

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES PATRICK BARKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51809

**FILED**

NOV 03 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

In March 2006, appellant James Barker was home with five-month-old J.B. At some point in the evening, J.B. suffered blunt trauma to his head. Barker called J.B.'s mother, Angelica Liscano, whom he lived with, and told her that he had fallen down the stairs while holding J.B. Upon her arrival at home, Liscano discovered that J.B. did not appear to be breathing. The couple rushed J.B. to the hospital. At the hospital, Barker admitted to shaking J.B. J.B. did not survive the injuries.

The State charged Barker with open murder by child abuse. A jury convicted Barker of first-degree murder. The district court sentenced him to life in prison with the possibility of parole after a minimum of 20 years.

On appeal, Barker raises four issues. He first argues that the district court abused its discretion when it allowed Detective Ed Kilgore to testify that, in his opinion, Barker did not fall down a flight of stairs while holding J.B. Barker next contends that the district court abused its discretion when it allowed Dr. Katherine Raven to testify about evidence

of an old skull fracture suffered by J.B. He further argues that it was an abuse of discretion for the district court to allow two witnesses to testify about Barker's demeanor at the hospital. Finally, Barker claims that the State presented insufficient evidence to support the jury verdict.

As to the issue of Detective Kilgore's testimony, we determine that it was erroneous to allow him to testify that, in his opinion, Barker did not fall down the stairs. However, Detective Kilgore's testimony was not objected to and therefore, was not preserved for appeal. Accordingly, we conclude that the error was not plain and did not affect Barker's substantial rights. We further conclude that Barker's remaining arguments are without merit and therefore affirm the judgment of conviction.

## DISCUSSION

### Detective Kilgore's testimony

Barker argues that the district court abused its discretion when it allowed Detective Kilgore to testify that, upon completing his investigation, it was his opinion that J.B.'s injuries were not a result of a fall down a flight of stairs. However, this issue was not preserved for appeal. Therefore, our inquiry is limited to determining whether the admission of Detective Kilgore's testimony resulted in plain error and affected Barker's substantial rights. Nelson v. State, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007) (explaining that when an issue is not preserved for appeal, this court must determine "whether the error is plain and affected [appellant's] substantial rights"). "As a general rule, an appellant must demonstrate that the error was prejudicial in order to prove that it affected his substantial rights." Id.

In claiming that Detective Kilgore's testimony was improper, Barker relies on Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). In Lord, this court determined that it was error for a law enforcement officer to testify regarding a victim's injuries in a case in which the cause of injury was not apparent; in those instances, a qualified medical expert should testify as to medical issues. Id. at 33, 806 P.2d at 551. "[L]ayperson opinion pursuant to NRS 50.265 is not an appropriate vehicle to illuminate the cause of these types of injuries." Id. at 34, 806 P.2d at 551.

Here, Detective Kilgore testified specifically as to what he believed was not the cause of death. He testified that the inconsistencies in Barker's story; the search of the home, including the blood smears and the carpeting on the stairs; and the extent of J.B.'s injuries led him to conclude that the cause of death was not the result of an accidental fall down the stairs. Pursuant to NRS 50.265,<sup>1</sup> Detective Kilgore's testimony was rationally based on his perception. However, he also factored in J.B.'s injuries in making a conclusion that the cause of death could not have been accidental. In this case in particular, in which the cause of the injuries leading to J.B.'s death was called into question, we determine that a qualified medical expert should have testified as to medical issues, not Detective Kilgore.

While we conclude that Detective Kilgore's testimony was contrary to the standards set forth in Lord, we further conclude that this

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<sup>1</sup>NRS 50.265 states that lay witness testimony is limited to "those opinions or inferences which are . . . [r]ationally based on the perception of the witness[ ] and . . . [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."

error did not prejudice Barker's substantial rights. Lord, 107 Nev. at 34, 806 P.2d at 551 ("[W]e cannot conclude that this error prejudiced Lord's substantial rights. There was other strong evidence of guilt."). In this case, we conclude that Barker has not demonstrated actual prejudice because the record contains substantial evidence supporting the jury's verdict. Accordingly, we determine that any error that occurred did not affect Barker's substantial rights.

Dr. Raven's testimony

On appeal, Barker claims that the district court abused its discretion when it allowed Dr. Raven to testify to an old skull fracture that she observed while performing the autopsy on J.B. Barker argues that it was erroneously admitted as prior bad act evidence. His claim is both misguided and meritless.

The district court specifically ruled that the evidence of the old skull fracture could not be admitted as prior bad act evidence, noting that doing so would require a Petrocelli hearing. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 83 P.3d 818 (2004). Rather, the district court found that the evidence was admissible pursuant to NRS 48.035(3), which provides:

Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

The statute codifies the *res gestae* doctrine. Sutton v. State, 114 Nev. 1327, 1331, 972 P.2d 334, 336 (1998). This court has held that

[i]f the doctrine of *res gestae* is invoked, the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995). In determining whether the proffered evidence is “inextricably intertwined with the charged crimes,” this court has considered the contemporaneousness of the evidence in question to the crime charged, whether the two incidents arose out of the same transaction, and whether they “involved the same participants.” Id. at 895, 900 P.2d at 331. This court reviews a district court’s evidentiary rulings for an abuse of discretion. Hernandez v. State, 124 Nev. \_\_\_\_, \_\_\_\_, 188 P.3d 1126, 1131 (2008).

In this case, the crime charged was open murder by child abuse, and therefore, the State had to prove malice. Graham v. State, 116 Nev. 23, 28-29, 992 P.2d 255, 258 (2000) (explaining that “when an enumerated first-degree murder is charged, such as murder by child abuse, the presence or absence of deliberation and premeditation is of no consequence. . . . [I]f done with malice and in an enumerated manner, the killing constitutes first-degree murder by legislative fiat”). This court has observed that in a murder by child abuse case, the “nature of the injuries administered . . . circumstantially establish[ ] the malice requirement.” Id. at 29, 992 P.2d at 258.

The slightly older skull fracture was inextricably intertwined with the charged crime. The State had to prove its theory of first-degree murder by child abuse beyond a reasonable doubt, and a bulk of its evidence was provided by its expert witness, Dr. Raven. Her expert opinion was that J.B. died of severe head injuries—in fact, as many as five blunt injuries. Barker's expert witness, John Plunkett, directly refuted Dr. Raven's opinion, testifying that he believed J.B. suffered, at most, two head injuries and discussing that the nature and number of the skull injuries were closely related and relevant to the crime charged. Since Dr. Raven's expert opinion was that the cause of death was several severe injuries to J.B.'s skull, she could not present her testimony without referring to all of the skull injuries that she discovered during the autopsy. Further, Dr. Raven testified that the fracture in question appeared to be healing, which meant it was slightly older than the other injuries to J.B.'s skull. Accordingly, the older fracture was evidence that was contemporaneous with the injuries related to the crime charged. Moreover, the skull fracture in question had caused the same type of hemorrhaging as the more recent wounds and all of the injuries sustained by J.B. Therefore, because we conclude that the testimony regarding the older skull fracture was inextricably intertwined with the charged crime, we conclude that the district court acted within its discretion when it allowed Dr. Raven to testify regarding the older skull injury.<sup>2</sup>

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<sup>2</sup>Barker further argues that the district court abused its discretion in allowing Diane Schearer and Barbara Hopkins to testify as to his demeanor at the hospital. We disagree. Both witnesses testified as to their opinions, which were rationally based on their perceptions the night  
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Sufficiency of evidence

Barker claims that the evidence presented by the State was insufficient to convict him of open murder. We disagree.

The standard of review for sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Grey v. State, 124 Nev. \_\_\_\_, \_\_\_\_, 178 P.3d 154, 162 (2008) (quoting Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006)).

We conclude that any rational trier of fact could have found Barker guilty of open murder by child abuse because substantial evidence supports that finding. Dr. Raven testified that it was her expert opinion that the cause of death was multiple head injuries. She provided testimony explaining the multiple injuries to J.B.’s skull, eyes, and back. Her autopsy revealed that the child suffered severe trauma to his head and backbone. Further, she also reported bruises consistent with fingerprints on the child’s abdomen. Detective Kilgore provided evidence that there were blood smears throughout the house. He further testified that Barker’s statements about the incident were inconsistent. The State presented photographs of the layout of the apartment, including pictures of a carpeted staircase with no apparent defects. We determine that the

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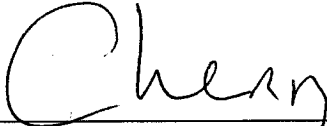
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they interacted with Barker in the emergency room. See NRS 50.265. Accordingly, we determine that Barker’s contentions regarding this evidence fail.


State presented sufficient evidence for a rational mind to conclude that J.B.'s death was not accidental but rather a result of open murder by child abuse.

Having considered Barker's claims and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Richard Wagner, District Judge  
Lockie & Macfarlan, Ltd.  
Attorney General Catherine Cortez Masto/Carson City  
Humboldt County District Attorney  
Humboldt County Clerk