IN THE SUPREME COURT OF THE STATE OF NEVADA

GENARO PERRY

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 69139

ROUTING STATEMENT: This case is not presumptively assigned to the Nevada Court of Appeals because it is a direct appeal from a conviction for offenses that include Category B felonies. NRAP 17(b)(1).

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history.

On June 15, 2014, Appellant Genaro Perry was charged by way of Information with the following crimes: Count 1 – Robbery with Use of a Deadly Weapon

(Felony – NRS 200.380, 193.165); Count 2 – False Imprisonment with Use of a Deadly Weapon (Felony – NRS 200.460(3)(b)); Count 3 – Grand Larceny Auto (Felony – NRS 105.228(3)); Count 4 – Assault with a Deadly Weapon (Felony – NRS 200.471(2)(b)); Count 5 – Coercion (Felony – NRS 207.190(2)(a)); Count 6 – Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence (Felony – NRS 200.481, 200.485, 33.018); and Count 7 – Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution (Felony – NRS 199.305). 1 AA 0000-09.

Perry waived his right to a jury and requested a bench trial. 1 AA 00185-86, 00190; 2 AA 00405-06. The bench trial commenced on September 29, 2015. 1 AA 00187. On October 1, 2015, he was found guilty of all seven felony counts. On January 6, 2016, he was sentenced to: Count 1, maximum of 120 months and minimum of 36 months, plus a consecutive sentence of maximum of 120 months and minimum of 36 months for the use of a deadly weapon; Count 2, maximum of 60 months and minimum of 18 months, concurrent with Count 1; Count 3, maximum of 96 months and minimum of 24 months, consecutive to Counts 1 and 2; Count 4, maximum of 60 months and minimum of 18 months, concurrent with Count 3; Count 5, maximum of 60 months and minimum of 18 months, concurrent with Count 4; Count 6, maximum of 48 months and minimum of 18 months, concurrent with Count 5; and Count 7, maximum of 36 months and minimum of 12 months, concurrent

with Count 6, to be served in the Nevada Department of Corrections. 2 AA 00410-27.The district court also ordered restitution in the amount of $18,103.28. Id.

The Judgment of Conviction was filed on January 22, 2016. 1 AA 00407-09. Perry filed a Notice of Appeal on November 4, 2015. On June 21, 2016, Perry filed a Fast Track Statement. The State herein responds.

6. Statement of Facts.

Perry and Corla Carpenter were involved in a six-month relationship from the end of 2013 through mid-April 2014. 2 AA 00226-27. On the night of April 30, 2014, Perry came to Corla's house after she was already in bed, demanding the blood pressure medication he had left behind when they broke up. 2 AA 00228. She eventually let him in but told him that he would have to leave by the morning. 2 AA 00229.

When the morning came, however, Perry started acting aggressively, scaring Corla. 2 AA 00230031. She tried to call for help, but he grabbed her phone and threw it against the wall, telling her that she would not call the police on him. 2 AA 00231-32. She tried to escape to the bathroom; he punched her in the face. 2 AA 00234.

She tried to run away from him but fell down the stairs and landed in the kitchen. 2 AA 00237. He beat and kicked her while she was curled in the fetal position on the kitchen floor. 2 AA 00237-38. Eventually, Perry grabbed a knife that was laying on the stove. 2 AA 00239. When she saw the knife, Corla begged him

not to kill her. Id. Perry took her into the living room at knifepoint and made her sit there for 50 minutes, not moving, while he paced in front of her and made plans to kill her. 2 AA 00239-41.

Perry grabbed Corla's car keys from the living room and marched her to the bathroom. 2 AA 00244-45. He again threatened her, saying that he would kill her if she left the bathroom before she heard the garage door close. 2 AA 00246-47.

As a result of the attack, Corla had two black eyes, a fractured nose, and sore ribs. 2 AA 00254. She was diagnosed with glaucoma due to trauma and had a surgical implant inserted beneath her eyeball to move it back into place because the bone holding it up was fractured. 2 AA 00252-53, 00258. She lost two teeth. 2 AA 00256. She went to two months of physical therapy because the damage to her hip was such that she could not walk well. 2 AA 00253-54. The right side of her face was permanently numb and, after two surgeries, was still suffering from nerve damage. 2 AA 00255.

Corla's car was found one mile away, at an apartment complex that Perry used. 2 AA 00260. He was arrested three weeks later, on May 20, 2014.

Before trial, Perry sought to admit testimony of a security guard at TJ Maxx who witnessed a disagreement between Corla and another customer on July 2, 2012. 1 AA 00168-81. Corla had a knife in her purse at the time. 2 AA 00266. She eventually pleaded guilty to Misdemeanor Assault and Misdemeanor Carrying

Concealed Weapons. Id. The incident occurred over a year before Perry and Corla began dating and almost two years before he attacked her. 2 AA 00226, 00227, 00260. Perry was not present at the TJ Maxx at the time of the incident; he only learned of it later from Corla. 2 AA 00269.

7. Issues on appeal.

I. The district court properly prevented the introduction of the security guard's testimony.
II. The district court properly excluded self-defense instructions for the trier of fact.
III. The district court properly returned a verdict based on sufficient evidence.
IV. There was no cumulative error.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT PROPERLY PREVENTED THE INTRODUCTION OF THE SECURITY GUARD'S TESTIMONY.

A. The District Court Properly Admitted Evidence About State Of Mind

Perry claims that he should be granted relief because the district court erred when it excluded the security guard's testimony. He argues that the guard's testimony was necessary to establish "state of mind", i.e. that Perry had prior knowledge of the incident at TJ Maxx and this knowledge underlay his attack on Corla. FTS at 14-15. 1 AA 0170. However, Perry's assertion that the district court prevented him from establishing his state of mind on the day he attacked Corla is without merit.

When self-defense is an issue and it is necessary to show the state of mind of the defendant at the time of the commission of the offense, specific acts of violence

of the victim, which tend to show that the victim was a violent and dangerous person, may be admitted provided that the specific acts of violence were known to the accused. See, e.g., State v. Sella, 41 Nev. 113, 138 (1917).

Here, the district court allowed evidence showing state of mind. 1 AA 00175. At a hearing 12 days before the bench trial, the court reviewed, among other issues, testimony that would be presented at trial. 1 AA 00168-81. Perry offered that he might assert self-defense to refute the charges against him. 1 AA 00170. After hearing arguments, the district court held that the state-of-mind testimony would be admitted into evidence if Perry asserted self-defense:

> THE COURT: [S]o to the extent that he raises self-defense at trial and seeks to admit evidence about this incident of which he was aware to show what he – to show that it affected his state of mind on this day, I would grant your request.

1 AA 00175.

In Daniel v. State, this Court was concerned that the jury would not believe the defendant's claim of prior bad acts by the victims because such claims were "self-serving." 119 Nev. 498, 516 (2003). Thus, the Court reasoned, the defendant should have been allowed to present corroborating testimony by either cross-examining the victims about the prior bad acts or presenting extrinsic evidence. Id.

Here, the district court resolved this issue by admitting testimony wherein Corla herself admitted what happened at TJ Maxx. Corla testified to both the incident at TJ Maxx and Perry's knowledge of it. 2 AA 00260-62. There is no better

corroborating testimony than that of the victim admitting to the prior bad act. Additionally, Perry cross-examined her about the incident, allowing him to elicit more details to corroborate what he had been told by Corla. 2 AA 00266-69.

Thus, Perry's assertion lacks merit because the district court did, in fact, explicitly give him the very thing he claims he was denied: evidence to argue state of mind. 1 AA 00175. This claim should therefore be denied.

B. The District Court Did Not Abuse Its Discretion In Excluding The Security Guard's Testimony.

Perry further contends that the court abused its discretion in excluding the guard's testimony because additional detail about the TJ Maxx incident would have provided "a more accurate depiction of Mr. Perry's state of mind at the time of their altercation." FTS at 15. This argument is baseless on its face. Perry was not in the TJ Maxx when the incident occurred and did not witness it. He was told about it later *by Corla.* 2 AA 00269. The most accurate depiction of Perry's state of mind would be provided by presenting evidence about what Corla told him after the incident, not by questioning a security guard who never spoke to Perry. Corla was, therefore, a better witness to establish Perry's state of mind and what knowledge he might have had than the security guard was, given that Perry was not present and did not learn about the incident from the guard.

Further, a prior bad act by the victim is not admissible to show an accused's state of mind when the accused cannot establish that he knew about the act. Burgeon

v. State, 102 Nev. 43, 46 (1986). Here, the guard was to provide "additional details" about what happened at TJ Maxx. FTS at 15. However, such testimony would be inadmissible because the guard could not know if Perry had learned those "additional details" through Corla. The district court acknowledged at trial that it had considered the issue of the guard's inability to testify to Perry's knowledge:

> THE COURT: So, I was only allowing information about that incident to the extent that it affected your client's—
> MR. SHETLER: Right.
> THE COURT: –state of mind—
> MR. SHETLER: Right.
> THE COURT: –that day. *So unless he talked to the security guard, I don't see how that would be pertinent to that issue.*

2 AA 00373-74 (emphasis added). The security guard could not establish that Perry knew about these "additional details" and, as such, the guard's testimony could not be used to show state of mind. Burgeon, 102 Nev. at 46. Therefore, the testimony was inadmissible and was properly excluded by the court.

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. It is within the district court's sound discretion to admit or exclude evidence; this Court will not overturn the district court's decision "absent manifest error." Means v. State, 120 Nev. 1001, 1007-08 (2004). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Here, the court thoroughly considered the issues regarding the security guard's testimony, including that the security guard might be able to testify to what happened at TJ Maxx but could not testify about whether Perry knew of those events when he attacked Corla. 2 AA 00373-74.

The district court admitted the best evidence available to establish Perry's state of mind, while avoiding irrelevant or prejudicial testimony. Perry's only knowledge of what happened in TJ Maxx came from Corla. At trial, she admitted the prior bad act and was cross-examined about it, thereby allowing Perry to introduce it as part of his defense. 2 AA 00260-62, 00266-69. The guard's testimony, on the other hand, was inadmissible to show state of mind. Therefore, the court's decision to exclude the guard's testimony was well-reasoned rather than arbitrary or capricious, and the court did not abuse its discretion.

II. THE DISTRICT COURT PROPERLY EXCLUDED SELF-DEFENSE INSTRUCTIONS.

Perry argues he should have been allowed a self-defense instruction. FTS at 17. However, a right to self-defense requires that there be "a reasonably perceived apparent danger" or actual danger, which then entitles a defendant to an instruction on self-defense. Pineda v. State, 120 Nev. 204, 212 (2004).

Here, the parties agreed on tentative jury instructions before the trial, when Perry claimed he would assert self-defense. 1 AA 00185. After both sides rested, but before closing arguments, the district court reviewed the jury instructions with the

parties. 2 AA 00377-80. The State objected to the inclusion of the self-defense instruction on the ground that no evidence had been presented during trial to even infer self-defense. 2 AA 00378. After hearing arguments, the district court held that the record did not support a self-defense instruction because Perry had failed to make even a cursory showing that he had a reasonable perception of apparent danger. 2 AA 00378-79.

Perry claims that, when the State objected to the self-defense instruction, he "argued that there was evidence to support those instructions." FTS at 17. However, in this "argument," he could not articulate exactly what evidence in the record would justify the instruction:

> THE COURT: Okay. Mr. Shetler.
> MR. SHETLER: Your Honor, the evidence itself to support those Instructions, it's a good argument that we didn't establish enough evidence to get to that point. Certainly the victim did not assist us in that endeavor and Officer Braggs [sic] did not – Braggs right; did not say that she saw any evidence.
>
> I will argue in closing that it's possible our officer was slightly biased, with all due respect for her service, and I'll make an argument about that. I – I'm saying everything I think I can.

2 AA 00378. This was the only argument made in favor of keeping the self-defense instruction after the State's objection, and it did not address the district court's concern about lack of evidence in the record supporting that instruction. Having given Perry a chance to respond, the district court then ruled to exclude the instruction. 2 AA 00378-79.

Perry cites Culverson for the proposition that inferring self-defense through the victim's cross-examination at trial should be sufficient to require a self-defense instruction based on apparent danger. FTS at 16-17; Culverson v. State, 106 Nev. 484, 797 P.2d 238 (1990). However, Perry ignores Culverson's requirement that the apparent danger be *reasonable*. Culverson, 106 Nev. at 487-88, 797 P.2d at 239-40.

Here, as the district court explained:

> THE COURT: [T]here is no evidence that Ms. Carpenter made any threat or threatened any kind of violence or held a weapon or said she was going to do anything to cause the Defendant harm. So, I think the State is correct that there is not evidence to support the giving of those Instructions in this case. I just – there just isn't evidence of self-defense.

2 AA 00378-79. Nothing in the record supports even an inference of a *reasonable* perception of apparent danger on Perry's part. Nothing in the record indicates that Corla tried to attack Perry on the day he beat her. 2 AA 00224-00310. There is no evidence establishing that Corla threatened him, either verbally or physically, or that she intended to do him harm. Id. The record belies Perry's claims of either actual danger or a reasonable perception of apparent danger that would entitle him to a jury instruction.

Perry was not entitled to a self-defense instruction because he had no reasonable belief of apparent danger. Therefore, the district court did not err when it excluded self-defense instructions for the trier of fact.

III. THE DISTRICT COURT PROPERLY RETURNED A VERDICT BASED ON SUFFICIENT EVIDENCE.

A. Excluding The Security Guard's Testimony Did Not Affect The Verdict.

Perry's argument that, "[h]ad the Court permitted the introduction of the Security Guard's testimony, the Trier of Fact would have been unable to return a verdict of guilty beyond a reasonable doubt" is nonsensical. FTS at 18.

First, self-defense is not a defense to five of the seven felonies of which Perry was convicted.[1] (Self-defense could only be asserted on the battery and assault charges.) Perry conveniently ignores that he would have been found guilty of five felonies even if (1) the security guard's testimony had been admitted, (2) it had somehow led to a self-defense instruction being given, *and* (3) that instruction had changed the verdict on the battery and assault charges.

More importantly, however, Perry incorrectly assumes that admitting the security guard's testimony would have led to a self-defense instruction, when evidence about the attack itself shows that Perry had no reasonable perception of apparent danger. 2 AA 00378-79. The district court had already admitted state-of-

[1] The five felonies are: Robbery with Use of a Deadly Weapon, False Imprisonment with Use of a Deadly Weapon, Grand Larceny Auto, Coercion, and Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution. Additionally, overturning Perry's conviction on the Battery and Assault felonies would not change his aggregate sentence because those run concurrent to the sentences for the other five felonies, two of which carry a higher sentence than the Battery and Assault charges.

mind evidence. However, state-of-mind evidence alone is not enough when there was no evidence suggesting that Perry was entitled to a self-defense instruction. 1 AA 00168-81; 2 AA 00260-62, 00266-69. The guard could not testify to Perry's state of mind, and he could add no new information about Perry's attack on Corla because he knew nothing about it. Therefore, the guard's testimony, had it been introduced for state of mind, would not have affected the verdict.

B. The Verdict Was Properly Reached Based On Substantial Evidence.

Perry does not challenge the validity of the substantial evidence already in the record underlying his conviction. Where there is substantial evidence in the record to support a verdict, the verdict will not be overturned by an appellate court. See, e.g., Tellis v. State, 85 Nev. 679, 679-80 (1969). Substantial evidence is evidence that, when viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the central elements of the offense. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (*citing* Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 1789 (1979)).

Perry's claim of insufficient evidence asserts only that the guard's testimony would have changed the outcome in this case. As discussed *supra*, that testimony could only possibly be related to the Assault and Battery charges and not the other five felonies. As such the State will address the evidence supporting Perry's guilt solely on those two charges.

Among the evidence the court considered in Perry's conviction for Battery Resulting in Substantial Bodily Harm is that he punched Corla in the face. 2 AA 00234. When she was down on the ground, begging Perry to stop, he continued to kick her. 2 AA 00237. After he kicked and punched her, he cut her hand with a knife. 2 AA 00239.

The court heard testimony from the officer who first responded to the scene. She testified that when she arrived at the house, Corla's right eye was swollen shut, the entire right side of her face was swollen, her nose was bleeding, her lip was bleeding, and her hand was bleeding. 2 AA 00340-41. Corla was so injured that she could not stand while police took pictures of her injuries. 2 AA 00341. As a result of the attack, Corla lost feeling in the right side of her face. She also required a surgical implant beneath her right eye because of the fracture of her orbital bone. 2 AA 00204-08.

The district court also considered evidence supporting Perry's conviction for Assault with a Deadly Weapon including testimony that, after he stopped kicking her, Perry grabbed a steak knife and began swinging it at Corla, eventually injuring her hand. 2 AA 00239. When she saw him grab the knife, Corla began screaming and begging for her life. Id. Her terrified reaction indicates that she was reasonably aware of Perry's impending attack with the knife. Police officers later found the bloody knife in the garage. 2 AA 00362.

Perry offers no reasonable explanation for how or why the guard's testimony would have altered the verdict in this case. There is substantial evidence in the record, unchallenged by Perry, that would allow a rational trier of fact to find that Perry was guilty beyond a reasonable doubt, particularly when viewing the evidence in the light most favorable to the prosecution. Therefore, the court properly returned a verdict based on the substantial evidence showing Perry's guilt.

IV. THERE WAS NO CUMULATIVE ERROR.

Perry argues that he would have been found not guilty if the district court had admitted the security guard's testimony and given a self-defense instruction to the trier of fact. FTS at 18-19. He contends that these two decisions by the court constitute cumulative error that justifies overturning his conviction. Id.

The cumulative error doctrine applies where the Court finds multiple errors that, although harmless individually, cumulate to violate a defendant's constitutional rights. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a finding of cumulative error requires that there be more than one error in a given case.

Cumulative error *cannot* exist where, as here, an appellant has not shown that even one underlying error occurred. McConnell v. State, 125 Nev. 243, 259 (2009). Perry has not asserted a single meritorious claim of error and, as such, there is "nothing to cumulate." Id. Therefore, Perry was not denied a fair trial based on cumulative error, and the district court's Judgment of Conviction should be affirmed.

9. Preservation of the Issue.

The issues were preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points and contains 3,627 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 25th day of August, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Ryan J. MacDonald*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 25, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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