IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WILLIAM STRAIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89781

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon and battery with a deadly weapon. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge. Appellant Matthew Strain raises four issues on appeal.

Jury instruction

Strain argues the district court erred in failing to instruct potential jurors during voir dire that being charged with a crime is not evidence of that crime. Because Strain failed to object below, we review for plain error. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

After the information was read to the prospective jurors, the district court stated that all defendants are presumed innocent. *See* NRCrP 17(2) (requiring the district court to inform prospective jurors that a defendant is presumed innocent). And, before deliberations, the district court instructed the jury that a charge is not evidence of the defendant's guilt. Strain thus fails to demonstrate plain error. *See Green*, 119 Nev. at 545, 80 P.3d at 95 ("In conducting plain error review, we must examine

whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights."). We therefore conclude no relief is warranted on this ground.

Witness testimony

Strain argues the district court erred in permitting the victim's wife to testify about her reaction to the victim's death because the testimony exceeded the State's offer of proof and was irrelevant. Strain objected to the offer of proof, and the district court, in overruling the objection, stated that Strain could renew the objection if the testimony exceeded the offer of proof. We review this claim for plain error because Strain failed to object to the testimony that exceeded the offer of proof. *Id.*

Testimony describing the victim's wife's reaction to the victim's death was irrelevant and inadmissible. *See* NRS 48.015 (defining relevant evidence); *see also* NRS 48.025(2) (excluding irrelevant evidence). And the error in admitting the irrelevant testimony is plain because the error is "so unmistakable that it is apparent from a casual inspection of the record." *Burnside v. State,* 131 Nev. 371, 402, 352 P.3d 627, 649 (2015) (internal quotation marks omitted). But because the State presented overwhelming evidence and Strain has otherwise failed to demonstrate how the error affected his substantial rights, the error does not merit reversal under NRS 178.602. *See also Green*, 119 Nev. at 545, 80 P.3d at 95 ("[T]he burden is on the defendant to show actual prejudice."). No relief is therefore warranted on this ground.

Judicial estoppel

Strain argues the district court erred in failing to apply judicial estoppel to prohibit the State from asserting two different positions. Strain asserts that the State should have been estopped from arguing at trial that

Strain was coherent at the time of the killing because the State moved the district court to forcibly medicate Strain for psychosis in the days after his arrest. We conclude that judicial estoppel does not apply. *See NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (stating that judicial estoppel applies when a party takes two inconsistent positions to obtain an unfair advantage). The State's two positions are not inconsistent because they describe Strain's mental state at two different times. *See Johnson v. State*, 117 Nev. 153, 165, 17 P.3d 1008, 1016 (2001) (observing that a defendant's mental state may be fluid and change over the course of a trial). The district court therefore did not err in determining that judicial estoppel did not bar the State's argument at trial regarding Strain's mental state. *NOLM, LLC*, 120 Nev. at 743, 100 P.3d at 663 ("Whether judicial estoppel applies is a question of law subject to de novo review." (internal citation omitted)). Therefore, no relief is warranted on this ground.

Cumulative error

Strain argues that cumulative error deprived him of a fair trial. Because we discern only one error, "there is nothing to cumulate." *Belcher v. State,* 136 Nev. 261, 279, 464 P.3d 1013, 1031 (2020). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Bell

_____, J.
Stiglich

_____, J.
Cadish

cc: Hon. Leon Aberasturi, District Judge
Ristenpart Law
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk