

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JAMES SIMON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43664

FILED

MAY 19 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery constituting domestic violence, third offense. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Michael James Simon to serve a prison term of 12 to 30 months.

Simon contends that the district court abused its discretion in granting, in part, the State's motion to admit evidence of Smith's prior incidences of domestic violence because the State failed to establish clear and convincing proof of the prior acts. Additionally, Simon contends that the district court abused its discretion in admitting the prior bad act evidence because the prejudicial impact of the evidence far outweighed its probative value. We conclude that Simon's contentions lack merit.

NRS 48.045(1) provides that evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that the defendant acted in a similar manner on a particular occasion. But NRS 48.045(2) provides that such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting such evidence, the trial court must conduct a hearing on the record and

determine: (1) that the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.¹ On appeal, we will give great deference to the trial court's decision to admit or exclude evidence and will not reverse the trial court absent manifest error.²

In this case, after hearing arguments from counsel, the district court ruled that the evidence of the prior incidences of domestic violence involving the same victim was admissible to prove motive and lack of mistake, and that the probative value of the prior bad act evidence was not substantially outweighed by the danger of unfair prejudice. We conclude that the district court did not err in so ruling. Further, we note that the State presented clear and convincing evidence of the prior bad acts, namely, the testimony of the victim, as well as her written police statements describing the batteries.³ Accordingly, the district court did not commit manifest error in admitting the prior bad act evidence.

¹Tinch v. State, 113 Nev. 1170, 1175-76, 946 P.2d 1061, 1064-65 (1997).

²See Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

³We note that the evidence was also admissible to prove that the victim-witness was motivated to testify in a certain manner, more particularly, to recant her prior statements describing domestic abuse after reconciling with her husband. See Lobato v. State, 120 Nev. ___, ___, 96 P.3d 765, 770 (2004).

Simon next contends that reversal of his conviction is warranted because the victim referred to five other batteries in violation of Simon's constitutional rights to due process and a fair trial. In particular, the following colloquy occurred:

Prosecutor: At the end of [your police] statement, did you tell the police officers anything else?

....

Victim: On the bottom of the statement where I put it [domestic battery] happened five times, that wasn't true.

Prosecutor: It was a lie?

Victim: I don't remember five other times that we had a fight like that.

Prosecutor: But that was a lie?

Victim: Yeah, ending was, but the statement was true until the end because I don't remember any.

We conclude that the victim's isolated reference to five prior batteries does not warrant reversal of Simon's conviction.

In Thomas v. State, we held that that the admission of witness testimony referencing a defendant's criminal history was harmless error because the statement was unsolicited by the prosecutor, defense counsel had refused the district court's offer to admonish the jury, and there was overwhelming evidence of the defendant's guilt.⁴

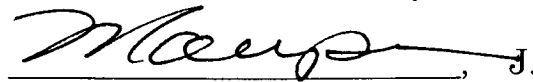
In this case, we conclude that any prejudicial effect of the admission of the testimony was minimized by the fact that the victim expressly stated that her prior statement that Simon had battered her five

⁴114 Nev. 1127, 1141-42, 967 P.2d 1111, 1121 (1998); see also Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281 (1992).

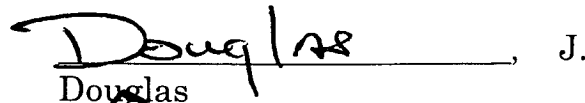
times was a lie. Although Simon did not receive a cautionary instruction,⁵ we are convinced that the victim's testimony involving five prior batteries did not affect the outcome of the proceedings. Accordingly, reversal of Simon's conviction is not warranted.

Having considered Simon's contentions and concluded that they lack merit, we affirm the judgment of conviction. However, our review of the judgment of conviction reveals a clerical error. The judgment of conviction states that Simon was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Accordingly, we

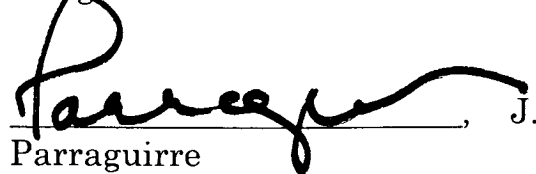
ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.



Maupin



Douglas



Parraguirre

⁵It is unclear from the record on appeal whether defense counsel actually requested a cautionary instruction. Defense counsel discussed the testimony at an unrecorded sidebar conference. After the unrecorded conference, the prosecutor resumed questioning the victim and there was no further testimony about the "five other times."

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk