IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TYSHAURS COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87914-COA

ORDER OF AFFIRMANCE

Tyshaurs Collins appeals from a judgment of conviction, pursuant to a jury verdict, of one count of battery on an officer and one count of attempted first-degree kidnapping of a minor. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

In July 2022, Collins took his infant daughter to a Las Vegas storage complex where he had a shared storage unit.[1] The storage complex manager agreed to watch Collins's daughter while he moved things out of his unit. Unbeknownst to Collins, the mother of his child, Kajanai Smith, and Smith's mother were also at the storage complex. Smith called 9-1-1 to report an Asian male with a firearm, and LVMPD Officer Eric Resberg responded. Smith initially told Officer Resberg the Asian man had already left, but then admitted that she actually called 9-1-1 to have police serve Collins with a temporary protective order (TPO). Officer Resberg instructed Smith to dial the non-emergency line, 3-1-1.

Shortly thereafter, Smith dialed 9-1-1 a second time to report a Black male waving a firearm and making threats at the same storage unit

[1]We recount the facts only as necessary for our disposition.

complex. A few minutes into the call, a person who identified herself as "April Jones" took the phone from Smith and began providing a description of the alleged suspect and firearm. Officer Jacob Stoehr responded to this second call.

At the scene, Officer Stoehr made contact with Smith, Smith's mother, and the storage complex manager, but he could not locate anyone by the name of April Jones. While speaking to them, Officer Stoehr observed a person, later identified as Collins, matching the description of the alleged suspect, though Officer Stoehr did not observe any firearm.[2]

Meanwhile, unaware that Smith had called the police, Collins was locked inside the interior of the complex looking for a way back to the office. When Collins saw Officer Stoehr, Collins began walking away and then climbed over a spiked wall to leave the locked area of the complex, ripping his shirt and injuring his groin in the process.

K-9 Unit Officer Brennen Bychinski, who was also dispatched to the scene, observed Collins briskly walking down the street away from the storage unit complex and began to pursue him. After realizing he was being pursued, Collins ran away. Officer Bychinski lost sight of Collins when he entered the parking lot of AREA15, an entertainment and art complex in Las Vegas.

As officers pursued Collins, Jenny Sewell and her six-year-old son, X.S., were walking to their car through the AREA15 parking lot. Sewell spotted Collins moving through the parking lot with his hands in his

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[2]At the scene, Officer Stoehr conversed with Officer Resberg, who informed Officer Stoehr about Smith's earlier 9-1-1 call reporting an Asian man with a gun. Officer Stoehr later testified at trial that Smith likely lied on the second 9-1-1 call when she reported a Black male with a gun.

waistband, which concerned her because it appeared that he was concealing a weapon. Collins began to mirror Sewell's movements, and once Collins noticed the police close behind him, he grabbed X.S.'s arm and said, "let's go." Sewell told Collins to take his hands off X.S., and Collins briefly released him before grabbing X.S.'s collar. Sewell began yelling and hitting Collins, and Collins then released X.S. and placed his hands in his front pockets.

Officer John Phillips soon arrived at AREA15 and saw the altercation between Collins and Sewell. He approached them with his weapon drawn and ordered Collins to take his hands out of his pockets. When Collins eventually complied, Officer Phillips holstered his weapon. Collins then ran toward Officer Phillips, knocking him to the ground. Collins continued to run away but was eventually apprehended by Officer Bychinski and other responding officers.[3]

Based on the events at AREA15, the State charged Collins with one count of battery on an officer and one count of attempted first-degree kidnapping of a minor. At calendar call in October 2023, both parties announced ready for trial. However, the following day, the State requested a continuance because one of the police officers was unavailable to testify. The district court granted the continuance over Collins's objection.

Before the next calendar call, the State filed a motion in limine to introduce the second 9-1-1 call placed by Smith and "April Jones" because it could not locate or subpoena Smith. Collins raised concerns about the call's unreliability and asserted that its admission violated his right to

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[3]When Collins was arrested, he did not have a firearm on his person, and after searching both the storage complex and AREA15, police never recovered a firearm.

confront witnesses against him under the Sixth Amendment. The district court granted the State's motion after finding that the call was admissible as nontestimonial hearsay under *Davis v. Washington*, 547 U.S. 813 (2006).

The case proceeded to a four-day jury trial. During trial, the State presented video evidence from the officers' body cameras, a police air unit, and surveillance video from AREA15's parking lot security cameras, along with testimony from Sewell, Officer Phillips, Officer Bychinski, and AREA15 security personnel, who testified that they observed Collins struggling with Sewell and "yank[ing]" X.S.'s arm. Sewell testified that Collins grabbed X.S.'s arm, then his collar, and said, "let's go." According to Sewell, Collins only released X.S. once Sewell yelled at him and hit him.

Collins testified in his own defense. Collins testified that he reached for X.S. in order to blend in with the Sewell family because X.S.'s skin complexion was similar to his own. On cross-examination, Collins also affirmed that he grabbed X.S. because he was concerned about the police K-9, and he believed that police would not release the dog while he was holding a child.

During its closing argument, the State asserted that Collins "testified his purpose in taking X.S. was to keep him for as long as necessary in order to prevent the release of the K-9. That was his purpose. That was his intent." Collins objected that this characterization of his testimony amounted to prosecutorial misconduct, but the district court overruled the objection. In his own closing argument, Collins emphasized his desire to blend in with the Sewell family, as opposed to any intent to kidnap X.S. Collins was ultimately found guilty on both counts.

Thereafter, Collins moved for a new trial due to the alleged prosecutorial misconduct in closing arguments. He argued that the State mischaracterized his testimony to establish the necessary "intent" element

for attempted first-degree kidnapping of a minor.[4] After noting that both parties could argue reasonable inferences based on the evidence, the district court denied Collins's motion. The court subsequently sentenced Collins to an aggregate term of 24 to 60 months in prison. This appeal followed.

The district court did not abuse its discretion in admitting the second 9-1-1 call

Collins first argues that the district court violated his Sixth Amendment right to confront the witnesses against him by admitting Smith's second 9-1-1 call into evidence because the call's unreliability rendered it inadmissible testimonial hearsay. This court reviews the district court's decision to admit evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Generally, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Testimonial statements are defined as "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact." *Id.* at 51.

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[4]Although Collins's motion sought a new trial on all charges, he did not argue that the alleged prosecutorial misconduct had an impact on his conviction for battery on an officer.

However, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. Thus, the United States Supreme Court has recognized that 9-1-1 calls are *generally* nontestimonial because they are "ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827 (internal quotation marks omitted).

In *Harkins v. State*, the Nevada Supreme Court provided that when determining whether a statement is testimonial, a trial court should evaluate the following four factors: (1) to whom the statement was made (a government agent or an acquaintance); (2) whether the statement was spontaneous or made in response to a question (*e.g.*, whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended. 122 Nev. 974, 987, 143 P.3d 706, 714 (2006).

In this case, Collins did not include a copy of the 9-1-1 call transcript in his appendix, nor did he move to transmit a recording of the 9-1-1 call to this court pursuant to NRAP 10(b)(2). As a result, this court cannot meaningfully analyze whether the 9-1-1 call contained testimonial hearsay pursuant to *Harkins*. *See Feazeal v. State*, No. 76911, 2019 WL 3755284, *4 (Nev. Aug. 8, 2019) (Order of Affirmance) (determining that the appellant's failure to provide a transcript of the 9-1-1 call precluded the supreme court from finding a Confrontation Clause violation under

Harkins); *see also* NRAP 30(b)(3) (providing that appellant's appendix must contain any "portions of the record essential to determination of issues raised in appellant's appeal"); NRAP 10(b)(2) (providing that "[i]f exhibits cannot be copied to be included in the appendix, the parties may request transmittal of the original exhibits" to the clerk of the court).

Based on the limited record provided, we can ascertain that the statements on the call were made to a government agent, the 9-1-1 dispatcher, and that it objectively appeared that an ongoing emergency existed given the officers' subsequent dispatch to the scene. Yet, without the audio or the transcript of the call, this court cannot determine whether the statements at issue were spontaneous or made in response to police questioning, or if the questions were posed primarily for use at a later trial or to resolve an apparent emergency. *See Harkins*, 122 Nev. at 987, 143 P.3d at 714. Where the appellant fails to include the necessary documents in their appendix, this court necessarily presumes the missing portion supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007). Therefore, this court presumes the contents of the 9-1-1 call support the district court's decision that the call was nontestimonial, and thus, admissible.

Collins argues that the 9-1-1 call was inadmissible because subsequent evidence established that there was "no emergency" and the call was "inherently unreliabl[e]." However, when the reliability of a 9-1-1 call is later called into question, its admission may nevertheless be permissible if the statements made on the call objectively indicated—at the time the call was made—that its primary purpose was to enable police assistance to an ongoing emergency. *See, e.g., Gragg v. Prosper*, No. CIV S-08-2162 GGH P., 2009 WL 2488132, *11 (E.D. Cal. Aug. 11, 2009) (Order). In *Gragg*, for instance, a woman called 9-1-1 because she allegedly believed her ex-

boyfriend, Gragg, was on his way to kill her. *Id.* at *2. Later, the woman recanted her statements that Gragg had threatened her, then refused to testify. *Id.* at *3. Like Collins, Gragg argued the 9-1-1 call was inadmissible because the woman was not suffering from a real emergency. *Id.* at *4. The federal district court acknowledged that while the woman later recanted her statements, "it does not change the fact that at the time she made the call the circumstances *objectively* indicated that an ongoing emergency existed." *Id.* at *11.

Here, Smith's subsequent admission that she first called 9-1-1 to have police serve a TPO does not necessarily render the second 9-1-1 call inadmissible. The 9-1-1 call's *later* unreliability does not change that at the time Smith made the statements at issue, they objectively indicated that Smith's primary purpose was to seek police assistance with an ongoing emergency. *See id.*; *see also Davis*, 547 U.S. at 827. Therefore, Collins does not show that the district court abused its discretion in admitting the 9-1-1 call.

The district court did not abuse its discretion in denying Collins's motion for a new trial

Second, Collins argues that the district court abused its discretion in denying his motion for a new trial based on his claim that the State committed prosecutorial misconduct during its closing argument. This court reviews the denial of a motion for a new trial for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). A district court may grant a new trial "if required as a matter of law or on the ground of newly discovered evidence," NRS 176.515(1), or if it "disagrees with the jury's verdict after an independent evaluation of the evidence," *Washington v. State*, 98 Nev. 601, 603, 655 P.2d 531, 532 (1982).

When analyzing claims of prosecutorial misconduct, this court engages in a two-step analysis. "First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "[S]tatements by the prosecutor, in argument, . . . when made as a deduction or a conclusion from the evidence introduced in the trial, are permissible and unobjectionable." *Parker v. State*, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (internal quotation marks omitted). "During closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." *Jones v. State*, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997).

During the State's closing argument, the prosecutor told the jury, "[Collins's] intent here was to take [X.S.] and to keep him for as long as was necessary in order to keep K-9 from being released." This was a reasonable inference from the evidence based on Collins's testimony. Specifically, Collins answered affirmatively when the State asked him on cross-examination if he was concerned about the police dog when he grabbed X.S. and that his "thought process was, I'm going to find a [child] and grab that [child] by the hand so law enforcement won't release the dog." Therefore, the prosecutor's statements were not improper, and the district court did not abuse its discretion in denying Collins's motion for a new trial on this basis.

Sufficient evidence supports Collins's conviction for attempted first-degree kidnapping of a minor

Third, Collins claims his conviction for attempted first-degree kidnapping of a minor is not supported by sufficient evidence. Relying on *Schofield v. State*, 132 Nev. 303, 372 P.3d 488 (2016), and *Burkhart v. State*,

107 Nev. 797, 820 P.2d 757 (1991), Collins argues that the State failed to establish attempted first-degree kidnapping of a minor because his contact with X.S. was brief, it occurred in a public place in the presence of X.S.'s mother, and Collins did not have any means to escape with X.S. The State responds that the evidence was sufficient to support Collins's conviction because Collins repeatedly grabbed X.S.—only letting go after Sewell shouted at him and hit him several times—and Collins admitted he did so to prevent the police from releasing a K-9 on him.

When determining whether a jury verdict is supported by sufficient evidence, this court will inquire "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) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

NRS 200.310(1) provides that the crime of first-degree kidnapping is committed when a person "leads, takes, entices, or carries away or detains any minor with the *intent to keep*, imprison, or confine the minor . . . ." (Emphasis added). "An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." NRS 193.153(1).

During trial, the State proceeded under a theory that Collins acted with the intent "to keep" X.S. The Nevada Supreme Court has held that the phrase "to keep" within this statute requires an intent by the defendant "to keep a minor permanently or for a protracted period of time."

Schofield, 132 Nev. at 308-09, 372 P.3d at 491 (holding that the State failed to prove the appellant intended to keep his son permanently or for a protracted period of time when he forced his son to go with him on a trip to the grocery store). "Protracted" means "lasting for a long time or longer than expected or usual." *Protracted*, *New Oxford American Dictionary* (3rd ed. 2010).

Here, the State presented sufficient evidence for the jury to convict Collins of attempted first-degree kidnapping of a minor by showing that he grabbed X.S. with the intent to keep X.S. for a protracted period of time. At trial, Sewell testified that Collins twice grabbed X.S. and said, "let's go," and that he did not stop until she yelled at and repeatedly hit him. Collins admitted that he grabbed X.S. so the police would not release the K-9. Since there is no permissible or "usual" amount of time to take a minor hostage to use as a human shield, a rational juror could have found that the State established the necessary intent element. Though Collins also testified that he grabbed X.S. to blend in with the crowd, the jury was permitted to determine what weight to give to the various explanations he offered for his conduct. *See Walker*, 91 Nev. at 726, 542 P.2d at 439.

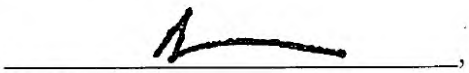
Collins also points to *Burkhart* as analogous due to its similarity in the defendant's brief contact with the victim. However, *Burkhart* is distinguishable. In *Burkhart*, the supreme court reversed an appellant's conviction for attempted second-degree kidnapping of a minor after determining that "there was no testimony which would have allowed the jury to infer what appellant intended to do with" the minor. 107 Nev. at 799, 820 P.2d at 758. Similar to Collins, the appellant in *Burkhart* made only "three brief contacts" with the alleged minor victim, who was "standing in plain view in a casino hallway within a few feet of his parents." *Id.* at 798, 820 P.2d at 757. Yet, unlike Collins, the appellant made no attempt to

flee and was apprehended without resistance. *Id.* Further, while Collins testified about his intent in repeatedly grabbing X.S., there was no similar testimony in *Burkhart*. In the absence of such testimony, the supreme court concluded that "[a]ny inference as to appellant's specific intent must have been based on unbridled speculation." *Id.* at 799, 820 P.2d at 758. Because there was sufficient evidence from which the jury could infer Collins's criminal intent in this case, *Burkhart* does not control the outcome here.

Therefore, we conclude that Collins's conviction is supported by sufficient evidence.[5] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

[5]Collins also argues that he is entitled to relief under the doctrine of cumulative error. However, as he has failed to demonstrate any errors, there are no errors to cumulate. *See Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Insofar as Collins has raised other issues which are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Christy L. Craig, District Judge
Waldo Law, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk