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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHA-RON HAINES, Defendant-Appellant.	No. 17-10059 D.C. No. 2:14-cr-00264-APG-VCF-2 MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted January 17, 2019
San Francisco, California

Before: WALLACE and FRIEDLAND, Circuit Judges, and ADELMAN,** District Judge.

Sha-Ron Haines appeals his convictions for sex trafficking a minor. We address in a separate, published opinion his argument that the district court erred in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Lynn S. Adelman, United States District Judge for the Eastern District of Wisconsin, sitting by designation.

excluding testimony under Federal Rule of Evidence 412. His other arguments are addressed herein. We affirm.

1. We decline to order a new trial based on alleged prosecutorial misconduct.

First, the district court did not abuse its discretion in denying a mistrial based on co-defendant Tyral King's testimony that he met Haines at a youth detention center. *See United States v. Cardenas-Mendoza*, 579 F.3d 1024, 1029 (9th Cir. 2009) ("When there are allegations of prosecutorial misconduct, the court reviews a district court's denial of a mistrial for abuse of discretion."). To obtain a reversal based on prosecutorial misconduct, the defendant must establish both misconduct and prejudice. *United States v. Lloyd*, 807 F.3d 1128, 1167 (9th Cir. 2015). The record does not compel Haines's contention that the prosecutor intentionally elicited this testimony. *See id.* at 1168 ("A prosecutor's inadvertent mistakes or misstatements are not misconduct."). Further, the district court quickly sustained Haines's objection, ordered the jury to disregard the improper testimony, and offered to provide a curative instruction (which Haines declined for strategic reasons). *See United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016) ("A cautionary instruction from the judge is generally sufficient to cure any prejudice from the introduction of inadmissible evidence, and 'is the preferred alternative to declaring mistrial when a witness makes inappropriate or prejudicial remarks[.]'" (quoting *United States v. Escalante*, 637 F.2d 1197, 1203 (9th Cir. 1980)). The district court

was better positioned to evaluate the magnitude of any possible prejudice from the passing mention of the juvenile detention facility, and we will not disturb its decision here.

Second, the district court did not abuse its discretion in denying a mistrial based on a police detective's reference, while testifying about a call between Haines and the victim, J.C., to his "training and experience from listening to jail calls." Haines fails to show that the government deliberately violated the court's previous order not to reference jail calls. More importantly, the district court promptly sustained Haines's objection and struck the testimony. These curative measures were sufficient.

Third, Haines fails to demonstrate that he should be granted a new trial based on improper vouching. During rebuttal argument, the prosecutor said: "Tyral King, you don't want to listen to what he said, I think he was honest – I'm not going to say that – withdrawn." She then recast her statement as "the evidence shows that he was saying that he was honest and truthful." Because Haines did not object to the initial, withdrawn statement, our review is for plain error. *See, e.g.*, *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999). While a prosecutor may not place the prestige of the government behind a witness through personal assurances of the witness's veracity, *id.*, here the prosecutor quickly withdrew the assertion of personal belief and recast her argument in terms of what the evidence showed. The

district court then instructed the jury that the lawyers' arguments are not evidence, that the jury determines witness credibility, and that the jury should use "greater caution" in evaluating King's testimony. These instructions were sufficient; reversal is not required under the plain error standard. *See United States v. Daas*, 198 F.3d 1167, 1178-79 (9th Cir. 1999).

Finally, Haines fails to demonstrate a pattern of misconduct that so affected the jury's ability to consider the totality of the evidence fairly that it tainted the verdict and deprived Haines of a fair trial. *See United States v. Reyes*, 660 F.3d 454, 463 (9th Cir. 2011).

2. The district court properly denied Haines's motion to dismiss based on outrageous government conduct and subornation of perjury regarding J.C.'s grand jury testimony. Dismissing an indictment for outrageous government conduct is limited to extreme cases in which the defendant can demonstrate that the government's conduct violates fundamental fairness and is so grossly shocking as to violate the universal sense of justice. *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013). An indictment obtained through the submission of perjured testimony will be dismissed only if that testimony was material and knowingly presented to the grand jury. *See United States v. Brown*, 347 F.3d 1095, 1098 (9th Cir. 2003). Our review is de novo. *See United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000).

Haines does not explain how the fact that J.C. later changed her testimony about giving Haines money meant the prosecutor knowingly misled the grand jury. Further, even excising J.C.'s grand jury testimony that she gave her money to Haines, sufficient evidence remained to indict; receipt of money is not an element of any of the charges. Finally, Haines cites no authority for the proposition that a government officer engages in the sort of misconduct warranting the extreme remedy of dismissal by pressuring a witness (already under subpoena) to testify, as the detective allegedly did here.

3. Haines argues that the government knowingly presented false testimony at trial when the detective testified that he never called J.C.'s probation officer. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that a due process violation occurs where the state uses false evidence to obtain a criminal conviction). A *Napue* violation requires proving that (1) the testimony was actually false, (2) the government knew or should have known it was false, and (3) the testimony was material. *United States v. Renzi*, 769 F.3d 731, 751 (9th Cir. 2014). Because he did not raise this issue before the district court, Haines must show that any error was plain. *See United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011).

Haines fails to show that detective gave false, as opposed to merely inconsistent, direct testimony. Nor can he show that, even if false, the testimony

was material. Haines cross-examined the detective about the additional calls he made, permitting the jury to fully evaluate the issue. *See Renzi*, 769 F.3d at 752.

4. We find no reversible error in the district court's evidentiary rulings, which we review for abuse of discretion. *United States v. Mikhel*, 889 F.3d 1003, 1035 (9th Cir. 2018).

First, the district court did not abuse its discretion in admitting the phone call between Haines and J.C. The government did not disclose the call prior to trial because it did not know of its existence until it debriefed King the Friday before trial; the detective was able to authenticate the call based on his familiarity with Haines's voice, *see United States v. Ortiz*, 776 F.3d 1042, 1044-45 (9th Cir. 2015); and the detective did not narrate the call, as Haines alleges, but rather merely identified the speakers. J.C. also authenticated the call at trial.

Second, the district court did not violate Haines's confrontation rights by allowing "hearsay" testimony that J.C.'s mother, not the investigating detective, reported J.C.'s use of social media to J.C.'s probation officer, resulting in J.C.'s arrest shortly before her grand jury appearance. This testimony was not offered for the truth of the matter – that J.C. really was on social media – but rather to show why J.C. was arrested. *See United States v. Wahchumwah*, 710 F.3d 862, 871 (9th Cir. 2013).

Third, the district court did not abuse its discretion in refusing to allow Haines to admit the minutes of a juvenile court hearing at which J.C. was released, which indicated that J.C. testified before the grand jury earlier that day. Haines argues that the document should have been admitted as a business or public record, but he admitted in the district court that he did not have a records custodian or certification for the document, *see* Fed. R. Evid. 803(6), and he does not even address the "hearsay within hearsay" issue that troubled the district court, *see* Fed. R. Evid. 805. In any event, Haines got this evidence in through J.C.'s probation officer, so any error was harmless.

Fourth, the district court did not err in allowing J.C.'s probation officer and advocate to testify that J.C. never advised them of the detective's alleged coercion. Testimony that a declarant did *not* say something is not hearsay. Further, J.C. herself testified that she did not report the coercion to these people, so any error was harmless.

Finally, the district court did not err in allowing the detective to testify that J.C.'s text messages were indicative of prostitution. Haines cannot show that this amounted to improper expert testimony, rather than lay opinion based on the detective's experience as a vice officer and his knowledge of the investigation. *See United States v. Barragan*, 871 F.3d 689, 704 (9th Cir. 2017).

5. Because the district court committed no reversible error, Haines's cumulative error argument fails as well. *See United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007).

AFFIRMED.