IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALAN LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85004

FILED

SEP 12 2025

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 one count of first-degree murder by child abuse and one count of child abuse with substantial bodily harm. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In 2014, Appellant Michael Lee was tried and convicted of first-degree murder by child abuse and child neglect causing substantial bodily harm for the death of two-year-old B.A. After prevailing on a petition for writ of habeas corpus, Lee was retried. A jury convicted him on both counts, and he was sentenced to prison. On appeal, Lee challenges his conviction, raising several evidentiary and trial procedure issues.[1]

Sufficiency of the evidence

Evidence is sufficient to support a criminal conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when viewed in a light most favorable to the

[1]After oral argument, Lee filed a motion seeking leave to file a supplement/errata to his argument. We hereby grant the motion and have duly considered the declaration of counsel in this disposition. No further supplements are necessary.

prosecution. *Belcher v. State*, 136 Nev. 261, 275, 464 P.3d 1013, 1029 (2020) (quoting *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). "The jury's verdict will not be disturbed on appeal when there is substantial evidence supporting it." *Brass v. State*, 128 Nev. 748, 754, 291 P.3d 145, 150 (2012).

In challenging the evidence as insufficient, Lee points only to Dr. Gavin's testimony regarding the timeframe in which the injuries were incurred relative to the death. Lee claims that Dr. Gavin's testimony shows that the injury could have occurred up to 72 hours before death and therefore the State's entire theory that only two people could have caused B.A.'s injuries "was false, advanced in bad faith, and did not support the verdict." We are not persuaded by Lee's argument. Dr. Gavin acknowledged that the time of death may have been slightly more than 24 hours post-injury given that she observed more macrophages on a slide when preparing for this trial than she did when preparing for the first trial. But, she also explained that based on the amount of neutrophils cells present, she believed the death causing injury occurred around 24 hours before B.A.'s death. The jury's evaluation and acceptance of Dr. Gavin's testimony does not negate the existence of sufficient evidence to support the verdict. *See Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) ("This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact."); *see also Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (observing that a conviction may rest entirely on circumstantial evidence). Therefore, Lee fails to present a meritorious argument that the State failed to present sufficient evidence of his guilt.

Late disclosures of evidence

Lee argues that the State failed to timely disclose three categories of exculpatory evidence: a CD recording of witness interviews, an evidence log, and Dr. Gavin's revised timeline.[2] Lee contends that because of the late disclosures, he lacked time to prepare and was prejudiced as a result. In late disclosure cases, the appropriate inquiry "is whether the lateness of the disclosure so prejudiced appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *United States v. Miller*, 529 F.2d 1125, 1128 (9th Cir. 1976); *see Thomas v. Eighth Jud. Dist. Ct.*, 133 Nev. 468, 478 n. 12, 402 P.3d 619, 628 n. 12 (2017) (differentiating between a *Brady* violation where exculpatory evidence is not disclosed and a late disclosure). There is no prejudice from a late disclosure "[i]f the defendant is presented with a substantial opportunity to use the belatedly disclosed evidence." *United States v. Alahmedalabdaloklah*, 94 F.4th 782, 828 (9th Cir. 2024); *see also United States v. Douglas*, 525 F.3d 225, 245 (2d Cir. 2008) ("*Brady* material that is not disclosed in sufficient time to afford the defense an opportunity for use may be deemed suppressed within the meaning of the *Brady* doctrine." (internal quotations omitted)).

We conclude that Lee has failed to demonstrate the required prejudice stemming from the late disclosures. Contrary to Lee's arguments, he had a substantial opportunity to use the evidence despite it being

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[2]We decline to address Lee's claim regarding other purportedly exculpatory evidence—specifically, a video allegedly placing him at another location—because he presents no meaningful argument or analysis in support. *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; issues not so presented need not be addressed by this court.").

produced after the trial had already started. Lee was able to review the CD recording before the witnesses testified and he had both the recording and transcript when he cross-examined Arica Foster. While the transcript was produced after Brad Moshier testified, Lee could have recalled Brad in his case in chief but did not do so. And Meridee Moshier's recorded interview statements were consistent with her ensuing testimony in the first trial, such that Lee has not shown that he missed out on any impeachment opportunities. While Lee claims that he would have tried to enhance the audio and retain a body language expert if he had time, he has not meaningfully argued with citation to supporting authority or evidence that the late disclosure had an adverse effect on his ability to mount a defense. *Maresca*, 103 Nev. at 673, 748 P.2d at 6.

As to the evidence log, it too was produced with sufficient time for Lee to cross-examine Detective Collins about whether he logged the CD recording into evidence. During the first trial, a missing CD of witness interviews was not turned over to Lee but was found in the evidence vault during the second trial. At the second trial, Lee effectively impeached Collins by highlighting inconsistencies in his testimony about his inability to access the recording of the interview during the first trial.

Under the circumstances, the same holds true as to the late disclosure of Dr. Gavin's revised opinion on the injury timeline. First, the State immediately disclosed Dr. Gavin's revised timeline after Dr. Gavin provided it to the State. Second, the slides on which Dr. Gavin based her opinion were the same slides on which both Dr. Gavin and Lee's rebuttal expert relied in forming their opinions in the first trial. Dr. Gavin's allegedly late-revised opinion did not preclude Lee from retaining a rebuttal expert to address evidence that had been available to Lee for over a decade.

just as he had done in the first trial. Third, when Lee requested a one-day continuance the district court granted Lee a two-day continuance, giving Lee Thursday, Friday, and the weekend to adjust his cross-examination. *Alahmedalabdaloklah*, 94 F.4th at 828 (stating "that a continuance granted for the purposes of preparation and investigation will often remedy any prejudice to the defendant's case resulting from late-disclosed evidence."). Moreover, upon resuming trial, Lee's trial counsel confirmed they were ready to proceed. Accordingly, because Lee has not shown prejudice from any of the late-disclosed evidence, the district court did not abuse its discretion in denying Lee's motion for a new trial. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991) (observing that denial of a new trial motion is reviewed for an abuse of discretion).

Prosecutorial misconduct

Lee identifies two occurrences of alleged prosecutorial misconduct. Our review is confined to plain error because Lee failed to object to these comments below. *Parker v. State*, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that a defendant must raise a timely objection and seek corrective instruction to preserve the issue of prosecutorial misconduct for appeal); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing claims of prosecutorial misconduct for plain error where the defendant fails to preserve the matter). Lee carries the burden to demonstrate actual prejudice or a miscarriage of justice. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (holding actual prejudice results where "a prosecutor's statements so infect[] the proceedings with unfairness as to make the results a denial of due process.").

First, Lee alleges that the State intentionally misrepresented Dr. Gavin's revised timeline in its pretrial disclosure. We disagree because

Dr. Gavin's testimony remained materially consistent with both her testimony from the first trial and the State's pretrial disclosure. Moreover, even assuming the State was less than precise in disclosing Dr. Gavin's revised timeline, Lee fails to demonstrate actual prejudice or a miscarriage of justice. *Green*, 119 Nev. at 545, 80 P.3d at 95. Second, Lee argues that the State inappropriately shifted the burden of proof to him by commenting in closing that "you, as the trier of fact, get to determine whether that woman [Arica Foster] killed her son." We disagree that this comment was improper, as it was consistent with the State's theory that only two people (Lee and Foster) could have inflicted the life-ending injury given the timeline. This is permissible commentary because it asks the jury to draw inferences from the evidence. *State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965) (holding that the prosecution has "a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully [its] views as to what the evidence shows."). Moreover, directly after this statement, the district court issued a curative instruction reminding the jury that the State carried the burden to prove beyond a reasonable doubt that Lee committed the offenses, which abated any potential prejudice that could have resulted.

Lee's requests for continuances

Lee argues that the district court acted unreasonably or arbitrarily by not continuing the trial or hearings. We review the district court's decision regarding a motion for continuance for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). A trial court generally abuses its discretion in denying a continuance if the denial deprives the defense of sufficient time to prepare for trial; however, the defendant must show resulting prejudice from the denial. *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010).

As to Lee's request to continue the evidentiary hearing and the trial, Lee was not requesting additional time to prepare his own witnesses and he was given the opportunity to question both pertinent witnesses about potentially inadvertently disclosed evidence. Moreover, because Lee sought disqualification based on the potentially inadvertently disclosed information, we ordered based on Lee's request that the district court was required to decide that issue before proceeding with trial. *Lee v. Eighth Jud. Dist. Ct.*, No. 84328, 2022 WL 766426, at *2 (Nev. Mar. 11, 2022). Under the circumstances, the district court did not abuse its discretion in denying a continuance. We likewise perceive no prejudice in proceeding with the hearing on Lee's motion to dismiss. While the CD recording of the interview required Lee to adjust his cross-examination of certain witnesses during trial, he was generally aware of the interview and its substance based on notes and the detective's report disclosed before the first trial. Therefore, the late disclosure of the CD did not leave Lee with inadequate time to prepare for trial. *Higgs*, 126 Nev. at 9, 222 P.3d at 653. And once it was disclosed, Lee did not seek further continuance, instead informing the court that he would wait to determine if any prejudice resulted from the late disclosure. Finally, although Lee asked for an additional day to prepare and present closing arguments, the district court acted within its discretion in denying this request. This is especially true since Lee had already agreed that closing argument would take place on this day, and sticking to this schedule does not rise to the level of denying Lee a fair trial.

Juror misconduct

First, Lee argues that jurors made comments demonstrating that they ignored the burden of proof instruction and therefore committed misconduct by basing Lee's guilt on his inability to prove Foster inflicted the injuries. Lee claims that the jurors' comments support his argument

that "the State's burden shifting affected the verdict" and coupled with the other alleged errors denied him a fair trial. Second, Lee argues that the jurors inappropriately conducted outside research as demonstrated by their questions about prior trials or hearings and a question asking if Lee had been in jail since his arrest.

The conduct Lee points to fits in the intrinsic juror misconduct category, i.e., "conduct by jurors contrary to their instructions or oaths." *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). Because such misconduct "can rarely be proven without resort to inadmissible juror affidavits that delve into the jury's deliberative process," intrinsic misconduct will warrant a new trial "only in extreme circumstances." *Id.* at 565, 80 P.3d at 456. Such circumstances are not present here and because Lee's argument relies on inadmissible juror statements, his argument fails. *Id.* at 562, 80 P.3d at 454 (holding that generally a jury cannot impeach its own verdict). Moreover, Lee concedes this evidence is not admissible. Accordingly, the district court did not abuse its discretion in denying Lee's motion for new trial based on juror misconduct. *Meyer*, 119 Nev. at 561, 80 P.3d at 453.

As to the alleged independent research, this claimed misconduct is subject to plain error review because it was not raised in Lee's motion for new trial. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015) (explaining application of plain error standard). We cannot say that the record supports that the jury conducted any independent research based on the questions identified by Lee. *See Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007) (defining plain error as one that is "so unmistakable that it is apparent from a casual inspection of the record."). The first jury question was: "You keep referencing a prior hearing/trial.

What happened on that trial? Or trials? Why did it not resolve?" This question does not plainly support the inference that the jury conducted prohibited outside research, especially because the district court clarified that no one had used the word trial but there had been several previous hearings in this case. The second jury question was: "Has defendant been held in jail since his arrest on 10-26-11 to present." The record likewise does not support that this question resulted from improper outside research, especially given that the jury was informed that Lee was arrested on this date and the trial was occurring nearly 11 years later. Thus, Lee has not shown reversible error regarding any jury misconduct.

Remaining arguments

Lee claims judicial bias as a basis for reversal, but because he failed to raise bias concerns below, waiver applies, and we decline to address the claim on appeal. *Blankenship v. State*, 132 Nev. 500, 505 n.2, 375 P.3d 407, 411 n.2 (2016). Finally, because we conclude that Lee has not identified any district court error, we necessarily reject his cumulative error argument. *Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting that cumulative error claims require "multiple errors to cumulate").

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Cadish, J.
Cadish

Lee, J.
Lee

cc: Hon. Jacqueline M. Bluth, District Judge
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