trial unless I have representation. I think it would work out better, because—if that was my situation. But at this point, I just don't trust my attorneys." The district court asked Brown if he requested to represent himself. Brown replied, "It's just—it's just weird stuff going on, you know. I've been asking—from the documents I've been asking for my jacket, my clothes for trial and I still—just still haven't gotten them." The district court denied Brown's motion, finding that he was equivocal about whether he would like to represent himself.

We conclude the record supports the district court's finding of equivocality because Brown failed to directly assert that he wanted to represent himself even though he stated he did not feel safe with his attorneys. Thus, we need not reach Brown's other arguments regarding timeliness, disruptiveness, and competence. Accordingly, we conclude Brown has not shown error on this ground.

The prosecutor's comment was not burden-shifting

Brown contends that the State committed misconduct by burden-shifting when it suggested that Brown failed to present evidence to explain how his DNA was found within T.H.'s sexual assault examination kit. Prosecutorial misconduct claims are assessed under a two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine whether the prosecutor's conduct was improper. *Id.* If so, we next determine whether the improper conduct requires reversal. *Id.* Generally, "[t]he tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper." *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). However, a prosecutor may "properly argue that the defense failed to substantiate its theory with supporting evidence." *See Evans v.*

State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

In closing argument, Brown argued that the DNA evidence was unreliable. During rebuttal, the State refuted Brown's assertions regarding the reliability of the evidence and argued in response: "And no other male DNA was there. One full male profile, so how did it get there? Nothing. Nothing that has been suggested or speculated about can overcome that. How did his DNA get inside [T.H.'s] vagina on the night she was raped?"

We determine the prosecutor's comment amounted to permissibly rebutting Brown's argument by contending that his theory was unsubstantiated by the evidence. *See Rimer v. State*, 131 Nev. 307, 331, 351 P.3d 697, 714 (2015) (determining no misconduct because prosecutor merely suggested evidence did not substantiate defense theory when in opening argument defense claimed evidence would show defendant spent most of day in bed sick and in closing argument prosecutor argued "what evidence is there to suggest that they were sick. How about a witness[ ]"). Accordingly, we conclude the comment was not misconduct.

The detective's testimony was not witness-vouching

Brown argues that the detective impermissibly vouched for T.H. by testifying that she was a unique or superior victim. Brown did not object at trial. We may "address an [unpreserved] error if it was plain and affected the defendant's substantial rights." *Green*, 119 Nev. at 545, 80 P.3d at 95 (internal quotation marks omitted). "A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness." *Perez v. State*, 129 Nev. 850, 861, 313 P.3d 862, 870 (2013).

The following exchange occurred during the State's direct examination of the detective:

> Q. Okay, and what do you remember about her demeanor?
>
> A. She was obviously very emotionally disturbed by the event, and in pain–not physical pain, but emotionally. But she was strong. Seriously, in my hundreds of the sexual assaults that I interviewed; she was one that really stood out.
>
> Q. Okay. And why?
>
> A. Just because of her strength. How–how well she held it together. She was very clear in the things that she was talking about, and, you know, just, I mean, bit her lip and worked hard.

Here, the detective's comments were made in response to a question from the State asking about T.H.'s demeanor during the interview. The detective's description of T.H. was permissible because he commented on her demeanor without vouching for her truthfulness. *See Farmer v. State,* 133 Nev. 693, 705, 405 P.3d 114, 125 (2017) (rejecting a claim of improper vouching where the defense "claim[ed] that the State's witnesses inappropriately vouched for one another by making statements regarding the victims' demeanor, describing other witnesses as cooperative or uncooperative, and restating each other's testimony"); *Perez,* 129 Nev. at 862, 313 P.3d at 870 (concluding no vouching when the expert offered a general opinion and offered no specific opinion regarding whether he believed the victim was telling the truth); *Vasquez-Reyes v. State,* No. 80293, 2022 WL 831977 (Nev. Mar. 18, 2022) (Order of Affirmance) (rejecting vouching argument when officer described victim's demeanor as "very genuine," without opining as to truthfulness). Thus, we conclude the testimony was not error.

The district court did not err by giving the no-corroboration jury instruction

Brown did not object to the no-corroboration jury instruction, but he argues on appeal that giving the jury the instruction constituted

plain error. "[T]his court has the discretion to address an [unpreserved] error if it was plain and affected the defendant's substantial rights." *Green*, 119 Nev. at 545, 80 P.3d at 95 (internal quotation marks omitted). "For an error to be plain, it must, at a minimum, be clear under current law." *Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (internal quotation marks omitted).

In *Gaxiola*, we upheld as a valid statement of Nevada law the following instruction: "There is no requirement that the testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." *Id.* at 647, 649, 119 P.3d at 1231-32. The text of the jury instruction here was nearly identical to the one used in *Gaxiola*. Thus, because the instruction in *Gaxiola* accurately stated Nevada law, giving the instruction was not error, much less plain error.[2]

Cumulative error does not warrant reversal

Lastly, Brown argues that cumulative error warrants reversal. "Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." *Byford v. State*, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000). "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Here, the issue of guilt is not close. The State presented evidence that Brown's DNA was found in both C.D.'s and T.H.'s rape kits and presented testimony that the likelihood that DNA belonged to someone

[2]We decline Brown's invitation to revisit *Gaxiola*.

other than Brown was approximately one in 1.57 nonillion (a number to the 30th power). Regarding errors, while we acknowledge that the district court violated both Brown's right to confrontation as to T.H., and his right against self-incrimination through questioning about whether Brown consented to the search, we conclude that the strength of the evidence in this case far outweighs the other two factors. Therefore, we determine cumulative error does not warrant reversal.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk