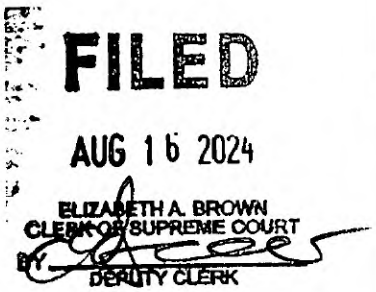
IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN BRADLEY EISENMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84700



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder 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.

Cameron Ryan's body was discovered on December 9, 2015, on a dirt access road that paralleled U.S. Route 95 between Craig Road and Lone Mountain in Las Vegas. Ryan had been shot in the left eye. Appellant Shawn Bradley Eisenman was charged with Ryan's murder. The primary evidence against Eisenman came from eyewitness Christopher Talamante, who testified that Eisenman shot Ryan from a window in Talamante's house. The State also presented a significant amount of corroborating evidence, most notably, that Eisenman purchased a box of ammunition the day before Ryan's death, and following Ryan's death, Eisenman shoplifted one round of ammunition and returned a full box of ammunition. At trial, Eisenman's defense focused on suggesting that Talamante shot Ryan. Eisenman was convicted at trial and sentenced to life without the possibility of parole with additional consecutive time for the weapon enhancement and possession of a firearm by a prohibited person. Eisenman now appeals,

asserting a number of errors at trial. To the extent any error occurred, we find them to be harmless and therefore affirm the judgment of conviction.

The district court did not err when it permitted a substitute coroner to testify at Eisenman's trial

Eisenman asserts that his constitutional right to confront and cross-examine witnesses was violated when the district court allowed a substitute coroner to testify. Dr. Lisa Gavin testified instead of the coroner who performed the autopsy, Dr. Jennifer Corneal. Eisenman argues that Dr. Corneal would have testified that a gunshot wound expert was needed. Additionally, Eisenman asserts detectives provided Dr. Corneal with an article on high velocity gun shots, and that the doctor heavily relied on this article in her autopsy report. Dr. Gavin was unable to address either issue, but rendered an independent opinion based on her own expertise and her review of the available evidence. Eisenman was also permitted to examine the detectives regarding the article.

Eisenman did not make a Confrontation Clause objection below. In fact, Eisenman failed to lodge an objection prior to Dr. Gavin's testimony and only after her testimony concluded did Eisenman argue that the testimony was hearsay. We discern no plain error from the record. *See Flowers v. State*, 136 Nev. 1, 9-10, 456 P.3d 1037, 1045-46 (2020) (finding no plain error where a forensic pathologist who did not conduct the autopsy or author the autopsy report testified as to his opinions about the cause and manner of death); *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (reviewing unpreserved constitutional error for plain error).

The district court did not err by admitting purported unfairly prejudicial and irrelevant evidence

Eisenman contends the district court erred by admitting prejudicial and irrelevant evidence. The court admitted a video of

Eisenman firing a handgun without holding a *Petrocelli* hearing. The State argues that the act of firing a gun is not bad or prejudicial so the evidence falls outside of NRS 48.045(2). Notably, NRS 48.045(2) discusses other act evidence, which can include, but is not limited to bad acts. We conclude the video constituted other act evidence; therefore, before the video was admitted, a hearing should have been held outside the presence of the jury to determine whether the video was "(1) relevant, (2) proven by clear and convincing evidence, and (3) not substantially more prejudicial than probative." *Dickey v. State*, 140 Nev., Adv. Op. 2, 540 P.3d 442, 448 (2024); *see also* NRS 48.045(2).

The State introduced the video in rebuttal to Eisenman's cross-examination of Talamante. During questioning, Talamante was asked several questions regarding his familiarity with guns, and a video of Talamante shooting a gun was played for the jury. The State introduced the video of Eisenman to show Eisenman's familiarity with guns and to rebut the inference that Talamante was the only one who was familiar with guns. *See Newman v. State*, 129 Nev. 222, 236-37, 298 P.3d 1171, 1181-82 (2013) (reviewing errors in the admission of other act evidence for harmless error). Although no *Petrocelli* hearing was held before the video was admitted, we conclude this error was harmless. The video of Eisenman shooting a gun was relevant, the conduct sought to be admitted was proven by clear and convincing evidence, and the evidence was not substantially more prejudicial than probative. Thus, had the court held a hearing the video could have been admitted. Additionally, the evidence of guilt was overwhelming. *See Chappell v. State*, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998) (holding that the failure to conduct a *Petrocelli* hearing before

admitting other act evidence was harmless error due to the overwhelming evidence of guilt).

Eisenman also argues that the district court erred by allowing improper victim impact testimony during the guilt phase of the proceeding. The State called Ryan's aunt and his girlfriend to testify. The two women testified that Ryan had grown up in northern Nevada, and further testified about Ryan's disconnection from his family, mental health issues, time in prison and a halfway house, and drug use. The testimony was relevant and admissible to show why Ryan was staying at Talamante's house and to further demonstrate Eisenman's knowledge that Ryan would be there. The testimony also explained why Ryan would not contact the police if he felt threatened. Ryan's drug use was directly relevant to the State's theory that Eisenman killed Ryan over a drug dispute. We conclude that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. The testimony that Ryan grew up in northern Nevada does not appear relevant and it is unclear what, if any, sympathy, emotional appeal, prejudice, or influence on the jury could come from this fact. We therefore conclude that the admission of evidence as to Ryan's origin was harmless. *See Chavez v. State*, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009) (reviewing the admission of irrelevant evidence for harmless error).

The district court did not err by limiting the cross-examination of Talamante regarding the failure to take a polygraph examination

Eisenman argues that the district court erred by limiting his cross-examination of Talamante and law enforcement witnesses regarding Talamante failing to take a polygraph examination. Specifically, Eisenman wanted to ask about Talamante agreeing to submit to a polygraph examination but then never returning to the police station to take the exam,

and law enforcement failing to follow up with Talamante to have the exam scheduled. Eisenman asserts the refusal to submit to the polygraph demonstrated Talamante's consciousness of guilt. During cross-examination, the district court allowed Eisenman to ask about Talamante's failure to return to the police station, and deficiencies in the investigation. The district court only precluded Eisenman from mentioning a polygraph examination. We conclude there was no abuse of discretion in the district court's ruling because the failure to take a polygraph cannot be used to demonstrate consciousness of guilt. *See Santillanes v. State*, 102 Nev. 48, 50-51, 714 P.2d 184, 186-87 (1986); *see also Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (reviewing for an abuse of discretion the district court's decision to exclude evidence).

The State did not commit prosecutorial misconduct

Eisenman argues that the State committed several instances of prosecutorial misconduct. Eisenman contends that the prosecution improperly elicited sympathetic testimony from Ryan's aunt and girlfriend during the guilt phase of the trial. The testimony from the aunt and girlfriend about Ryan's childhood was arguably inadmissible and irrelevant. To the extent the prosecutor improperly elicited this testimony, we conclude the conduct does not warrant reversal given the overwhelming evidence against Eisenman and his inability to articulate any prejudice. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

Eisenman next argues that the State committed prosecutorial misconduct by failing to update the curriculum vitae of the initial coroner, Dr. Corneal, to reflect her relocation to Arizona, failing to place Eisenman on notice that the State no longer intended to call Dr. Corneal, and instead calling a substitute coroner. The State properly amended its notice of

witnesses to include the substitute coroner, Dr. Gavin, and placed an asterisk next to her name to indicate a new witness. Thus, Eisenman had notice of the substitute coroner. As to not updating the initial coroner's address, NRS 174.234(4) states in pertinent part that "[e]ach party has a continuing duty to file and serve upon the opposing party any change in the last known address . . . of any witness that the party intends to call during the case in chief of the State." The "intends to call" language is likewise repeated throughout NRS 174.234. Given that the State no longer intended to call the initial coroner as a witness, the State was not obligated to update her address. Thus, because the conduct was not improper, we conclude there was no prosecutorial misconduct. *See Valdez*, 124 Nev. at 1188, 196 P.3d at 476.

Eisenman also argues that the prosecutor committed misconduct by failing to request a limiting instruction under *Tavares* for the stolen bullet evidence. The stolen bullet evidence was relevant to concealing the murder and did not constitute other act evidence. Because neither a *Petrocelli* hearing nor a *Tavares* instruction was needed for this evidence, we conclude there was no prosecutorial misconduct. *See id.*

The district court did not err by admitting evidence of a theft Eisenman committed the day before the murder

Eisenman contends that the district court erred by admitting other act evidence without holding a *Petrocelli* hearing. During trial, the State presented evidence that Eisenman stole a single round of ammunition from Sportsman's Warehouse without the district court first conducting a hearing outside the presence of the jury. The State's theory was that Eisenman stole the single round of ammunition in order to replace the bullet he fired and return a full box of ammunition after the murder to cover

up his crime. This was not collateral other act evidence pursuant to NRS 48.045(2) but rather evidence of Eisenman's attempt to conceal the murder. We conclude it was therefore admissible without the hearing required for other act evidence.

The district court did not err by admitting Eisenman's phone calls from jail

Eisenman argues that the admission of his jail calls, without first conducting a *Petrocelli* hearing, was error. Eisenman made calls from jail a week before trial, requesting a third party to threaten Talamante in order to prevent or alter Talamante's testimony. NRS 48.045(2) does not apply to "[e]vidence that after a crime a defendant threatened a witness with violence" because such evidence "is directly relevant to the question of guilt." *Evans v. State*, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). Thus, evidence of "a threat is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission." *Id.* Therefore, we conclude the jail calls were directly relevant to the question of Eisenman's guilt and were not other acts that required an evidentiary hearing. *See id.*

The district court did not err by not issuing Tavares *instructions prior to the admission of Eisenman's other acts*

Eisenman argues that the district court erred by failing to give *Tavares* instructions limiting the use of the other act evidence, specifically the theft of the ammunition, the jail calls, and the gun video. *See Tavares v. State*, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), *modified in part by Mclellan*, 124 Nev. 263, 182 P.3d 106. The evidence of Eisenman stealing ammunition and threatening Talamante was directly relevant to Eisenman's guilt for the murder and its probative value was not

substantially outweighed by the danger of unfair prejudice. Accordingly, this was not the type of collateral uncharged act contemplated by NRS 48.045(2) and *Tavares*. Additionally, Eisenman did not cogently argue that the handgun video was other act evidence until his reply brief, and as such has waived this issue. *See State v. Bennett*, 119 Nev. 589, 608, 81 P.3d 1, 13 (2003). We conclude that the district court did not err by failing to give limiting instructions.

The district court did not err by limiting Eisenman from presenting mitigation evidence at the sentencing hearing

Eisenman asserts that the district court erred by not allowing him to present mitigation evidence at sentencing from Dr. Natalie Brown, who diagnosed Eisenman with Fetal Alcohol Syndrome. Dr. Brown was unable to testify due to a scheduling issue. When made aware of the problem, the district court offered to hear the testimony on another day. Eisenman also presented the issue of FASD through two other expert witnesses, although those witnesses had not conducted direct testing on Eisenman. The record on appeal does not contain an oral or written motion to continue the proceedings in order to secure Dr. Brown's presence. Therefore, Eisenman failed to preserve this issue. We conclude the district court did not err. *See Flowers*, 136 Nev. at 8, 456 P.3d at 1045 (outlining plain error review).

The State did not fail to present corroborating evidence

Eisenman asserts that the State failed to present corroborating evidence in order to sustain the verdict, pursuant to NRS 175.291(1), because Talamante was an accomplice. NRS 175.291(1) states that "[a] conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without

the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Additionally, "the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof." *Id.* Even assuming Talamante was an accomplice, we conclude there was a significant amount of evidence corroborating Talamante's testimony and proving Eisenman's guilt. *See Cheatham v. State*, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988) ("Corroboration evidence need not be found in a single fact or circumstance and can, instead, be taken from the circumstances and evidence as a whole."); *LaPena v. Sheriff*, 91 Nev. 692, 695, 541 P.2d 907, 909 (1975) ("[I]nferences are permitted in the corroboration of accomplice testimony.").

Eisenman was connected to the murder through the purchase and return of a box of the type of ammunition used to kill Ryan, and through his theft of the same type of ammunition to cover up the use of a single bullet. The electronic evidence from the phones showed that Eisenman thought Talamante and his girlfriend were informing the police about the murder and that Eisenman was threatening them. The searches for a Winchester rifle on the laptop connect Eisenman to Talamante's testimony that the rifle was used as the murder weapon. The video of Ryan constantly looking over his shoulder at the Sante Fe Station Hotel and Casino and the evidence of Ryan at the pawnshop corroborates Talamante's testimony that Ryan was afraid of Eisenman and was attempting to get money to pay Eisenman for a supposed stolen bag of methamphetamine. The testimony from the neighbors corroborated that Talamante was afraid of Eisenman and that Eisenman acted in a threatening manner toward Talamante. As "[c]orroboration evidence . . . need not in itself be sufficient to establish guilt, and . . . will satisfy the statute if it merely tends to connect the

accused to the offense," *Cheatham*, 104 Nev. at 504-05, 761 P.2d at 422, we conclude no relief is warranted on this ground.

The district court did not err by denying Eisenman's motion to strike the State's late filed witness list

Eisenman argues that the district court erred by denying his motion to strike the State's updated witness list filed the day before jury selection. The State made a single addition to the amended witness list. The newly listed witness did not testify at trial and had been listed by the State as a potential rebuttal witness in response to a late request by the defense for raw cell phone data. "Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission." *Jones v. State*, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997). Even assuming the late filing constituted a failure to endorse, which it does not here, we conclude there was no prejudice from the failure to strike the witness. Likewise, we conclude the district court did not abuse its discretion by denying the motion to strike.

The district court did not err by denying Eisenman's motion to revise the State's witness list

Eisenman argues that the district court erred by denying his motion requesting that the State revise its witness list. Eisenman asserted the list contained superfluous names and was so large that it concealed who the State would call at trial. No statute or rule provides for the removal of witnesses from a witness list, and as such we review for an abuse of discretion. *Cf. Langford v. State*, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979) (discussing the trial court's broad discretion to fashion remedies in discovery under an abuse of discretion standard). In the context of a relatively complex first-degree murder trial, we conclude the State's witness

list was not superfluous nor so large that it was an abuse of discretion for the district court to deny the motion to revise the list.

The district court did not err by denying Eisenman's motion to admit evidence of Talamante's bad acts

Eisenman argues that the district court erred by denying his pre-trial motion to admit other act evidence pertaining to Talamante's drug use and of Talamante's assault with a deadly weapon on Talamante's father, Johnny Talamante. With regard to evidence of Talamante's drug use, Eisenman asserted that the drug use should be admitted to prove motive and identity. We agree with Eisenman that the district court erred in its pre-trial ruling prohibiting the admission of evidence of Talamante's drug use, because the drug use was relevant to Eisenman's theory that Talamante killed Ryan because of stolen drugs. Nevertheless, we conclude that the error was harmless because Eisenman was permitted at trial to question Talamante about drug use on cross-examination, and the drug use was referenced in closing argument.

As to Talamante's conviction for assault with a deadly weapon in the year 2000, Eisenman argues that it was relevant for the nonpropensity purposes of identity, motive, intent, absence of mistake or accident, preparation, and plan. *See* NRS 48.045(2). Eisenman also asserts that the dynamic between Talamante and his father was relevant to impeach Talamante's credibility. We disagree.

The evidence was not probative of identity as the perpetrator, Eisenman, was identified and the assault did not establish a signature crime. *See Flowers*, 136 Nev. at 6, 456 P.3d at 1044 ("The identity exception in NRS 48.045(2) applies where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime

so clear as to establish the identity of the person on trial." (internal quotations omitted)). And the motive asserted—that Talamante hurt his father in the past due to financial difficulties due to drugs and therefore had the same motive to kill Ryan—did not demonstrate a nonpropensity purpose for admitting the evidence. We also are unpersuaded by Eisenman's argument that the previous assault proved Talamante had a motive for testifying against Eisenman. Eisenman claims that Talamante testified against him because had Talamante been charged, he could have faced life without the possibility of parole or the death penalty due to his criminal history. This reasoning would effectively make the criminal history of every witness or defendant admissible and render NRS 48.045 meaningless. As to Eisenman's argument about intent and lack of innocence, the previous assault did not relate to Talamante's relationship with Ryan or the killing and Eisenman's argument is one of propensity. Lastly, there was no similarity between the previous assault and the instant murder such that the evidence showed a lack of innocence, mistake, accident, or coincidence. Additionally, Talamante's intent and absence of mistake were not at issue. *Cf. Ford v. State*, 122 Nev. 796, 806, 138 P.3d 500, 507 (2006) (stating "that three of Ford's five prior bad acts, concerning situations in which he burglarized a person's home, were admissible to prove his intent and/or the absence of mistake when he broke into Gomes' residence"). Therefore, we conclude that Talamante's assault was not relevant for any of these nonpropensity purposes.

As to Eisenman's argument that the other bad acts were admissible to show the dynamic between Talamante and his father, that dynamic was never at issue in this case. *Cf. Bigpond v. State*, 128 Nev. 108, 118, 270 P.3d 1244, 1250 (2012) (noting that "the victim's prior accusations

of domestic violence were relevant because they provide insight into the relationship and the victim's possible reason for recanting her prior accusations, which would assist the jury in adequately assessing the victim's credibility"). There is no relevant purpose here, and we conclude that Eisenman has failed to overcome the presumption of inadmissibility.

There is no cumulative error requiring the reversal of Eisenman's conviction

Finally, Eisenman asserts cumulative error requires the reversal of his conviction. *See Mulder v. State*, 116 Nev. 1, 17, 922 P.2d 845, 854-55 (2000) (providing the relevant factors to consider for a claim of cumulative error). We disagree. The State presented overwhelming evidence of Eisenman's guilt and the few errors we have discussed were harmless. We therefore

ORDER the judgment of conviction AFFIRMED.

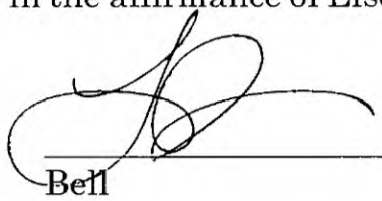
_____, J.
Herndon

_____, J.
Lee

BELL, J., concurring:

The majority concluded that a video of Eisenman shooting a gun was admissible under the circumstances of the case. I disagree. The evidence was improperly admitted without the court holding a *Petrocelli* hearing. Had the court held a *Petrocelli* hearing, I do not believe the evidence would have been properly admitted under NRS 48.045(2). The video showed Eisenman firing a handgun several months before Ryan was shot. The video does not show a target, but only Eisenman firing a vastly

different type of gun than the rifle used to kill Ryan. Thus, the video does not serve to show Eisenman was a particularly skilled marksman – which may have been admissible under the facts of the case. Eisenman declined to testify, so the State was not using the video to rebut testimony that Eisenman was unfamiliar with guns. The State's stated purpose for admission of the video was to rebut the inference that Talamante was the only person involved who was familiar with guns and because the defense played a video of Talamante shooting. Yet, the analysis of admissibility of the Eisenman video does not turn on whether the defense played a video of Talamante shooting. Eisenman firing a handgun at some unrelated time under unrelated circumstances does not support admission for motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. An unrelated video of a criminal defendant shooting a gun in a homicide trial involving a gun also carries a high degree of prejudice. Under the facts as presented, I cannot say the minimal, if any, relevance, outweighs the prejudice. Nevertheless, given the overwhelmingevidence against Eisenman, I do find the error in admission of the video harmless and concur in the affirmance of Eisenman's conviction.



_____, J.
Bell

cc: Hon. Jacqueline M. Bluth, District Judge
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