IN THE SUPREME COURT OF THE STATE OF NEVADA

FERNANDO JOSE REYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88011

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts each of driving under the influence resulting in death and/or substantial bodily harm, reckless driving resulting in death and/or substantial bodily harm, and leaving the scene of an accident involving death or personal injury. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Factual Background

Appellant Fernando Jose Reyes' convictions arise from two motor vehicle collisions on January 1, 2023. In the first collision, Reyes reversed his car while waiting at a red light, crashed into the car waiting behind him, and then drove off through a red light into traffic without exchanging insurance information. The second collision occurred immediately after the first when Reyes ran another red light and t-boned a second car. Reyes' car then spun out into a pedestrian right of way where it struck two pedestrians, killing them, and crashed into some rocks and an electrical box on the side of the road. Reyes then ran from the crash site on foot but was chased and apprehended by bystanders and arrested shortly thereafter.

The State presented sufficient evidence of Reyes' guilt

Reyes argues that there was insufficient evidence to support his convictions. We review the sufficiency of the evidence by asking whether a reasonable jury, when viewing the evidence in the light most favorable to the prosecution, could have been convinced of the defendant's guilt beyond a reasonable doubt. *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

The State presented sufficient evidence for the jury to find that Reyes was the proximate cause of the second collision

Reyes first argues that the State did not prove beyond a reasonable doubt that he was the proximate cause of the collision with the second car, a required element for four of his convictions. He argues that the evidence presented at trial was insufficient to prove his guilt. Instead, Reyes argues that the evidence supported a conclusion that it was actually the driver of the second car who was the proximate cause of the accident. We have held that proximate cause is that which produces an injury through a natural and continuous sequence, unbroken by intervening causes, and without which the injury would not have occurred. *Williams v. State*, 118 Nev. 536, 550, 50 P.3d 1116, 1125 (2002). Contributory negligence of another does not exonerate the defendant. *Id.*

The State provided substantial evidence, including testimony from six eyewitnesses, that Reyes was the proximate cause of the collision with the second car. At trial, multiple eyewitnesses reported that they observed a silver SUV (later identified as Reyes' car) speed through the red light and t-bone a black Toyota Prius (the second car) that was turning left in the intersection. The driver of the Prius testified that he had a solid green arrow signal as he turned into the intersection. The State presented data collected through the airbag control module of Reyes' SUV indicating that the SUV was traveling 55 miles per hour through the intersection with

the accelerator ninety percent depressed, indicating that the vehicle was accelerating two seconds before the crash. Additionally, a police officer testified that the investigation revealed that the Toyota Prius was traveling at a relatively low speed while making the left-hand turn. We conclude that this evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that Reyes was the proximate cause of the collision. Further, even if the jury reasonably believed that the second driver had somehow contributed to the collision, any contributory negligence on that driver's part would not exonerate Reyes. *See Williams*, 118 Nev. at 550, 50 P.3d at 1125.

The State presented sufficient evidence to prove that the drivers of the first and second cars suffered substantial bodily harm

Reyes next argues that the State did not prove beyond a reasonable doubt that the drivers of both the first and second cars suffered substantial bodily harm, a required element for four of Reyes' convictions.

NRS 0.060 defines "substantial bodily harm" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ"; or "[p]rolonged physical pain." We have previously determined that "'prolonged physical pain' . . . encompass[es] some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." *Collins v. State*, 125 Nev. 60, 64, 203 P.3d 90, 92-93 (2009). Importantly, it is not the type of injury that determines the finding of prolonged physical pain, but the length and physical nature of the pain itself. *See id.*

We conclude that based on the definition of "prolonged physical pain," a reasonable jury could have found that both drivers suffered an injury that lasted longer than the pain immediately resulting from the car

crashes. The driver of the first crash continued to experience migraine headaches for the following year and still receives rehabilitative treatment and pain for her shoulder issues. The driver of the second car suffered from bruising on his chest and general pain in his leg that kept him out of work for a week. Therefore, we conclude that sufficient evidence supports Reyes' convictions.

Introduction of Reyes' lack of insurance did not violate Reyes' right to a fair trial

Reyes argues that the State improperly introduced evidence of a prior bad act—that Reyes did not have automobile insurance—and the district court erred by failing to grant a mistrial or give a curative instruction. We disagree for multiple reasons.

At trial, during a sidebar, the court instructed the State not to question a witness regarding the issue of who had automobile insurance, and immediately after the sidebar the State asked the witness if Reyes had automobile insurance. After the witness replied in the negative the court once again called a sidebar, reprimanded the State, and the State explained that it had misunderstood the court's previous instruction. The district court declined to grant a mistrial but did offer a curative instruction, which Reyes declined.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *Smith v. State*, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994). When prior bad act evidence is improperly admitted at trial, the error is harmless where other overwhelming evidence supports the conviction. *Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002). Regardless of whether Reyes' lack of motor insurance is considered a prior bad act, any potential prejudicial effect was harmless given the substantial evidence of Reyes' guilt. The jury was presented with

significant evidence, offered by six eyewitnesses, that Reyes drove recklessly, resulting in two car crashes and the death of two pedestrians, and that he left the scene of the accidents. Additionally, the State offered evidence gathered from Reyes' blood draw that he was under the influence of drugs at the time of the incident. Therefore, any improper admission of Reyes' lack of insurance was harmless.

Additionally, Reyes argues that the court erred by not giving a curative instruction regarding the prior bad act evidence of Reyes' lack of motor insurance. Here again we disagree. When prior bad act evidence is admitted, the prosecutor has a duty to request a limiting instruction, and absent this request, the court should raise the issue sua sponte. *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110-111 (2008). However, when the defense explicitly waives the giving of a limiting instruction at trial, no error is presumed. No error occurred because not only did Reyes decline to request such an instruction at trial, but he explicitly waived the court's sua sponte offer to give one. The court asked Reyes if he was requesting "any sort of admonition" following the introduction of the evidence, and Reyes stated "No, I'm good to go." Thus, we conclude that the court did not err by failing to give a limiting instruction regarding this evidence.

Reyes' Fifth Amendment right against self-incrimination was not violated

Reyes next argues that his fundamental right to a fair trial was violated by the State's introduction of testimony that Reyes was not cooperative at the scene, stopped answering questions, and "just shut down." Reyes argues that this evidence implicated his Fifth Amendment right against self-incrimination. Further, Reyes argues that the State impermissibly implied during closing arguments that his silence at the scene of the accidents was evidence of his guilt.

Reyes did not raise these objections at trial and therefore the alleged errors are subject to plain error review. *See Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). To satisfy this standard, the error must be "so unmistakable that it is apparent from a casual inspection of the record." *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010) (quoting *Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007)). In addition, "the defendant [must] demonstrate[ ] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" *Martinorellan*, 131 Nev. at 49, 343 P.3d at 593 (alterations in original) (quoting *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d _465, 477 (2008)).

A prosecutor may not refer to a defendant's post-arrest silence in its case in chief. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). However, reversal is not necessary if the reference is harmless. *Id.* We conclude that while the officer's testimony about Reyes' post-arrest silence as well as the State's comments during closing that Reyes "just shut down" were likely improper, they were also harmless. As explained above, the jury was presented with overwhelming evidence of Reyes' guilt, such that these comments did not cause actual prejudice or a miscarriage of justice. Thus, Reyes fails to demonstrate plain error.

The district court did not err by admitting lay opinion testimony that Reyes was leaving the scene of the collision

Reyes argues that an eyewitness's testimony that Reyes "[l]ooked around and proceeded to leave the scene" was an impermissible opinion by a lay witness on an ultimate issue in the case, namely whether Reyes was guilty of the crime of leaving the scene of an accident.

Reyes did not raise this objection at trial and therefore we review for plain error. *See Martinorellan*, 131 Nev. at 48, 343 P.3d at 593.

NRS 50.265 limits lay witness testimony to opinions or inferences which are "[r]ationally based on the perception of the witness" and are "[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Lay witnesses may not give a direct opinion on guilt in a criminal case as the question of guilt is left to the trier of fact. *Collins v. State*, 133 Nev. 717, 725-26, 405 P.3d 657, 665 (2017). However, testimony that allows a jury to draw an inference as to the witness's opinion of the defendant's guilt is not impermissible. *Id.* at 725, 405 P.3d at 664-65.

We conclude that the testimony given by the eyewitness about Reyes leaving the scene does not rise to the level of an improper lay witness opinion on Reyes' guilt. The witness described how Reyes "rustled around" in his vehicle before getting out of the passenger's side door, then retrieved a backpack from the hatch, looked around, and "proceeded to leave the scene." Considering the witness's statement in context, it was not an opinion on Reyes' guilt, but merely a description of Reyes' actions.

The district court did not err by refusing to give Reyes' proposed jury instruction

Reyes argues that the district court erred by refusing to give Reyes' proposed instruction, which read: "To be guilty of breaching the Duty to Stop and render aid at the scene of the crash involving death or personal injury you must actually leave the scene with intent no [sic] to return." Reyes argues that this instruction represented his defense theory—that he was not fleeing the scene but simply removing himself from an unsafe crash site. Reyes contends that the plain meaning of the phrase "and shall forthwith return" in NRS 484E.010 requires that the defendant must leave the scene with the intent not to return, and thus his proposed instruction

was an accurate statement of the law. He further argues that the district court's refusal to provide it denied him the opportunity to argue that it was the State's burden to prove that he did not have the intent to return to the crash site.

We review a district court's decision to settle jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). A defendant is entitled to have the jury instructed on his theory of the case, so long as there is any evidence to support it; however, the district court may refuse to give such an instruction when it is substantially covered by other instructions. *Runion v. State*, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

We conclude that Reyes' proposed jury instruction was covered by those ultimately given. The jury was instructed that a defendant "shall forthwith return to and in every event shall remain at the scene of the crash," which, as Reyes acknowledges on appeal, implies that a defendant who has left the scene must make their best effort to return. This instruction was a correct and accurate statement of the law because it provided the exact language of the law itself. *See Langford v. State*, 95 Nev. 631, 638, 600 P.2d 231, 236 (1979) ("[A] fundamental principle of our system of trial by jury is that an instruction must accurately state the law."). The required intent to return is sufficiently implied in the given instructions

and there was nothing prohibiting Reyes from explaining his theory of defense in closing argument, an opportunity he did not take. Therefore, we conclude that the district court did not err by rejecting Reyes' proposed jury instruction.

Reyes was not entitled to more time to file a motion to set aside the verdict

Reyes argues that the court erred by denying his motion to set aside the jury verdict after he requested more time to file it. He argues that he should have been afforded more time because the trial judge had earlier indicated that she was open to hearing such a motion, the court is permitted to allow for such an extension, and the judge was aware of defense counsel's time limitations. NRS 175.381(2) provides that a motion to set aside a verdict "must be made within 7 days after the jury is discharged or within such further time as the court may fix during the period." Reyes filed his motion to set aside the verdict eleven days after the jury was discharged. And while Reyes is correct that the court is permitted to extend the deadline to "such further time as the court may fix during the period," NRS 175.381(2), he did not file a motion for an extension until after the seven-day statutory deadline had already expired. Thus, both motions were untimely. Additionally, Reyes' arguments that the trial judge expressed openness to an extension and was sympathetic to defense counsel's schedule cannot overcome the simple fact that the motions were not timely filed. We therefore conclude that the district court did not err by refusing to grant Reyes an extension of time and his related motion to set aside the verdict.

Cumulative error does not warrant reversal

Reyes last argues that the cumulative effect of multiple errors warrants reversal. Because we conclude that the district court did not err,

there are no errors to cumulate. *See Byford v. State*, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000). Thus, cumulative error does not warrant reversal.

For the foregoing reasons, we conclude no relief is warranted and we therefore

ORDER the judgment of conviction AFFIRMED.

Pickering, J.
Pickering

Cadish, J.
Cadish

Lee, J.
Lee

cc: Hon. Carli Lynn Kierny, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk