

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILIP MATTHEW O'REILLY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52314

**FILED**

**FEB 03 2010**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Philip O'Reilly contends that the district court erred by prohibiting his expert witness from testifying that when young people are in love they crave attention from the person they love. We will not reverse a district court's decision regarding the admission of expert testimony absent an abuse of discretion. Grey v. State, 124 Nev. \_\_\_, \_\_\_, n.17, 178 P.3d 154, 161, n.17 (2008). We conclude that the district court did not abuse its discretion by prohibiting the proposed testimony because it was not relevant to assist the jury to determine a fact in issue or understand the evidence, see NRS 50.275, and was not "outside the ken of ordinary laity," Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

O'Reilly next contends that the district court erred by: (1) excluding pictures depicting himself and the victim as a happy couple on the morning of the crash, (2) admitting a "My Space" posting he made weeks prior to the crash that graphically demonstrated his "propensity for violence, and (3) admitting evidence regarding the "pursuit intervention

technique” (PIT). We review the district court’s determination to exclude or admit evidence for an abuse of discretion. Mclellan v. State, 124 Nev. \_\_\_, \_\_\_, 182 P.3d 106, 109 (2008). We conclude that the district court did not abuse its discretion by excluding the pictures because this evidence did not make it more or less probable that O’Reilly intended to kill the victim at the time of the crash. See NRS 48.015. We further conclude that the district court abused its discretion by admitting the “My Space” posting because its probative value was substantially outweighed by the danger of unfair prejudice, see NRS 48.035(1), and by admitting the PIT testimony because in the absence of any testimony that O’Reilly knew the PIT was prohibited or was classified as deadly force, the testimony did not make it more or less likely that O’Reilly intended to kill the victim, see NRS 48.015. However, these errors were harmless in light of the overwhelming evidence of guilt. See Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 121-22 (2002). Therefore, we conclude that no relief is warranted.

O’Reilly also contends that the district court erred by prohibiting him from cross-examining the victim regarding her actions after the conclusion of direct examination and by allowing the State to ask improper questions of other witnesses. We note that O’Reilly has cited no authority in support of these contentions, and we conclude that he has failed to demonstrate that the district court abused its discretion.


Next, O’Reilly contends that the district court improperly included jury instruction 8 because it combined intent and malice aforethought and his right to a fair trial was violated because this instruction conflicted with instruction 11. Because O’Reilly did not object to instruction 8, we review this claim for plain error. Quanbengboune v. State, 125 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 56, December 3, 2009). The inclusion of language regarding malice aforethought and intent in

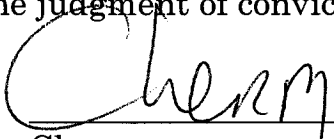
jury instruction 8 was not error because intent must be proven to establish the express malice necessary for an attempted murder conviction. See NRS 200.020(1); NRS 193.330(1); Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272-73 (1988). Further, instruction 8 correctly advised that the State need not prove deliberation and thus did not conflict with instruction 11. Therefore, we conclude that O'Reilly has failed to demonstrate plain error.

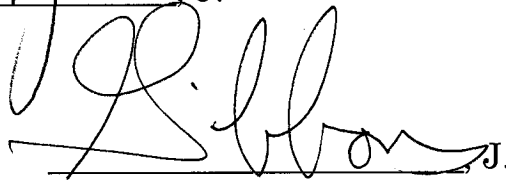
Lastly, O'Reilly contends that prosecutorial misconduct denied him of due process. We disagree. Prosecutorial misconduct occurs when the prosecutor's conduct is improper. See, e.g., Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 476 (2008). The independent actions of the police officer did not constitute prosecutorial misconduct. Moreover, we conclude that O'Reilly has failed to demonstrate any prejudice from the officer's actions.

Having considered O'Reilly's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

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

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

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

cc: Hon. Michelle Leavitt, District Judge  
Justice Law Center  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk