IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERWOOD GALE JORDAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43927

FILED

NOV 0 2 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On August 10, 2004, the district court convicted appellant Sherwood Jordan, pursuant to a jury verdict, of 20 counts of sexual assault on a minor under 14 years old and 20 counts of lewdness with a child under 14 years old. He was sentenced to serve five consecutive terms of life in prison with the possibility of parole after 10 years for five sexual assault counts, plus 35 additional concurrent terms of imprisonment for the remaining counts. This appeal followed, raising several claims.

Jordan contends that he was incompetent to stand trial because he was left physically and mentally impaired from a stroke he had suffered years earlier. Thus, he maintains that the district court unconstitutionally denied his pretrial motion challenging his competency, despite expert testimony that supported his claim. We disagree.

A defendant is incompetent to stand trial when he is "not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid

and assist his counsel in the defense."[1] When "doubt arises" as to a defendant's competency, the district court shall suspend the proceedings until the question of competency is resolved.[2]

When conflicting expert testimony is presented during a competency hearing, those conflicts are to be resolved by the district court.[3] And this court will affirm a district court's decision regarding a defendant's competence so long as it is supported by substantial evidence.[4]

Here, the district court held a competency hearing on July 13, 2001, pursuant to NRS 178.415. Dr. Thomas Kinsora, a clinical neuropsychologist who had evaluated Jordan's brain function, was the only witness. He testified that Jordan suffered from impaired memory and language abilities. Notably, Dr. Kinsora testified on direct examination that Jordan had an impaired ability "to retain information over a long period of time," and the doctor was "not confident" that Jordan would be able to "remember what he reads after a half hour or 20 minutes." He also testified that Jordan had an impaired ability to both express and process language "beyond the simple one-step command or one- or two-step sentences."

Dr. Kinsora testified further that Jordan had "pretty good" reading comprehension and read "at about the sixth grade level." And he believed that Jordan "understands the charges against him." When he

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[1]NRS 178.400; see Dusky v. United States, 362 U.S. 402, 402 (1960).

[2]See NRS 178.405.

[3]See Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

[4]Id.

was asked by Jordan's counsel whether Jordan would be able to provide meaningful assistance in his defense, Dr. Kinsora replied, "No. I don't really think he'll be able to. . . . I'm not confident that you could get over the language issues and the memory issues and actually have a trial in a smooth and effective manner."

On cross-examination by the State, however, Dr. Kinsora testified that Jordan was not completely impaired and probably could "go through all the facts of the case" with his counsel and be generally asked questions regarding them. He added that Jordan had memory of pre-stroke events, and Jordan could also tell his counsel whether something did or did not truly happen so long as it was phrased simply. It was also revealed that Jordan had written letters to the victim while he was in custody and had provided those letters to his counsel. Dr. Kinsora further testified that Jordan was certainly legally sane—he knew right from wrong and was able to appreciate the nature and quality of his actions. Dr. Kinsora finally added that Jordan's impairments would likely get no better or worse, even with treatment, and that "[he's] reached a plateau."

After Dr. Kinsora's testimony, a stipulation was read into the record that another doctor who evaluated Jordan would have testified at the hearing consistently with Dr. Kinsora. It was further stipulated that witnesses were prepared to testify that Jordan was eventually able to perform a number of activities after his stroke, such as: hold a total of three jobs at various times; drive his car to and from work; manage his own finances, i.e., pay bills, write checks; read the newspaper; watch and understand television; and attend church and work with a youth group.

At the conclusion of the hearing, the district court did not expressly find Jordan competent, but it denied Jordan's motion, indicating

an implicit finding to this effect. We conclude that the relevant evidence presented at the hearing was conflicting, but that substantial evidence supported the district court's decision to deny Jordan's motion. More specifically, although Dr. Kinsora and another defense expert opined that Jordan would be unable to meaningfully assist his counsel in his own defense, the whole of Dr. Kinsora's testimony did not support the conclusion that Jordan was incompetent. And other stipulated evidence revealed during the hearing belied Jordan's claims.

Jordan does not cite to anywhere in the record where he renewed his competency challenge after this initial hearing, despite the district court's permission to do so.[5] He has failed to demonstrate that he is entitled to relief on this matter, and we affirm the district court's decision to deny his motion challenging his competency.

Jordan also contends that he was denied his right to testify on his own behalf because of his incompetence and that the district court failed to adequately admonish him of this right. We disagree.

A criminal defendant has a constitutional right to testify in his own defense at trial.[6] We have stated that district courts should advise every defendant of this right on the record and outside the presence of the

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[5]Jordan also contends that the district court erroneously abandoned a procedure for making him competent during trial whereby a day of recess would occur between witness testimony. Yet, as discussed above, the district court did not find Jordan incompetent, and the record reveals that this idea was merely raised as a suggestion by the district court while discussing the matter at the hearing—it was not ordered to occur.

[6]See Phillips v. State, 105 Nev. 631, 632, 782 P.2d 381, 382 (1989); U.S. Const. amends. V, VI, and XIV.

jury at or near the end of the State's case-in-chief.[7] However, we have also rejected the contention that the failure of the district court to expressly advise a defendant of this right mandates reversal.[8]

Our review of the record reveals that the district court admonished Jordan outside the presence of the jury and near the end of the State's case-in-chief regarding his right to testify. Although some of Jordan's responses during the admonishment were equivocal, the district court provided Jordan's trial counsel with a copy of the admonishment and specifically granted a request to delay the proceedings until the following morning so that counsel could confer with Jordan and ensure that he understood this right before he decided whether to testify. We conclude that the record belies Jordan's claim that he was never admonished of his right to testify in his own defense. Jordan has cited to no evidence in the record suggesting that he was misled or coerced into making this decision.[9] He is also not entitled to relief on this issue.[10]

Jordan further contends that the district court improperly admitted irrelevant and prejudicial evidence of prior acts of domestic violence committed by him. We disagree.

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[7]See Phillips, 105 Nev. at 633, 782 P.2d at 382.

[8]Id.

[9]Id.

[10]Jordan also contends on appeal that he was not properly informed of his constitutional right against self-incrimination. See U.S. Const. amend. V; Nev. Const. art. 1, § 8; see also NRS 178.394. Jordan, however, did not testify in his own defense, and this constitutional right is therefore not implicated.

The admission of evidence rests within the district court's discretion[11] and will not be disturbed on appeal "absent manifest error."[12] Here, the State maintains that Jordan's acts of domestic violence were admissible under NRS 48.035(3). As we explain below, the evidence of Jordan's violence against the victim's mother went to the victim's credibility and was relevant to explain her years of silence about the sexual abuse she suffered. But it was possible for her to describe that abuse without referring to the domestic violence.[13] Thus, we conclude that the evidence of Jordan's prior acts of domestic violence was inadmissible under the narrow scope of NRS 48.035(3), and the State's reliance upon that statute as a basis for admission was in error.

However, a district court's decision to admit evidence will be affirmed on appeal if it reached a right result albeit for an incorrect reason.[14] Here, it appears that the district court may have relied to some extent on both NRS 48.035(3) and NRS 48.045(2) in admitting the evidence of Jordan's domestic violence. Our review of the record reveals that the evidence was admissible as "[e]vidence of other crimes, wrongs or acts" pursuant to NRS 48.045(2).

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[11]See 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).

[12]See Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 697 (2005) (quoting Walker v. State, 116 Nev. 442, 446, 997 P.2d 803, 806 (2000)).

[13]See Weber v. State, 121 Nev. ___, ___, 119 P.3d 107, ___ (2005) (Adv. Op. No. 57, September 15, 2005); Bellon v. State, 121 Nev. ___, ___, 117 P.3d 176, 181 (2005).

[14]See Bellon, 121 Nev. at ___ & n.5, 117 P.3d at 180 & n.5 (citing Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970)).

NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"A presumption of inadmissibility attaches to all prior bad act evidence."[15] Prior to the admission of such evidence, the district court is required to determine in a Petrocelli hearing outside the presence of the jury that (1) the evidence is relevant, (2) it is clear and convincing, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice.[16] The failure to hold a hearing, however, does not constitute reversible error where "the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility."[17]

Here, the victim testified that she did not reveal the sexual abuse to anyone until nearly seven years after it stopped because Jordan had threatened to kill her and her mother if she did and she was afraid of him. Jordan's threats were given substance and believability by the repeated acts of physical violence the victim witnessed Jordan commit upon her mother and the property destruction she witnessed Jordan

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[15]Rosky, 121 Nev. at ___, 111 P.3d at 697.

[16]See Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001); Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

[17]Qualls, 114 Nev. at 903-04, 961 P.2d at 767.

commit around the family's home. That Jordan kept the young victim fearful and silent about the sexual abuse provided him with the "opportunity" to repeatedly commit the abusive acts over a prolonged period of time. We therefore conclude that the evidence of domestic violence was properly admitted under NRS 48.045(2) to show Jordan's opportunity to commit the sexual abuse.

Given that the allegations of abuse first surfaced nearly seven years after it ceased and the absence of physical evidence, why the victim remained silent for so long was highly relevant to the State's case. Four witnesses, including the victim, her mother, her grandmother, and her neighbor, testified about the acts of violence and property destruction committed by Jordan in the family's home. This evidence was clear and convincing. It carried the danger of being unfairly prejudicial, but the victim's credibility in this case was paramount to the jury's determination of guilt or innocence, and any danger posed by the evidence's admission did not substantially outweigh its probative value.

Although the district court did not hold a formal Petrocelli hearing prior to the admission of this evidence, two hearings were held outside the presence of the jury to discuss the relevance and the potential prejudice of this evidence.[18] One hearing was based on the State's motion in limine; the other was held the morning before the trial commenced.

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[18]See Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1281 (2005) (concluding that a district court's failure to make a determination that a defendant's prior bad acts were proven by clear and convincing evidence prior to their admission was error, but not a basis for reversal where such a finding could be implied and was sufficiently supported by the record).

And the district court gave several limiting instructions to the jury verbally, as well as one in writing.

For the reasons discussed above, we conclude that the evidence of Jordan's prior acts of domestic violence was admissible under NRS 48.045(2) and the district court's admission of this evidence, even if partly on an incorrect basis, did not constitute error under the facts of this case.[19]

Jordan finally contends that reversible error occurred when the victim remarked, in response to a question by the prosecutor about when things started quieting down in her family, that "he . . . actually went to jail and everything was—there wasn't anything further—." Jordan objected and moved for a mistrial.

The victim's remark about Jordan going "to jail" was improper. However, we have recently stated that "[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement."[20]

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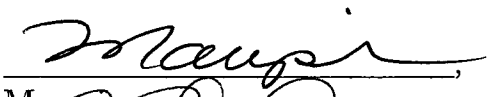
[19]In reaching this conclusion, we recognize that in Bellon we recently disapproved of the State maintaining before the district court that evidence is admissible solely under NRS 48.035(3) to avoid a Petrocelli hearing and then shifting its position on appeal and arguing admissibility under NRS 48.045(2). See 121 Nev. at ___, 117 P.3d at 180. Unlike Bellon, however, in this case the State has maintained on appeal that the evidence was admissible pursuant to NRS 48.035(3) only. Also unlike Bellon, and as discussed above, the record reveals that hearings were held outside the presence of the jury regarding the admissibility of the evidence.

[20]Carter v. State, 121 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 75, October 20, 2005) (citing Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)).

Here, the remark was isolated, the prosecutor did not seek to elicit it, and the district court promptly sought to cure any prejudicial impact by instructing the jury to disregard it. Although made in error, the remark was harmless, and as with his other claims he raises on appeal, we conclude that Jordan has not demonstrated that he is entitled to relief based upon it. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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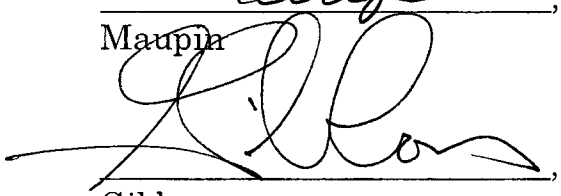

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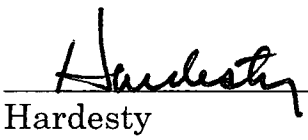

_____, J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General
Clark County District Attorney David J. Roger
Clark County Clerk