IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS EDWARD ZAVALZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89057

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a deadly weapon, murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and first-degree arson. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In December 2014, appellant Julius Zavalza and the victim Walter Wu were at Wu's house smoking heroin together. The two men got into an altercation, during which Zavalza grabbed a pocketknife and used it to stab Wu. Zavalza then set some clothes on fire to cover up what had happened, and he left the residence with a few boxes of shoes and other items. First responders brought Wu out of the burning house and transported him to the hospital, where he was pronounced dead. The medical examiner concluded that the manner of death was homicide and that Wu had suffered more than eighty stab wounds to his arms, face, and neck. Law enforcement arrested Zavalza.

After trial, the jury found Zavalza guilty on all counts. On appeal, Zavalza argues that: (1) the State improperly commented on Zavalza's right to remain silent during cross-examination; (2) the State improperly shifted the burden of proof to the defense during closing arguments; (3) the admission of gruesome photographs prejudiced Zavalza; (4) the State failed to preserve critical video evidence; (5) the district court

improperly allowed testimony from an expert on sneakers; (6) multiple jury instructions were erroneous; and (7) that cumulative error warrants reversal.

Prosecutorial misconduct

Zavalza raises two claims of prosecutorial misconduct. "When considering claims of prosecutorial misconduct, this court engages in a two-step analysis." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This court first determines whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Id.* at 1188, 196 P.3d at 476. "If the error is of constitutional dimension, then [this court] . . . will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476.

First, Zavalza argues that the State improperly commented on his right to remain silent. We agree, because impeaching a defendant with their post-arrest silence is improper and constitutes prosecutorial misconduct. *See Coleman v. State*, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995). For example, in *Murray v. State*, the prosecutor made multiple comments during cross-examination and closing arguments, stating at one point: "[the defendant]'s had over six years to manufacture this." 113 Nev. 11, 15, 930 P.2d 121, 123 (1997). And at another point: "[d]o you really expect these individuals to believe you after that long?" *Id.* at 16, 930 P.2d at 124. This court found these comments, and others, improperly referenced the defendant's right to remain silent. *Id.* at 16-17, 930 P.2d at 124-25; *see also Coleman*, 111 Nev. at 661 n.4, 895 P.2d at 656 n.4 (determining prosecutor improperly referenced the defendant's post-arrest silence during closing argument when they stated: "[t]hat's [the defendant's]

theory . . . [h]e's had nine months to think about what his theory would be and what might fly with this jury.").

Here, the prosecution stated "[y]ou've had 10 years to come up with this version you're feeding to the jury" during Zavalza's cross-examination. As demonstrated by *Murray* and *Coleman*, comments that refer to the length of time spent silent as time used to concoct a narrative are improper, since such comments implicate post-arrest silence, despite the defendant's later decision to testify. Thus, we conclude that the prosecutor's comment at trial during cross-examination was improper. Nevertheless, the record demonstrates that the prosecution made a mere passing reference to Zavalza's silence at trial and, in view of the otherwise overwhelming evidence of guilt, the error was harmless beyond a reasonable doubt. *See Morris v. State*, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996) (explaining that "[c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt." (internal citations omitted)).

Second, Zavalza argues that the prosecution made two comments in its closing argument that improperly shifted the burden of proof to Zavalza. *See Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996) (explaining impermissible shifting of the burden of proof is when the prosecution comments on the failure of the defense to present witnesses or evidence). In closing, the prosecutor displayed photos of Zavalza smiling and drinking days after the incident to contrast it with Zavalza's testimony during trial. Zavalza objected when the prosecutor suggested that Zavalza had to "convince" the jury that his presentation at trial was accurate.

Attorneys may argue about the lack of credibility of particular witnesses, including criminal defendants, and can point out to the jury

where certain testimony appears to be untruthful. *See Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990) (explaining that a prosecutor may "demonstrate to a jury through inferences from the record that a defense witness's testimony is palpably untrue"). But the prosecutor's terminology here, to the extent it suggests the defendant had to "convince" the jury of his version of events, was improper and likely amounts to error. However, we conclude that the comments do not warrant reversal given Zavalza objected immediately and the district court sustained the objection, then issuing a curative instruction to the jury. *See Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002) (explaining that when a defendant objects to a prosecutor's improper comment, the objection is sustained, and the jury is admonished to disregard the comment, reversible error rarely results). Thus, reversal is not required because, even assuming misconduct occurred, such misconduct was harmless.

The district court did not err in admitting autopsy photos

Zavalza next argues that the district court abused its discretion by admitting two unnecessarily graphic photographs because the photographs' probative value was substantially outweighed by their prejudicial effect.

"[T]he admission of photographs lies within the sound discretion of the district court." *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997). Photographs, even if relevant, can be inadmissible "if [their] probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1). However, even "gruesome photos will be admitted if they aid in ascertaining the truth," such as when they show the cause of death, the severity of wounds, and the manner of those wounds' infliction. *Browne*, 113 Nev. at 314, 933 P.2d at 192. We conclude that the

district court did not abuse its discretion in admitting the two photographs because they aided the jury in ascertaining the truth.

Although Zavalza failed to include the pictures in the record on appeal, the record reflects that one photo depicts two wounds and the second photo depicts a stab wound on Wu's head that went across the skull and came partly out, with a wire through the wound to demonstrate directionality and depth of the wound. These photos provide context as to how the medical examiner tallied up stab wounds for the autopsy report and depict the severity and manner of the wounds. Accordingly, these photographs were relevant and probative as to the cause of Wu's death and were not substantially outweighed by the danger of unfair prejudice. The photograph was gruesome because the manner of death, by stabbing, was itself an act that would create gruesome autopsy photographs. Given their probative value, the graphic nature of the photographs is not enough by itself to demonstrate an abuse of discretion in their admission.

There was no failure of the State to preserve or collect video evidence

Zavalza next argues that the State failed to preserve video evidence of the crime scene in violation of his right to due process and, relatedly, that the district court should have approved an instruction for the jury to be able to draw a negative inference from the destruction of the footage. The analysis for the State's failure to *preserve* evidence is different than that for the State's failure to *collect* evidence. *Compare Daniels v. State*, 114 Nev. 261, 956 P.2d 111, 115 (1988) (explaining that, if the State fails to preserve potentially exculpatory evidence, charges may be dismissed if the defendant can show "bad faith or connivance on the part of the government" or "that he was prejudiced by the loss of the evidence" (internal quotation marks omitted)), *with Gordon v. State*, 121 Nev. 504, 509, 117 P.3d 214, 218 (2005) (explaining that officers generally do not have a duty

to collect all potential evidence in a case). Although Zavalza asserts that the State failed to *preserve* evidence, his contention is really that the State failed to *collect* evidence from the alleged second camera. If the State failed to collect evidence, this court utilizes a two part test to determine when dismissal of charges is warranted: (1) the defense must show that the evidence was material and (2) if the evidence was material, the court "must determine whether the failure to gather it resulted from negligence, gross negligence, or bad faith." *Gordon*, 121 Nev. at 509, 117 P.3d at 218.

First, Zavalza argues that the State's failure to preserve the evidence from an alleged second camera resulted in prejudice because the footage could have supported Zavalza's self-defense claim.[1] At the outset, we note that the record does not support the existence of a second camera. If there was no second camera, then there is no need to analyze whether the State failed to collect evidence because there was no evidence to collect. But even if there *was* a second camera, we find that dismissal of the charges is not warranted. Under the first part of the test to determine whether dismissal of charges is warranted, the defense must show that the evidence was material. *Id.* Evidence is material if "there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available." *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001).

Here, Zavalza asserts that footage from the second camera would have captured the fight between Zavalza and Wu and supported Zavalza's self-defense claim that Wu had unexpectedly tried to shoot

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[1]Zavalza alleges that there were two cameras: one behind the front door of the house (video footage was recovered from this camera) and a second camera on the second floor where the fight took place (no video footage was recovered from this alleged second camera).

Zavalza. Assuming this assertion is true, then footage from this second camera could have been material evidence supporting Zavalza's claims and it could be viewed as supporting a reasonable probability that the result of the proceedings would have been different.

Even if the evidence is considered material, however, we conclude that the State's failure to collect such evidence resulted from mere negligence and therefore, under part two of the *Gordon* analysis, 121 Nev. at 509, 117 P.3d at 218, no sanctions were warranted. The camera installer testified that he had given a disc to the police that contained all the footage that was associated with the scene. Law enforcement believed there was only one camera to collect footage from, between the crime scene analyst only having documented one camera inside the house and the security company giving them a thumb drive with footage from that one camera. In fact, a detective testified that he had received all the video footage from the camera and that nothing suggested that more footage existed. Thus, failure to collect this alleged evidence did not stem from gross negligence or bad faith. As such, we conclude that any alleged failure to collect evidence from the purported second camera does not warrant dismissal of the charges.

Second, Zavalza asserts that he requested an instruction that would allow the jurors to draw a negative inference from the destruction of property. But Zavala does not provide a citation to the record that supports this claim, and the record does not appear to contain the alleged instruction request. Accordingly, Zavalza failed his "responsibility to provide this court with cogent argument supported by legal authority *and reference to relevant parts of the record.*" *Rodriguez v. State*, 117 Nev. 800, 811, 32 P.3d 773, 780 (2001) (emphasis added); *see* NRAP 28(a)(9)(A); *see also Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("We cannot properly consider

matters not appearing in that record."). As such, we decline to entertain this claim.

The district court did not err in admitting expert testimony

Zavalza argues that the district court improperly allowed Austin Doyle to testify as an expert on sneakers. "[A] district court's decision to allow expert testimony [is reviewed] for abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Before a person can testify as an expert, "the district court must first determine whether he or she is qualified in an area of scientific, technical, or other specialized knowledge." *Id.* at 499, 189 P.3d at 650. And in determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees; (2) licensure; (3) employment experience; and (4) practical experience and specialized training. *Id.* at 499, 189 P.3d at 650-51.

At trial, the district court permitted Doyle to provide expert testimony within "very narrow confines" about "terminology" related to the sneakers Zavalza had allegedly taken.[2] Doyle did not have any formal schooling or licensure involving sneakers. However, Doyle's resume demonstrated that he had years of practical and employment experience in the sneaker resale market, relevant to providing broader context about the shoes Zavalza had taken from Wu and resold in California. At the time of the trial Doyle had been working at Almighty Originals, a store selling sneakers, for four years and he had also been an independent sneaker

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[2]Doyle's testimony on direct examination focused on providing the name, condition, and resale value of sneakers the State showed him. For example, Doyle explained that the box for Jordan shoes released for the holidays were of better quality, with "pull tabs and like a slide-out function with a plastic cap over the top of that."

reseller for ten years. Practical experience is one of the four factors outlined in *Hallmark* and was sufficient to qualify Doyle as an expert on sneaker resale. As such, we conclude that Zavalza has not demonstrated the district court abused its discretion in permitting Doyle to testify as an expert within the narrow confines of shoe and shoe resale terminology.

The district court did not abuse its discretion in instructing the jury

Zavalza next challenges four jury instructions: (1) the use of the term "abandoned and malignant heart"; (2) the premeditation and deliberation instruction; (3) the "reasonable doubt" instruction; and (4) the "equal and exact justice" instruction. We conclude that the district court did not abuse its discretion in setting forth these four jury instructions. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (recognizing that district courts have "broad discretion to settle jury instructions, and this court reviews the district court's decision for abuse of that discretion or judicial error").

Each of the challenged jury instructions has been upheld by this court, word for word. *See, e.g., Leonard v. State*, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001) (explaining that the language used for malice instructions identical to those at hand was "well established in Nevada" and the instructions were "sufficient"); *Byford v. State*, 116 Nev. 215, 236-37, 994 P.2d 700, 713-14 (2000) (setting forth the language used for the premeditation instructions utilized in this case); *Chambers v. State*, 113 Nev. 974, 983-84, 944 P.2d 805, 810 (1997) ("This court has addressed the constitutionality of Nevada's statutory instruction on 'reasonable doubt' many times, concluding that it meets constitutional standards."); *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 228, 962 (1998) (explaining that the "equal and exact justice" instruction "does not concern the presumption of innocence or burden of proof" and that a separate instruction covered this

aspect of innocence and burden of proof (internal quotation marks omitted)). And Zavalza has not presented any persuasive reason to revisit our precedent. Therefore, no relief is warranted on this ground.

There is no cumulative error

Zavalza finally argues that cumulative error warrants relief. The following factors are relevant to consider when evaluating a claim of cumulative error: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

Here, the quantity of errors was minimal—at most, two instances of misconduct—and unrelated. Further, both times defense counsel immediately objected, and the prosecution either moved onto a different line of questioning or the judge admonished the jury, or both. Finally, the issue of guilt is not close given the overwhelming evidence towards Zavalza's guilt that ranges from video footage of Zavalza at Wu's residence, to Zavalza's blood evidence at the scene of Wu's killing, to the confession to Zavalza's friend about him planning to rob Wu for his shoes and killing Wu in the process. We therefore conclude that cumulative error does not warrant relief. For these reasons, 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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