IN THE SUPREME COURT OF THE STATE OF NEVADA

MARQUAN ANTONIO JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85954

FILED

NOV 14 2024

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 malicious destruction of property, assault with a deadly weapon, attempted burglary, battery resulting in substantial bodily harm to a victim 60 years of age or older, battery resulting in substantial bodily harm, battery with a deadly weapon, eight counts of burglary while in possession of a deadly weapon, three counts of possession of a stolen vehicle, two counts of grand larceny auto, eight counts of robbery with the use of a deadly weapon, six counts of conspiracy to commit robbery, four counts of battery with intent to commit a crime, and two counts of robbery with the use of a deadly weapon of a victim 60 years of age or older. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Appellant Marquan Jackson raises multiple issues on appeal. We address each in turn and conclude that none warrant relief from the judgment of conviction.

Body camera recordings and ankle monitor

To begin, Jackson presents multiple arguments regarding police body camera recordings and an ankle monitor Jackson was wearing when the crimes were committed. First, Jackson argues the district court erred when it denied motions to dismiss for failure to preserve police body

camera recordings and Jackson's ankle monitor. "This court will not disturb a district court's decision on whether to dismiss a charging document absent an abuse of discretion." *Morgan v. State*, 134 Nev. 200, 205, 416 P.3d 212, 220 (2018). "The State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed." *Leonard v. State*, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

Jackson did not demonstrate that the loss of the body camera recordings was in bad faith, as the recordings were deleted in the ordinary course after one year in accordance with the police department's retention policies at the time. *See State v. Hall*, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989) (holding that the State does not act in bad faith when law enforcement officers act in conformance with routine policies and procedures). Jackson also does not demonstrate that the exculpatory value of the recordings was apparent before they were lost or destroyed, as Jackson only speculates that there may have been something on the recordings that could have potentially benefited the defense. *See Leonard*, 117 Nev. at 68, 17 P.3d at 407 ("It is not sufficient to show merely a hoped-for conclusion or that examination of the evidence would be helpful in preparing [a] defense." (internal quotation marks omitted)). And because Jackson failed to show the State acted in bad faith or that the defense was prejudiced by the loss of the body camera recordings, the district court did not abuse its discretion by declining to give an adverse inference jury instruction concerning the body camera recordings. *See Daniel v. State,* 119 Nev. 498, 520, 78 P.3d 890, 904-05 (2003) (finding that an adverse inference jury instruction was not warranted when appellant showed "neither bad

faith nor that it could be reasonably anticipated the evidence in question would have been exculpatory and material.").

As to Jackson's ankle monitor, the device was not lost or destroyed, it was simply returned to the company that maintained it, which was standard procedure. The device itself, as well as all the associated records, were available to Jackson. Moreover, even if the ankle monitor were deemed constructively destroyed because it was put back in use monitoring another individual, Jackson does not demonstrate that the State acted in bad faith. And Jackson offers only speculation that independent testing of the device could potentially have shown it was malfunctioning, despite evidence to the contrary. *Sheriff v. Warner*, 112 Nev. 1234, 1242, 926 P.2d 775, 779 (1996) ("Mere assertions by the defense counsel that an examination of the evidence will potentially reveal exculpatory evidence does not constitute a sufficient showing of prejudice."). Therefore, the district court did not abuse its discretion by denying the motions to dismiss.

Second, Jackson argues the district court erred when it granted the State's motion to admit the GPS monitoring data from Jackson's ankle monitor. Jackson contends that because the GPS monitoring data came from an ankle monitor Jackson was wearing as a requirement of parole, it constituted prior bad act evidence. The GPS evidence, however, was not admitted to demonstrate Jackson's bad character or propensity to commit crimes. Rather, the GPS data was relevant to identity and opportunity, given that it showed that Jackson was present at the crime scenes when the crimes were committed. *See Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005) (noting that while other act evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith," it is admissible "to show motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident." (internal quotation marks omitted)). Evidence was also presented at the pretrial hearing showing that the GPS device belonged to Jackson and was functioning correctly. The GPS location data was probative and its probative value was not substantially outweighed by the danger of unfair prejudice. Indeed, no evidence of Jackson's underlying criminal conduct or parole status was adduced at trial. Thus, the district court properly admitted the GPS data. *See Walker v. State*, 116 Nev. 442, 446, 997 P.2d 803, 806 (2000) ("The trial court's determination of whether to admit or exclude [other act] evidence will not be disturbed on appeal absent manifest error.").

Jackson also argues that the district court erred in denying a motion for a mistrial based on a witness twice referring to Jackson's ankle monitor as an "ankle worn device," when Jackson and the State had stipulated to refer to the ankle monitor as a "wearable GPS device." The record shows that these remarks were brief and inadvertent; were not intentionally solicited by the State; and did not refer to criminal activity, Jackson's parole status, or even an ankle *monitor*. Further, the district court admonished the witness outside the presence of the jury, and the witness did not use the term again while testifying. Considering these circumstances, the district court did not abuse its discretion by denying Jackson's request for a mistrial. *See Smith v. State*, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994) (explaining that this court will not overturn the denial of a motion for mistrial absent a clear showing of abuse of discretion).

Admissibility of identification evidence

Next, Jackson argues that the district court erred in denying Jackson's motion to suppress the "show-up identification" conducted with two of the victims after Jackson's arrest as unnecessarily suggestive. In deciding whether a pretrial identification is constitutionally sound, the test is whether, considering the totality of the circumstances, the identification procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law." *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (alteration in original) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). "[W]e review the district court's legal conclusions de novo and its factual findings for clear error." *Lamb v. State*, 127 Nev. 26, 31, 251 P.3d 700, 703 (2011).

Although Jackson was handcuffed during the show-up identification, other circumstances demonstrate that the show-up was not unduly suggestive when considered as a whole. *See Johnson v. State*, 131 Nev. 567, 577-78, 354 P.3d 667, 674-75 (Ct. App. 2015) (holding that a show-up with a handcuffed suspect was not unnecessarily suggestive where the police "took substantial steps to ensure that [the witnesses] were not unduly pressured into a false or mistaken identification," including separating them while they independently viewed the suspect and cautioning them that it was equally important to exonerate innocent people). The show-up occurred less than three hours after the robbery. The victims were separated and the show-ups were conducted independently. The victims were cautioned that they did not have to identify anyone and that it was just as important to exonerate innocent people as it was to implicate guilty ones. And the victims were instructed that the person they were viewing may or may not be the person who committed the crime. Therefore, as the

show-up was not unnecessarily suggestive, the district court did not err by denying Jackson's motion to suppress.

Testimony of victims via audiovisual means

Jackson next argues that the district court erred in allowing three witnesses to testify via audiovisual means, alleging that doing so violated Jackson's right to confront the witnesses. "[W]hether a defendant's Confrontation Clause rights were violated is ultimately a question of law that [we] review[ ] de novo." *Chavez v. State,* 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal quotation marks omitted). The right to confrontation is satisfied by remote testimony if (1) having a witness testify remotely "is necessary to further an important public policy," and (2) "the reliability of the [witness's] testimony is otherwise assured."[1] *Lipsitz v. State,* 135 Nev. 131, 136, 442 P.3d 138, 143 (2019) (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). Remote testimony may only be used after the trial court hears evidence and makes a case-specific finding that remote testimony is necessary. *Id.* at 136-37, 442 P.3d at 143.

As the district court found, two of the witnesses were Russian citizens living in Russia, amidst the Russia-Ukraine war. Given these circumstances, it was necessary for them to testify remotely. *See Harrell v. Butterworth*, 251 F.3d 926, 930-31 (11th Cir. 2001) (finding adequate justification for remote testimony when the foreign witnesses were beyond the court's subpoena power and that it was in the State's interest to expeditiously and justly resolve criminal cases). But while the third witness was also a Russian citizen, they had recently moved to Florida. The district court justified allowing that witness to testify remotely because requiring

[1]Jackson does not argue that the remote testimony at issue was unreliable.

the witness to travel would have been unduly burdensome. "[C]oncerns of convenience, efficiency, or cost-savings" do not justify remote testimony. *Newson v. State*, 139 Nev., Adv. Op. 9, 526 P.3d 717, 722 (2023). Thus, we conclude that the district court improperly allowed this witness to testify remotely.

Although the State has not argued that any error in this respect was harmless, we conclude that our sua sponte review for harmlessness is appropriate here. *See Belcher v. State*, 136 Nev. 261, 268, 464 P.3d 1013, 1024 (2020) (providing that where the State fails to argue that error is harmless, this court may still determine that an error was harmless after considering the length and complexity of the record, the certainty that the error is harmless, and the futility and costliness of reversal and further litigation); *Medina v. State*, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (concluding that when the State can show beyond a reasonable doubt that Confrontation Clause error did not contribute to the verdict, reversal is unnecessary). While the record in this case is lengthy, it is not complex and most of it is irrelevant to the harmless-error review at issue. *See Belcher*, 136 Nev. at 269, 464 P.3d at 1024 (2020) ("[W]hether unbriefed harmlessness review unduly burdens this court does not directly correlate to the overall size of the record."). We are also certain that the error was harmless beyond a reasonable doubt. The witness's testimony was largely cumulative, the witness did not identify Jackson, Jackson did not contest the witness was robbed, and the State's case was strong overall. *See Medina*, 122 Nev. at 355, 143 P.3d at 477 (recognizing that the court may consider the extent to which testimony is cumulative of other evidence and the strength of the State's case in determining whether its admission was harmless). Because we are confident that a rational jury would have found

Jackson guilty without the testimony of this witness, it would be futile to reverse and remand because another trial would reach the same result. *See United States v. Brooks*, 772 F.3d 1161, 1172 (9th Cir. 2014) (concluding that remand for retrial would be futile where there is overwhelming evidence of guilt). Accordingly, we conclude that the confrontation error due to the remote testimony by the witness located in Florida was harmless beyond a reasonable doubt.

Objections during closing arguments

Jackson argues the district court erred in its response to several objections during closing arguments. First, Jackson contends the district court erred in overruling an objection that the State improperly shifted the burden to the defense during rebuttal closing arguments when the State urged the jury to look at the GPS data themselves and suggested that the defense did not address the modus operandi in their closing arguments. A prosecutor improperly shifts the burden of proof to the defendant when the prosecutor comments on the defense's failure to call witnesses or produce evidence. *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996). But a prosecutor does not improperly shift the burden of proof by commenting on the defense's failure to substantiate its theories with supporting evidence. *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).

As to the comment about the GPS data, the comment was made in response to Jackson's own closing argument. *See Pascua v. State*, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006) (finding that the defendant was not deprived of a fair trial when "[t]he prosecutor's comments during closing arguments were rebuttal to [the defendant's] closing argument").

Similarly, the comment about modus operandi was made directly in response to Jackson's codefendant's closing argument. *See Evans*, 117 Nev. at 631, 28 P.3d at 513 (noting that the State may "comment on the failure of the defense to counter or explain evidence presented"). Further, the prosecutor clarified that the defense had no duty to present evidence, and the jury was properly instructed that the State had the burden of proof. Accordingly, the State did not impermissibly shift the burden of proof during closing.

Second, Jackson argues that the district court erred in its rulings on several objections regarding misstatements of testimony during closing arguments. Jackson contends the district court should have overruled the State's objections that defense counsel misstated a witness's testimony concerning the witness's confidence in the accuracy of the GPS data, as well as a witness's testimony concerning whether the witness was told by the prosecutor to change their story. We disagree. Because the district court could reasonably have found the closing argument misstated those witnesses' testimony, we cannot conclude the district court abused its discretion in this regard. Jackson also argues that the district court should have sustained Jackson's objection to the State referring to the gloves as belonging to Jackson. The gloves were found discarded in the stairwell Jackson had just run down, along with a discarded mask bearing Jackson's DNA. Thus, it is a reasonable inference that the gloves belonged to Jackson. *See Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("[T]he prosecutor may argue inferences from the evidence and offer conclusions on contested issues." (internal quotation marks omitted)). Thus, we conclude that the district court did not abuse its discretion in its rulings on the closing argument objections. *See Glover v. Eighth Jud. Dist. Ct.*, 125 Nev.

691, 704, 220 P.3d 684, 693 (2009) (explaining that this court reviews a district court's "rulings respecting the latitude allowed counsel in closing arguments for [an] abuse of discretion" (internal citation omitted)).

Sufficiency of the evidence on Count 39

Jackson contends there was insufficient evidence to sustain the conviction for assault with a deadly weapon because there was no evidence that Officer Victor Noriega was in apprehension of bodily harm or that there was an attempt to use unlawful force against him. *See* NRS 200.471(1)(a) (defining assault). We disagree. The State presented sufficient evidence from which a rational trier of fact could have found the elements of the crime, including Officer Noriega's testimony that the van drove at him and he had to run out of the way to avoid being hit, video footage showing the incident, and Jackson's arrest after fleeing from the van. Therefore, Jackson has not shown that relief is warranted. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (explaining that to determine the sufficiency of evidence, the reviewing court considers "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").

Flight jury instruction

Next, Jackson argues the district court erred by providing a jury instruction on flight. A flight instruction is proper where the evidence supports "that the defendant fled with consciousness of guilt and to evade arrest." *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). Video recordings and testimony were presented demonstrating that after attempting to burglarize a truck, Jackson saw a police vehicle, ran back to his stolen van, and attempted to exit the parking garage. When Jackson

saw that police had barricaded the exits, Jackson turned around and went up the down ramp of the parking garage, where an officer attempted to stop the van. Jackson attempted to drive through the officer and ran into the officer's patrol car before continuing to drive the wrong way up the ramp. Jackson finally abandoned the vehicle, fled down a staircase, and was apprehended at the bottom. Because a flight inference fairly flows from the record facts, the district court did not abuse its discretion in giving a flight instruction. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (reviewing the settling of jury instructions for an abuse of discretion).

Jackson's sentence

Jackson presents three arguments regarding the sentence imposed. First, Jackson argues that the sentence constitutes cruel and unusual punishment. The district court sentenced Jackson within the statutory parameters. *See* NRS 205.273; NRS 205.060; NRS 199.480; NRS 200.380; NRS 193.165; NRS 200.400; NRS 200.481; NRS 205.228; NRS 193.167; NRS 193.330; NRS 200.471; NRS 193.155; *see also* NRS 176.035(1) (providing that district courts have discretion to run sentences consecutively or concurrently). And we are not convinced that the sentence imposed is so unreasonably disproportionate to the offenses as to shock the conscience. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (explaining that regardless of its severity, "[a] sentence within the statutory limits is not cruel and unusual punishment unless . . . the sentence is so unreasonably disproportionate to the offense as to shock the conscience"

(internal quotation marks omitted)). We therefore conclude that Jackson's sentence does not constitute cruel and unusual punishment.[2]

Second, Jackson argues that the district court abused its discretion by imposing a harsher sentence on Jackson for exercising his constitutional rights, specifically that Jackson went to trial and did not show remorse. Jackson's argument that the court imposed a harsher sentence because Jackson went to trial lacks merit, and Jackson cites no authority in support of the proposition that a district court abuses its discretion when it imposes a more severe sentence than the defendant would have received by accepting a pretrial plea offer. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument . . . ."). Jackson's claim that the district court imposed a harsher sentence because Jackson did not show remorse is similarly without merit, as Jackson has not shown that the district court's sentencing decision was based solely on Jackson's decision to remain silent. *Cf. Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981) (reversing a sentence where the district court expressly stated its sole reason for imposing a harsher sentence was the defendant's exercise of their Fifth Amendment rights); *Brake v. State*, 113 Nev. 579, 585, 939 P.2d 1029, 1033 (1997) (reversing a sentence where the district court primarily relied on the defendant's lack of remorse at sentencing).

Third, Jackson contends the district court erred when it ran the sentence consecutively to a Michigan parole violation. NRS 176.035(3) provides that "whenever a person under sentence of imprisonment for

---

[2]To the extent Jackson argues the sentence is excessive, this court does "not review nondeath sentences for excessiveness." *Harte v. State*, 132 Nev. 410, 415, 373 P.3d 98, 102 (2016).

committing a felony commits another crime constituting a felony and is sentenced to another term of imprisonment for that felony, the latter term must not begin until the expiration of all prior terms." A defendant's sentence does not expire simply because they are granted parole. Rather, the defendant "remains subject to an unexpired term of imprisonment," and "[i]f the parolee violates a condition of parole, he may be imprisoned on the unexpired sentence." *Coleman v. State*, 130 Nev. 190, 194, 321 P.3d 863, 866 (2014). Therefore, Jackson was under sentence of imprisonment when he was sentenced, and the district court did not err in running the sentence consecutive to the parole violation.

Cumulative error

Finally, Jackson argues cumulative error requires reversal. *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. As we have only identified one error, there is nothing to cumulate. *See Lipsitz v. State*, 135 Nev. 131, 139 n.2, 442 P.3d 138, 145 n.2 (2019) (concluding that there were no errors to cumulate when the court found only a single error). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.

Herndon, J.

Parraguirre, J.

cc: Hon. Tara D. Clark Newberry, District Judge
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk