



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH MANUEL ORTEGA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90354-COA

*ORDER AFFIRMING IN PART, REVERSING
IN PART AND REMANDING*

Joseph Manuel Ortega appeals from a judgment of conviction, entered pursuant to jury verdict, of child abuse, neglect, or endangerment with the use of a deadly weapon; five counts of child abuse, neglect, or endangerment; and coercion constituting domestic violence. Eighth Judicial District Court, Clark County; Hon. Kathleen E. Delaney, Judge.

Ortega argues he is entitled to relief because: (1) the State failed to present sufficient evidence at trial to convict him of the six counts of child abuse, neglect, or endangerment; (2) the district court erred by admitting the testimony of two witnesses; (3) the district court erred in instructing the jury; (4) the State committed prosecutorial misconduct during closing argument; and (5) the cumulative effect of the errors deprived him of a fair trial.

Sufficiency of the evidence

Ortega argues the State failed to present sufficient evidence to convict him of the six counts of child abuse, neglect, or endangerment. When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979);

accord Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

For count one, the State was required to prove that Ortega willfully caused a child, I.O., Ortega’s son, to suffer unjustifiable physical pain or mental suffering, or to be placed in a situation where I.O. may suffer physical pain or mental suffering, as a result of abuse or neglect with the use of a deadly weapon. See NRS 193.165; NRS 200.508(1). The State alleged Ortega willfully caused I.O. to suffer unjustifiable physical pain or mental suffering or to be placed in a situation where he might suffer physical pain or mental suffering by brandishing a firearm or pointing a firearm at I.O.

At trial, the State presented the testimony of I.O. I.O. testified he was sitting on the couch with his two-year-old brother (J.O.) when he saw Ortega in the backyard. I.O. testified he saw a black firearm in Ortega’s hand and watched Ortega raise the firearm and point it at him or in-between him and his brother. I.O. was scared his father would shoot him and his brother, so he covered himself and his brother with a blanket. Ortega’s wife and I.O.’s mother, Rosa, testified that she and Ortega had been arguing that day and also exchanged firearms. She testified that she locked Ortega out of the home. Video footage showed Ortega with a black firearm in the front yard. Rosa testified Ortega then moved to the backyard. Rosa testified she saw Ortega waving his hand around, but she could not say whether he had a firearm in his hand or not. She also testified she saw I.O. cover himself and his brother with a blanket. Later, a black firearm was recovered from the backyard. Viewing the evidence in the light most favorable to the State, we conclude that a

rational juror could have found the elements of child abuse, neglect or endangerment with the use of a deadly weapon. Accordingly, we conclude Ortega is not entitled to relief on this claim.

For counts two through five, the State was required to prove that Ortega willfully caused I.O., J.O., C.V. (I.O.'s cousin), and L.V. (I.O.'s cousin) to suffer unjustifiable physical pain or mental suffering or to be placed in a situation where they may suffer physical pain or mental suffering, as a result of abuse or neglect. *See* NRS 200.508(1). The State alleged Ortega willfully caused I.O., J.O., C.V., and L.V. to suffer unjustifiable physical pain or mental suffering or placed them in a situation where they might suffer physical pain or mental suffering by leaving a firearm in the backyard where they had access to it.

The day after the incident outlined above, a black firearm was found next to the children's trampoline in the backyard. It was found by Rosa after Ortega called and told her he left a firearm in the backyard by the trampoline. I.O. testified he also saw the firearm in the backyard while he, his brother, and his cousins were playing. The cousins' mother also testified that she was home with all four children the day after the incident and that the children likely played in the backyard. Further, testimony was presented that the children routinely played outside in the backyard. Viewing the evidence in the light most favorable to the State, we conclude that a rational juror could have found the elements of child abuse, neglect or endangerment. Accordingly, we conclude Ortega is not entitled to relief on this claim.

For count six, the State was required to prove that Ortega willfully caused J.O. to suffer unjustifiable physical pain or mental suffering, or to be placed in a situation where J.O. may suffer physical pain or mental suffering, as a result of abuse or neglect. *See* NRS 200.508(1). The State alleged Ortega

willfully caused J.O. to suffer unjustifiable physical pain or mental suffering or to be placed in a situation where he may suffer physical pain or mental suffering by slapping J.O. Ortega argues, inter alia, that the State failed to demonstrate Ortega slapped J.O. because Rosa testified there was no mark on J.O. The State presented a text Ortega sent to Rosa stating he had “just slapped J.O. in the face entirely too hard for peeing on himself.” But “[c]onfessions and admissions of the defendant may not be used to establish corpus delicti absent sufficient independent evidence.” *Sheriff v. Middleton*, 112 Nev. 956, 962, 921 P.2d 282, 286 (1996). And Rosa testified that, when she saw Ortega and J.O. shortly after Ortega sent the text, J.O. did not have any marks on his face. Further, J.O. did not testify at trial nor did any other witness testify about Ortega slapping J.O. The State did not present independent evidence from Ortega’s text to establish the corpus delicti for this charge but relied solely on Ortega’s admission to prove guilt. Therefore, we conclude the State failed to present sufficient evidence for this charge, and we reverse Ortega’s conviction on count six.

Evidentiary issues

Ortega argues the district court erred by allowing evidence that was speculative, hearsay, and beyond the personal knowledge of the witness. Ortega claims the district court should not have allowed Rosa to testify regarding her conversation with I.O., in which I.O. told her that he, J.O, C.V., and L.V. found the firearm in the backyard. Ortega argues that, other than I.O., none of the children testified that they saw the firearm in the backyard, touched the firearm while it was in the backyard, or were present when the firearm was in the backyard and therefore Rosa should not have been allowed to testify that I.O. told her “they” had seen the firearm in the backyard or to speculate that “they” meant J.O., C.V., and L.V.

Ortega did not object to this testimony at trial; thus, his claim is forfeited. However, this court may review the forfeited error for plain error. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). To demonstrate plain error, an appellant must show that: “(1) there was an ‘error’; (2) the error is ‘plain,’ meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant’s substantial rights.” *Id.* “[A] plain error affects a defendant’s substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a ‘grossly unfair’ outcome).” *Id.* at 51, 412 P.3d at 49.

At trial, Rosa testified that I.O., J.O., C.V., and L.V. played in the backyard nearly every day. Rosa testified that, when she went to retrieve the firearm from the backyard after Ortega told her it was there, I.O. told her “they” had seen the firearm in the backyard. The State asked Rosa if she was aware of who I.O. meant, and Rosa responded L.V., C.V., and J.O. This answer was based on Rosa’s knowledge that the children usually played in the backyard together. Thus, Ortega fails to demonstrate an error that is clear under current law from a casual inspection of the record. Further, I.O. later testified at trial that he was in the backyard with his cousins, L.V. and C.V., and probably his brother, and that they all saw the firearm by the trampoline. Therefore, Ortega fails to demonstrate that his substantial rights were affected. Accordingly, plain error has not been established, and we conclude Ortega is not entitled to relief on this claim.

Next, Ortega argues the district court erred by allowing the detective’s testimony regarding Rosa’s and I.O.’s demeanor during police interviews and testimony that Rosa’s statements to the police were corroborated by the videos she took on the day of the incident. Ortega contends the detective’s testimony was irrelevant, speculative, and tantamount to

vouching. Specifically, Ortega claims the detective's testimony regarding the demeanor of Rosa and I.O. during their interviews was irrelevant, the videos of the interviews were not admitted into evidence, and the detective's testimony that the statements of Rosa and I.O. were corroborated by the video evidence was confusing because the detective also stated the videos did not show the alleged criminal conduct. Further, Ortega claims the detective improperly testified as an expert without being noticed as such.

Ortega did not object to this testimony, and we review this claim for plain error. Even assuming the district court erred by allowing the challenged testimony, Ortega fails to demonstrate his substantial rights were affected. Without considering the detective's testimony, sufficient evidence was presented at trial to convict Ortega of counts one through five and count seven.¹ Therefore, we conclude Ortega is not entitled to relief.²

Jury instructions

Ortega challenges the district court's decision to give two jury instructions. Ortega did not object to the jury instructions below; therefore, this claim is subject to plain error review. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

¹For count seven, coercion constituting domestic violence, the State presented sufficient evidence that Ortega took Rosa's phone in order to force her to take a pregnancy test; thus, satisfying the elements. *See* NRS 33.018; NRS 207.190(1).

²Ortega also argues the district court erred by limiting his cross-examination of Rosa regarding her use of corporal punishment. Because this claim challenges evidence related to count six, and because we have reversed Ortega's conviction for count six for insufficient evidence, we decline to consider this claim on appeal.

First, Ortega argues the district court erred by giving Instruction 10 because it did not properly define willful. Instruction 10 provided that “[w]illful’ means the general intent to commit the crime,” and Ortega argues general intent is not otherwise defined in the jury instructions. Ortega contends Instruction 10 should have included the following language regarding willfulness: “The word ‘willfully’ . . . implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.” *Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984).

Even assuming the district court erred by failing to provide the jury with further explanation regarding the meaning of willful, Ortega fails to demonstrate his substantial rights were affected. Based on the evidence presented at trial, the jury could have found that Ortega had the purpose or willingness to commit the acts of child abuse, neglect, or endangerment alleged by the State. Therefore, we conclude Ortega fails to demonstrate that any error regarding the definition of willfulness in the jury instructions caused actual prejudice or a miscarriage of justice. Accordingly, we conclude Ortega is not entitled to relief on this claim.

Second, Ortega argues the district court erred by failing to instruct the jury on specific intent. Ortega contends that coercion is a specific intent crime and that the failure to explain specific intent versus general intent likely confused the jury. To support his argument, Ortega relies on *Ford v. State*, in which the supreme court concluded that the failure to instruct on the specific intent for pandering constituted plain error and warranted relief. 127 Nev. 608, 625-26, 262 P.3d 1123, 1134 (2011).

Here, the district court did not provide an instruction defining specific intent versus general intent. However, unlike the pandering statute

and instructions provided in *Ford*, Instruction 14 provided the correct specific intent for the crime of coercion. Instruction 14 stated: “The Crime of Coercion is committed when a person unlawfully, *with the intent to compel* another to do or abstain from doing an act which the other person has a right to do or abstain from doing.” (Emphasis added.) The jury was also instructed the State had the burden to prove “beyond a reasonable doubt every element of the crime charged.” Thus, the jury was correctly instructed regarding the specific intent to commit coercion, and Ortega fails to demonstrate error plain from a casual inspection of the record. Accordingly, we conclude Ortega is not entitled to relief on this claim.³

Prosecutorial misconduct

Ortega alleges the State committed numerous instances of prosecutorial misconduct during closing argument. We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Ortega did not object to these alleged instances of prosecutorial misconduct. Thus, these claims are subject to plain error review. *Id.* at 1190, 196 P.3d at 477; *see also Jeremias*, 134 Nev. at 50, 412 P.3d at 48.

First, Ortega argues the prosecutor improperly vouched for I.O. by making statements such as, “I remember specifically” what I.O. testified about and “I think I.O.’s manner on the stand” Ortega contends these statements improperly placed the prestige of the government behind I.O. to make him appear more believable.

³Ortega also argues the district court erred by failing to give an instruction on parental privilege. Because this instruction only pertained to count six, and because we have reversed count six, we decline to consider this claim on appeal.

“The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of the witness’s veracity.” *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (citation modified). However, the supreme court has recognized that where an “outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness.” *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). We conclude these statements do not constitute error plain from a casual inspection of the record. This case depended on which witnesses were telling the truth, and the prosecutor used reasonable latitude to argue I.O.’s credibility to the jury. Further, the second statement made by the prosecutor, “I think I.O.’s manner on the stand,” is taken out of context. The full passage was, “And I think, I.O.’s manner on the stand, the fact that he had to come and sit here in front of his dad and tell him, even though you’ve been telling me these things are not true and I’m here to tell the truth, consider that in your deliberations.” This statement was not commenting on what the prosecutor thought I.O.’s manner on the stand was like. Instead, this statement asked the jury to consider I.O.’s manner on the stand when deciding credibility and was not inappropriate. Therefore, we conclude Ortega is not entitled to relief on this claim.

Next, Ortega contends the prosecutor misstated I.O.’s testimony and argued facts not in evidence by arguing I.O.’s statements that Ortega denied pointing a gun at I.O. and by interpreting them. Ortega challenges the following statements made by the prosecutor, referencing the testimony of I.O.:

- (1) “my dad, to this day, my dad tells me he never did that. To this day. But he did. He pointed a gun at me, I saw. But to this day, he tells me he didn’t”;
- (2) “Who is apparently to this day, telling his child a witness in the State’s case,

a victim in the State's case, that nothing happened"; (3) "The defendant who has every motivation in the world to have his kid get up there and say, yeah, my dad says he didn't point a gun at me"; and (4) "even though you've been telling me these things are not true and I'm here to tell the truth." Ortega also argues that the prosecutor insinuated that Ortega tried to coerce his son not to testify.

We conclude Ortega fails to demonstrate prosecutorial misconduct. At trial, I.O. testified that, "My dad claims he didn't point a gun but a while back he has pointed a gun directly at my family." He also testified that, "To this day, he states it, but I don't believe him." A little later in his testimony, I.O. testified a firearm was pointed at him and "[Ortega] claims to this day that he never did it." Based on this testimony, the arguments by the prosecutor were reasonable inferences from the evidence presented at trial. Further, the prosecutor's argument that Ortega had a motive to keep his child from testifying was made in response to Ortega's argument that Rosa had a motive to have I.O. testify at trial. *See Pascua v. State*, 122 Nev. 1001, 1008, 145 P.3d 1031, 1035 (2006) (concluding a prosecutor's comments during closing argument were in rebuttal to a defendant's closing argument and did not constitute plain error). Therefore, we conclude Ortega fails to demonstrate he is entitled to relief on this claim.

Finally, Ortega argues the prosecutor denigrated the defense and misrepresented defense theories. During rebuttal closing argument, the prosecutor argued that Ortega insinuated Rosa had a motive to have I.O. testify a certain way on the stand. Specifically, the prosecutor argued, "I.O. lives with Rosa, they're getting a divorce, Rosa hates the defendant, and so maybe Rosa told I.O. to state these things, right? That's sort of what we're getting at." This was in direct response to Ortega's argument that "Motive also

comes in with regard to Rosa. What were her motives, interest, and feelings in this case? . . . I need you to ask in your own minds about possible motives in this case. That affects the credibility.” We conclude the prosecutor’s statements were a reasonable response to Ortega’s closing argument. See *Evans v. State*, 117 Nev. 609, 630, 28 P.3d 498, 513 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015); *Pascua*, 122 Nev. at 1008, 145 P.3d at 1035. Further, we conclude the challenged statements by the prosecutor did not misrepresent or denigrate the defense. Cf. *Butler v. State*, 120 Nev. 879, 898-99, 102 P.3d 71, 84-85 (2004) (concluding that statements portraying the defense’s presentation of evidence and defense tactics as a dirty technique and implying that defense counsel acted unethically were improper); *McGuire v. State*, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984) (concluding that statements with no discernable purpose other than to belittle defense counsel constitute misconduct). Therefore, we conclude Ortega fails to demonstrate he is entitled to relief on this claim.

Cumulative error

Ortega argues that the cumulative errors at trial entitle him to relief. Even where multiple errors are harmless individually, their cumulative effect may violate a defendant’s right to a fair trial. *Valdez*, 124 Nev. at 1195, 196 P.3d at 480-81. “When evaluating a claim of cumulative error, [this court] consider[s] the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” *Id.* at 1195, 196 P.3d at 481 (internal quotation marks omitted). But when errors are insignificant or nonexistent, the errors do not warrant relief. See *Pascua*, 122 Nev. at 1008 n.16, 145 P.3d at 1035 n.16 (noting “insignificant or nonexistent” errors do not warrant reversal based on cumulative error). While

the crimes here are serious, the issue of guilt was not close on the counts we are affirming. Further, as to the quantity and character of the alleged errors, they were minor and the cumulative error did not affect Ortega's substantial rights. Thus, we conclude that Ortega fails to demonstrate cumulative error entitles him to relief.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁴


Bulla, C.J.


Gibbons, J.


Westbrook, J.

cc: Hon. Kathleen E. Delaney, District Judge
Attorney General's Office/Carson City
Clark County District Attorney
Liberators Criminal Defense
Eighth District Court Clerk

⁴The State failed to respond to several arguments made in the opening brief, and Ortega requested that this court treat those failures as confessions of error. Having considered Ortega's request, we conclude Ortega is only entitled to the relief outlined above. *See Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010) (stating that the court has discretion as to whether to invoke the confession of error rule).