IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONEL VAZQUEZ-HINOJOSA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89379

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of lewdness with a child under the age of fourteen. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Appellant Leonel Vazquez-Hinojosa (Vazquez) is the father of the victim, P.V.M., who was ten years old at the time of the offense. Police officers arrested Vazquez on May 3, 2021, after his ex-wife, P.V.M.'s mother, Josephina Martinez, reported that she walked in on Vazquez with his hand down the front of P.V.M.'s leggings, rubbing her vagina. When law enforcement arrived, Vazquez stated that he touched P.V.M., that he messed up, and that he needed help. Law enforcement arrested Vazquez and the State charged him with lewdness with a child under the age of fourteen, alleging that Vazquez rubbed P.V.M.'s vagina or upper leg with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or P.V.M.

After trial, the jury found Vazquez guilty of lewdness with a child under the age of fourteen. Vazquez was subsequently sentenced to life in prison with the possibility of parole after ten years. Vazquez now appeals, arguing that the district erred when it excluded Dr. Deborah Davis from testifying, limited the expert testimony of Dr. William O'Donohue,

admitted inconclusive male DNA evidence from P.V.M.'s vulva and underwear, and admitted P.V.M.'s hearsay statements to Josephina. Vazquez also asserts that the State committed prosecutorial misconduct during closing arguments and failed to present sufficient evidence in support of the theory that Vazquez lewdly touched P.V.M.'s leg. Finally, Vazquez argues that cumulative error warrants relief.

Expert Testimony of Dr. Deborah Davis

Vazquez argues that the district court erred in excluding Dr. Davis's expert testimony. Vazquez asserts that Dr. Davis "linked scientific principles to the facts of this case" and that the principles in question were important for assisting the finder of fact in interpreting the testimony and evidence, and for rebutting the State's interpretations of the evidence during closing arguments. The State's position is that the district court did not err because Dr. Davis's testimony would have been based on generalizations rather than particularized facts and that, regardless, Vazquez failed to preserve the error as he failed to renew his objection at trial. Because Vazquez did not renew his objection at trial and the ruling was not final, the appropriate standard of review is plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

Vazquez has not shown plain error because he has failed to demonstrate that the district court erred in its initial order regarding Dr. Davis. The district court determines whether an expert's testimony will assist the trier of fact, under the meaning of NRS 50.275, by determining if the testimony "is relevant and the product of reliable methodology." *Halmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008). To that end, reliable methodology must be "based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 124 Nev. at

500–01, 189 P.3d at 651–52. A district court does not err when it precludes expert testimony that would present general principles within the expert's purview when the appellant fails to establish a "a viable foundation" for the expert opinion in the evidence elicited at trial. *See Porter v. State*, 94 Nev. 142, 147–48, 576 P.2d 275, 278–79 (1978) ("There was no express showing that [the expert] would have addressed himself to the testimony of the victim . . . . Rather, he would have testified about the unreliability of eyewitness accounts in general.").

Vazquez intended to keep Dr. Davis's testimony general in nature. The district court preliminarily excluded Dr. Davis, finding that such generalized testimony would be impermissibly disconnected from the evidence, but permitted Vazquez to re-raise Dr. Davis as an expert after the evidence developed at trial. We find that the district court exercised sound discretion in its preliminary order excluding Dr. Davis. Furthermore, the district court expressly permitted Vazquez to re-raise the issue at trial. *Cf. Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002) (recognizing that a motion in limine may preserve an evidentiary challenge without the need for another objection where the objection has been fully briefed and considered during a hearing and the district court has made a "definitive ruling"). Consequently, we find that Vazquez has not shown error or an adverse effect on his substantial rights because he never re-raised the issue of Dr. Davis's testimony at trial. Therefore, there is no error, let alone a plain error.

Expert Testimony of Dr. William O'Donohue

Vazquez argues that the district court abused its discretion because it prevented Dr. O'Donohue from applying his expert opinions to the facts of the case. According to Vazquez, Dr. O'Donohue should have

been permitted to opine on inconsistencies between P.V.M.'s first and second forensic interviews and on Vazquez's motivations.

We find that the district court did not abuse its discretion in limiting Dr. O'Donohue's testimony. "An expert may not comment on the veracity of a witness." *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992); *see also Perez v. State*, 129 Nev. 850, 861, 313 P.3d 862, 870 (2013) ("A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness."). Additionally, while an expert may use inadmissible hearsay in the preparation of their report, he may not be used to "effectively introduce . . . un-cross-examined testimonial hearsay into evidence." *Flowers v. State*, 136 Nev. 1, 9, 456 P.3d 1037, 1046 (2020). The district court's order permitted O'Donohue to testify about suggestibility and inconsistencies in forensic interviews broadly but precluded him from opining about perceived inconsistencies between P.V.M.'s two forensic interviews and from introducing inadmissible hearsay. We find that the district court did not manifestly abuse its discretion because its order protected the province of the jury and followed Nevada law on the permissible testimony of experts.

DNA Evidence

Vazquez next argues that evidence of male DNA found on P.V.M.'s vulva and underwear admitted at trial was not relevant. According to Vazquez, the only relevance of the DNA evidence was to demonstrate the thoroughness of the State's investigation, and thus that the trial court should have given a limiting jury instruction to that effect. Vazquez further argues that because the district court did not give a limiting instruction, the State committed prosecutorial misconduct by impermissibly arguing that Vazquez was likely the male who left the DNA evidence.

In response, the State argues that the DNA evidence was relevant because it both showed the thoroughness of the State's investigation and made facts in evidence more probable, specifically the testimonies of P.V.M. and Josephina. The State also argues that it did not commit prosecutorial misconduct during closing arguments because it did not misstate or overstate the DNA evidence, but rather, permissibly commented on how the evidence strengthened the testimony of its witnesses.

We find that the district court did not abuse its discretion when it admitted the evidence of male DNA obtained from P.V.M.'s underwear and vulva. In *Chaparro v. State*, we found that even when inconclusive DNA evidence "may be of minimal probative value to a defendant's guilt or innocence," such evidence "may be relevant to show the jury the thoroughness of the steps taken by law enforcement in order to investigate the victim's account." 137 Nev. 665, 672, 497 P.3d 1187, 1194 (2021). Inconclusive DNA evidence may also "be relevant to the State's presentation of a complete story regarding a particular piece of evidence." *Id.* at 137 Nev. at 672, 497 P.3d at 1194–95. In *Chaparro*, tights worn by the sexual assault victim during the incident were found to contain "a mixture of DNA for which no person could be excluded." *Id.* at 137 Nev. at 672, 497 P.3d at 1194. Although the DNA sample in *Chaparro* was inconclusive, this court determined it was relevant because it showed the thoroughness of the investigation and "completed the story" of the evidence already presented: that the defendant had "pulled down [the victim's] tights and digitally penetrated her." *Id.* at 137 Nev. at 672–73, 497 P.3d at 1194–95 (internal quotation marks omitted).

In the present case, evidence of male DNA tended to show the thoroughness of the investigation and completed the story presented by the evidence. Further, Josephina testified as a witness that she saw Vazquez with his hand down the front of P.V.M.'s leggings and P.V.M. testified that she was abused by Vazquez in exactly that way. As such, the district court did not abuse its discretion by ruling that evidence of male DNA recovered from P.V.M.'s underwear and vulva was relevant.

Vazquez also argues that the State committed prosecutorial misconduct when discussing the DNA results during closing arguments. Because Vazquez did not object to the alleged prosecutorial misconduct, we review for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

We find that the State did not commit prosecutorial misconduct; therefore, there was not a plain error. In closing arguments, "[t]he State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw *reasonable* inferences from the evidence." *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) (emphasis added). In *Valentine v. State*, the prosecutor improperly made direct comparisons between the inconclusive male DNA profile obtained from a firearm and the DNA profile of the defendant, despite the fact that the State's expert on that profile was "emphatic [that] she could make no conclusions, save for her overall conclusion that the evidence was consistent with a mixture of at least two persons, at least one of whom was male." 135 Nev. 463, 472–73, 454 P.3d 709, 718–19 (2019). In this case, the State argued that it was unlikely for male DNA to have come from another male in the household. Unlike the prosecutor in *Valentine*, who argued an inference that was contradicted by the evidence, here, the State permissibly

expressed its views on the evidence and asked the jury to make a reasonable inference therefrom. Therefore, we find no plain error due to prosecutorial misconduct.

P.V.M.'s Hearsay Statements

Vazquez next argues that the district court erred in admitting hearsay statements made by P.V.M. during Josephina's testimony. The State argues that the district court properly admitted P.V.M.'s statements under the excited utterance exception to the hearsay rule. We review a district court's decision to admit evidence for abuse of discretion. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Medina v. State*, 122 Nev. 346, 351, 143 P.3d 471, 474 (2006); NRS 51.095. While the time between the startling event and the statement is an important factor, the operative question is whether the declarant was "still under the stress of excitement caused by the event" when she made the statement. *See Medina* at 122 Nev. at 352, 143 P.3d at 475.

The record demonstrates that the district court admitted and examined the facts and circumstances surrounding P.V.M.'s hearsay statements. Josephina testified that P.V.M. made the statements sometime after the lewd touching and before leaving the family home with law enforcement. Josephina further testified that after the lewd touching—the startling event—P.V.M. was like "a turtle like in her shell." Thus, we find that the district court did not manifestly abuse its discretion when it admitted P.V.M.'s hearsay statements.

Alternative Factual Theory

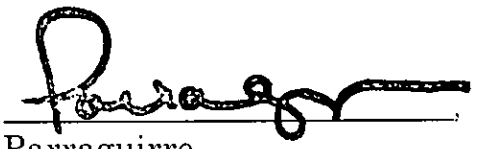
Vazquez argues next that, because the State charged him under two distinct factual theories—that he touched P.V.M.'s vagina lewdly *or* that he touched her upper leg lewdly—it was required to prove both beyond a reasonable doubt but failed to produce sufficient evidence to prove that Vazquez touched P.V.M.'s leg lewdly. "The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution." *Gordon v. State*, 121 Nev. 504, 508, 117 P.3d 214, 217 (2005) (quoting *Domingues v. State*, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996)).

The State presented sufficient evidence that Vazquez lewdly touched either P.V.M.'s vagina, leg, or both. "Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence." *Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001). Josephina testified that she walked in on Vazquez with his hand down the front of P.V.M.'s leggings. P.V.M. testified that Vazquez made her lie down on the bed and rubbed her leg, vagina, and other parts of her body. And Vasquez stated out of court that he touched P.V.M. Even if the jury did not find that there was substantial evidence that Vazquez touched P.V.M.'s vagina, but found that he touched her leg, a reasonable jury could infer the requisite lewd intent from Josephina or P.V.M.'s testimony about Vazquez's actions and demeanor, or from Vazquez's out-of-court statements. Viewing the evidence in the light most favorable to the State, we find that a reasonable jury could conclude that Vazquez lewdly touched P.V.M.'s leg, vagina, or both, beyond a reasonable doubt.

Cumulative Error

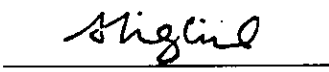
Finally, because we do not recognize any of the errors alleged by Vazquez, there is no cumulative error. *Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Thus, we

ORDER the judgment by the district court AFFIRMED.



_____, J.
Parraguirre

_____, J.
Bell



_____, J.
Stiglich

cc: Hon. David A. Hardy, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk