IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON GUEVARA-PONTIFES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70435

FILED

MAY 04 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Brandon Guevara-Pontifes appeals from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping, battery with the intent to commit sexual assault, and sexual assault. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

At trial, the State contended that Guevara-Pontifes dragged the victim by her hair to his vehicle, drove her to his apartment, forced her to have sex, and bit her. Guevara-Pontifes countered that the victim consented to these activities.[1]

On appeal, Guevara-Pontifes asserts that numerous errors were committed during the proceedings below. Specifically, Guevara-Pontifes claims that: (1) the district court erred in admitting portions of a clinical psychologist's testimony because it was inherently unreliable and invaded the province of the jury, (2) the State committed prosecutorial misconduct, and (3) the district court abused its discretion in imposing lengthy consecutive prison sentences.[2] We disagree.

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[1]We do not recount the facts except as necessary to our disposition.

[2]On appeal, Guevara-Pontifes also challenges the admission of certain inculpatory statements that he made to the police. However, "the record is [not] developed sufficiently . . . to provide an adequate basis for

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Guevara-Pontifes fails to show that the district court abused its discretion in admitting the clinical psychologist's testimony

Guevara-Pontifes argues that the district court erred in permitting a clinical psychologist to testify that the victim exhibited the characteristics of a person who had experienced domestic abuse. Guevara-Pontifes initially objected to this testimony, but subsequently withdrew his objection.

"We review a district court's decision to allow expert testimony for an abuse of discretion." *See Perez v. State*, 129 Nev. 850, 856, 313 P.3d 862, 866 (2013). Furthermore, any claim that has not been preserved for appeal is subject to plain-error review. *See Martinorellan v. State*, 131 Nev. ___, ___, 343 P.3d 590, 593 (2015). Under that standard, an error is "plain" if it is "so unmistakable that it reveals itself by a casual inspection of the record" and is "clear under current law." *See Maestas v. State*, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012). Moreover, reversal is warranted only if "the defendant . . . demonstrate[s] that the error affected his or her

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review" because he did not request a suppression hearing during the proceedings below. *See Wilkins v. State*, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980); *see also Moultrie v. State*, 131 Nev. ___, ___, 364 P.3d 606, 612 (Ct. App. 2015) (footnote omitted) ("Generally, a motion to suppress evidence must be filed to exclude evidence on constitutional grounds."). Further, to the extent that he attempts to assert a standalone Fifth Amendment involuntary confession claim (*i.e.*, one not premised on *Miranda v. Arizona*, 384 U.S. 436 (1966)) and/or a Sixth Amendment claim, he does not cogently argue it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider claims that are not cogently argued and supported with relevant authority).

substantial rights, by causing actual prejudice or a miscarriage of justice." *See Martinorellan*, 131 Nev. at ___, 343 P.3d at 593.

Here, neither of the court decisions upon which Guevara-Pontifes relies establishes that a clinical psychologist cannot render the type of opinion that was provided in this case. *See Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 826 (1992) (finding error where "the State's psychologist testified positively about . . . the veracity of the victim"); *Winiarz v. State*, 104 Nev. 43, 47-51, 752 P.2d 761, 764-66 (1988) (holding that the expert witness should not have been permitted to "directly attack[]" the defendant's credibility by testifying that she was "lying" and "feigning"). Moreover, at trial, defense counsel admitted that the expert was not asked to provide a "specific assessment" of the particular victim or her credibility. Since Guevara-Pontifes does not show that the district court abused its discretion in admitting this testimony, we conclude that he is not entitled to relief under the plain-error standard.[3]

Guevara-Pontifes is not entitled to relief on his claims of prosecutorial misconduct

Prosecutorial misconduct claims call for a "two-step analysis": (1) ascertain whether the prosecutor's conduct was improper; and (2) if so, determine whether the improper conduct warrants reversal. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The standard of review applied during the second step of the analysis "depends on whether the prosecutorial misconduct is of a constitutional dimension." *See id.* at

[3]We need not review Guevara-Pontifes' assertion that this testimony was "inherently misleading and unreliable" because he fails to support it with any cogent argument or citation to relevant authority. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

1188-89, 196 P.3d at 476 (footnote omitted). An error that is not of constitutional dimension merits reversal "only if the error substantially affects the jury's verdict." *See id.* at 1189, 196 P.3d at 476 (footnote omitted). "If the error is of constitutional dimension, then [the reviewing court] appl[ies] the *Chapman v. California* standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* (footnote omitted) (citing *Chapman v. California*, 386 U.S. 18 (1967)). Additionally, if a criminal defendant failed to object to the alleged prosecutorial misconduct at trial or otherwise preserve the error for appeal, then "this court employs plain-error review." *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (footnote omitted).

Here, the prosecutor asked the jury whether he was "the bad guy" for having the victim arrested after she failed to appear at a hearing. Guevara-Pontifes contends that this constituted an improper appeal to the conscience of the community, but even if he is correct, reversal would not be warranted because the district court sustained Guevara-Pontifes' objection to these remarks, and previously instructed the jury that statements, arguments, and opinions of counsel are not evidence. *See Newman v. State*, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013) (holding that jurors presumptively follow such instructions). Therefore, we conclude that these comments did not "substantially affect[] the jury's verdict." *See Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (footnote omitted).

Guevara-Pontifes also contends that the State mischaracterized the evidence when it described the Sexual Assault Response Team ("SART") examiner's testimony as claiming that the victim's bite mark was the worst she had ever seen, and was so serious that it would be included in future SART training sessions. The

prosecutor's characterization, however, had no substantial effect on the verdict because the jury heard the testimony and could have reasonably inferred that the bite mark was more intense and redder than others she had observed.

Lastly, Guevara-Pontifes claims that the State personally attacked defense counsel and demeaned the defense. Guevara-Pontifes failed to timely object to these statements, and fails to demonstrate that he suffered "actual prejudice or a miscarriage of justice." *Martinorellan*, 131 Nev. at ___, 343 P.3d at 593. Quite to the contrary, the remarks were brief and isolated, and merely related to the weight of the defense's character and other evidence.[4] *Cf. Taylor v. State*, 132 Nev. ___, ___, 371 P.3d 1036, 1045-46 (2016) (holding that the use of a PowerPoint slide that had the word "GUILTY" on it did not warrant reversal in part because

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[4]Additionally, Guevara-Pontifes asserts that the State's comments regarding the victim's phone call to emergency services were improper, but fails to include a transcript of the call on appeal. *See Fields v. State*, 125 Nev. 785, 789-90, 220 P.3d 709, 712 (2009) (concluding that the defendant's failure to include certain trial exhibits in his appendix limited the scope of the court's appellate review).

Moreover, we reject Guevara-Pontifes' claim that the State violated his Fifth Amendment privilege by claiming that he was "smiling" during the victim's testimony and by suggesting that the jury should infer from that behavior that he thought that the victim's recantations signified that "[he was] home free." *See Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (holding that the applicable standard "is whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify").

Finally, we have carefully reviewed Guevara-Pontifes' other claims of prosecutorial misconduct, and we conclude that they are either without merit or do not warrant reversal.

"the slide was displayed briefly only at the very end of the prosecutor's closing arguments"); *Butler v. State*, 120 Nev. 879, 897-900, 102 P.3d 71, 84-86 (2004) (vacating a death sentence in part because the prosecutor "portrayed [the defendant's] . . . tactics as a dirty technique in an attempt to fool and distract the jury").

The district court did not abuse its discretion in imposing lengthy consecutive prison sentences

Guevara-Pontifes contends that, at his sentencing hearing, the State impermissibly argued that he should be sentenced more severely based upon his failure to express remorse. But the record indicates that the State merely attempted to undermine his request for leniency by arguing that it contained several inconsistencies. *See Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1032-33 (1997) (concluding that a "district court abused its discretion in relying on the fact that [the defendant] refused to admit his [or her] guilt or show remorse when it imposed the sentence").

Further, this court will not presume that the district court was influenced by the State's other allegedly improper arguments, especially given that the district court's stated reasons for imposing the sentences are independent of these arguments. *See Randell v. State*, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (alteration in original) ("[J]udges spend much of their professional lives separating the wheat from the chaff, and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence."). Therefore, we conclude that the

district court's sentence was not an abuse of its discretion.[5] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

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[5]Guevara-Pontifes also asserts that his convictions should be reversed for the following reasons: (1) the district court erroneously permitted the victim to translate from Spanish to English certain statements Guevara-Pontifes had made during his conversations with her, (2) the State improperly attempted to impeach the victim by asking her whether she recalled making certain out-of-court statements, (3) the State revealed Guevara-Pontifes' pre-trial detainee status by referring to an iWeb visit he had with the victim, (4) the State failed to present sufficient evidence to sustain the instant convictions because the victim was an unreliable witness, and (5) the cumulative effect of the errors that Guevara-Pontifes raises on appeal warrants reversal even if each error is individually harmless. We have carefully reviewed these contentions and conclude that they are without merit.

Furthermore, we remind counsel for both parties that they are obligated to support all of their assertions with citations to the record and/or relevant authority. *See* NRAP 28(a)(10)(A); NRAP 28(b) (collectively providing that both parties must supply "citations to the authorities and parts of the record on which the[y] . . . rel[y]").

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk