IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC ANTHONY COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53019

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of child abuse resulting in substantial bodily harm and first-degree murder. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The charges against appellant Marc Colon and his girlfriend, Gladys Perez, stemmed from the child abuse and murder of Perez's three-year-old daughter, C.F. A jury convicted Colon on both charges. Colon now appeals the judgment of conviction. On appeal, Colon assigns the following errors: (1) the district court abused its discretion in denying his motion for severance, (2) the district court erred in restricting his cross-examination of Perez's expert, and (3) cumulative error warrants reversal of his convictions.[1]

For the reasons set forth below, we affirm the district court's judgment of conviction. As the parties are familiar with the facts of this

[1]Colon also asserts that the State's second amended superseding indictment was fatally flawed and that the district court gave several erroneous jury instructions. We have carefully considered each of Colon's arguments and conclude that they are without merit.

case, we do not recount them further except as necessary for our disposition.

DISCUSSION

The district court did not abuse its discretion in denying Colon's motion for severance

Colon argues that the district court abused its discretion in denying his motion to sever his trial from that of Perez because they had antagonistic defenses and several of the district court's evidentiary rulings prejudiced him due to his joint trial.[2] We disagree.

We review a district court's decision to grant or deny a motion for severance for an abuse of discretion. Marshall v. State, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). We also review the district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

If two or more defendants participated in the same unlawful act or transaction, the State may charge the defendants in the same indictment or information. NRS 173.135. But, "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." NRS 174.165(1).

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[2]Colon also argues that each of the district court's evidentiary rulings constituted independent abuses of discretion. Because the evidentiary rulings are subsumed within the broad issue of severance, we take up each of Colon's evidentiary challenges in our discussion of severance.

"[C]o-defendants jointly charged are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir. 1978). Joinder promotes judicial economy and tends to prevent inconsistent verdicts. Marshall, 118 Nev. at 646, 56 P.3d at 379. Thus, joinder is "prefer[able] as long as it does not compromise a defendant's right to a fair trial." Id. "The decisive factor in any severance analysis remains prejudice to the defendant." Id. at 646, 56 P.3d at 378. Some form of prejudice often exists in a joint trial, and therefore, establishing that "joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Id. at 647, 56 P.3d at 379. In particular, severance is required "'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" Id. (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Antagonistic defenses

Colon asserts that severance was warranted because the theory of his defense was antagonistic to Perez's defense theory.

"'[M]utually antagonistic defenses are not prejudicial per se.'" Id. (quoting Zafiro, 506 U.S. at 538). Rather, such defenses are a relevant consideration in a severance analysis "but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial." Id. at 648, 56 P.3d at 379.

Colon's defense theory was that Perez abused C.F. and caused the injuries that killed her. In contrast, Perez's defense was that Colon abused C.F., causing her death, and that Perez was prevented from intervening to render aid because she was acting under the duress caused

by Colon. Colon's and Perez's defenses were therefore antagonistic because acceptance of Colon's defense tended to preclude the jury from accepting Perez's; likewise, acceptance of Perez's defense tended to preclude the jury from accepting Colon's.

Although these defenses were antagonistic, such defenses are, in themselves, insufficient to establish prejudice. Id. at 648, 56 P.3d at 379; see Zafiro, 506 U.S. at 538. Moreover, even if there were some risk of prejudice, the district court properly instructed the jury that the State had "the burden of proving beyond a reasonable doubt" that each defendant committed the crimes with which he or she was charged. The jury was also instructed that "[s]tatements, arguments, and opinions of counsel are not evidence." In addition, the jury was instructed that "[e]ach charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offenses charged." These instructions sufficed to cure any prejudice associated with Colon and Perez's antagonistic defenses. See Zafiro, 506 U.S. at 540-41 (the risk of prejudice due to antagonistic defenses can be cured with proper instructions nearly identical to those identified above). Thus, although we agree with Colon that he and Perez had antagonistic defenses, we disagree that this, standing alone, necessitated severance.

Evidentiary rulings

Testimony that Perez suffered from battered-spouse syndrome

Colon argues that the district court should not have permitted Perez's expert, Dr. Paglini, to testify that Perez suffered from battered-spouse syndrome because this testimony vilified Colon and portrayed Perez as an innocent victim. He asserts that this evidence was irrelevant,

was improperly used as a conduit to introduce Perez's hearsay statements, and shows that his motion for severance should have been granted.

In general, "[a]ll relevant evidence is admissible." NRS 48.025(1). "'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Hearsay is not admissible unless it falls within an exception. NRS 51.065. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035.

An expert witness is permitted to rely upon hearsay statements to form the opinions that the expert presents at trial, provided that those statements are the type of evidence "relied upon by experts in forming opinions [on] the subject." NRS 50.285(2). An expert witness may not, however, be used as a mere conduit to introduce the statements of a nontestifying individual. See, e.g., McCathern v. Toyota Motor Corp., 23 P.3d 320, 327 (Or. 2001) (while experts may rely upon hearsay in forming their opinion, that "does not render otherwise inadmissible evidence admissible merely because it was the basis for the expert's opinion").

Here, Dr. Paglini's testimony regarding the effect of battered-spouse syndrome on Perez's mental state was relevant to Perez's defense. To form his medical opinion that Perez's mental state was the result of battered-spouse syndrome, Dr. Paglini relied upon tests that he performed on Perez, testimony presented at trial, and Perez's out-of-court allegations that Colon abused her. Although these allegations were hearsay, Dr. Paglini was permitted to rely upon these hearsay statements under NRS 50.285(2) because clinical psychologists in the field rely upon such statements to form their medical opinions and diagnoses of their patients.

The hearsay statements that Perez made to Dr. Paglini were not introduced at trial. The district court meticulously prevented Dr. Paglini from introducing any such statements and firmly cautioned Dr. Paglini before he testified that he could not testify as to the statements that Perez made to him. Although Dr. Paglini's testimony was, of course, somewhat prejudicial to Colon, this does not mean that one of Colon's specific trial rights was violated. See Zafiro, 506 U.S. at 540 ("[A] fair trial does not include the right to exclude relevant and competent evidence."). Therefore, we conclude that the district court did not abuse its discretion by admitting Dr. Paglini's testimony.[3] Concomitantly, because admission of this evidence did not violate any of Colon's specific trial rights or create an unreliable verdict given the overwhelming evidence against Colon, this evidentiary ruling does not demonstrate that severance was warranted.

Colon's bad acts

Colon contends that the district court should not have admitted evidence of his bad acts—namely, that (1) while they were in Oregon, Colon hit Perez with a cell phone and Perez came out of a bedroom with a black eye following an argument with Colon; (2) while they were in Minnesota, Colon argued with Perez and Perez wore heavy makeup to cover up bruises; and (3) Colon previously had controlled,

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[3]Colon recycles his severance argument regarding Dr. Paglini's testimony and asserts that this testimony violated his right to confrontation. Because Dr. Paglini did not introduce any of Perez's hearsay statements, his testimony did not violate Colon's right to confrontation. See U.S. v. Mitchell, 502 F.3d 931, 966 (9th Cir. 2007) ("The Confrontation Clause does not apply to non-hearsay.").

isolated, and threatened Perez. Colon asserts that this evidence was improperly used to show that he acted in conformity with these bad acts.

NRS 48.045(2) prohibits the admission of evidence of a person's "other crimes, wrongs or acts" for the purpose of proving that he or she "acted in conformity therewith." Such evidence, however, "is admissible if relevant for some other purpose." Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993).

Bad act evidence is presumptively inadmissible. Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1280-81 (2005). To overcome this presumption, the district court must hold a Petrocelli[4] hearing, outside the presence of the jury, to determine "that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

Failure to conduct a Petrocelli hearing is reversible error, "unless '(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.'" Rhymes, 121 Nev. at 22, 107 P.3d at 1281 (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

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[4]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

The district court did not hold a Petrocelli hearing regarding the bad act evidence at issue. Nonetheless, we conclude that the evidence was admissible under the test for admissibility set forth in Tinch.

Testimony regarding Colon's abuse of Perez was not introduced to prove that he acted in conformity with those acts. Rather, it was used to show that, following the murder of C.F., he attempted to cover up the crime and was abusing and controlling Perez because he feared that she might disclose the crime. Thus, the State properly used this testimony to show Colon's consciousness of guilt. See Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979) ("The conduct of an accused which shows consciousness of guilt is admissible, even though it may in itself be criminal.").

Colon's abuse of Perez was proven by clear and convincing evidence. Colon's cousin, who permitted Colon and Perez to stay with her in Oregon, testified that she witnessed Colon strike Perez with a phone. Colon's uncle, who permitted Colon and Perez to stay with him in Minnesota, testified that Perez wore heavy makeup and that he had to get between a heated argument between Perez and Colon. Colon's cousin and uncle were both subject to cross-examination, and Colon failed to present evidence rebutting their testimony.

Next, this evidence was highly relevant to show Colon's consciousness of guilt, as manifested in his attempts to cover up the crime by abusing Perez and restricting her ability to communicate. In addition, the district court offered to give an instruction informing the jury of the limited use of Colon's bad acts, but Colon made a tactical decision to have the district court not give the instruction. See Chavez v. State, 125 Nev.

328, 345, 213 P.3d 476, 488 (2009) (a limiting instruction can alleviate the danger associated with the admission of bad act evidence).

Finally, contrary to Colon's claims, the district court did not admit testimony that Colon had previously controlled, isolated, and threatened Perez. Instead, Dr. Paglini testified that Perez's mental condition was consistent with someone who had been a victim of battered-spouse syndrome. This was proper expert testimony. See Boykins v. State, 116 Nev. 171, 176, 995 P.2d 474, 477-78 (2000) ("Under Nevada law, the effect of domestic violence on beliefs, behavior, and perception of a defendant is admissible to show the defendant's state of mind." (internal quotations omitted)). Perez introduced this evidence to show that she acted under duress, not to show that Colon acted in conformity with his prior bad acts. Accordingly, we conclude that the district court did not abuse its discretion by admitting evidence of Colon's bad acts. Furthermore, because this evidentiary ruling did not compromise any of Colon's specific trial rights, it did not warrant severance.

Perez's bad acts

Colon argues that the district court should not have excluded evidence that Perez hit her other daughter, L.F., during a Thanksgiving gathering and while they were in Oregon. He asserts that evidence that Perez hit L.F. while they were in Oregon was admissible to show Perez's consciousness of guilt.

Although all relevant evidence generally is admissible, NRS 48.025(1), it may be excluded "if its probative value is substantially outweighed by the danger of . . . confusion of the issues or of misleading the jury." NRS 48.035(1). In addition, under NRS 48.045(2), "[e]vidence of

other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

Any probative value of evidence that Perez hit L.F. during a Thanksgiving gathering was substantially outweighed by the danger of misleading the jury. Colon and Perez's guilt or innocence was at issue, not whether Perez was a good or bad mother. Moreover, Colon introduced this evidence to show that Perez acted in conformity with these bad acts, and Colon points to no other purpose for introducing this evidence.

When Perez hit L.F. in Oregon, she was disciplining L.F. for reasons unrelated to concealing the murder of C.F., and therefore, such evidence was not admissible to demonstrate consciousness of guilt. We therefore conclude that the district court did not abuse its discretion by excluding evidence that Perez hit L.F. during a Thanksgiving gathering and while they were in Oregon. Because this evidence would also have been inadmissible as improper character evidence at a separate trial, Colon fails to show any prejudice from the district court's denial of his motion for severance.[5] Colon cannot show any prejudice flowing from his

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[5]Colon also claims that the district court should not have excluded evidence that Perez was an illegal alien and had an altercation with a coworker's wife. Evidence that Perez was an illegal alien had no bearing on the issues at trial. In fact, it had a substantial danger of confusing the jury because it was so attenuated from the issues at trial. Similarly, evidence that Perez had an altercation with a coworker's wife was not relevant because it occurred a considerable amount of time before C.F.'s murder. In addition, Colon introduced this evidence to show that Perez acted in conformity, and he fails to point to any permissible purpose for its admission. Thus, we conclude that the district court did not abuse its discretion by excluding evidence that Perez was an undocumented alien and had an altercation with a coworker's wife.

joint trial because this evidence also would have been excluded in a separate trial, as it would have been irrelevant.

Perez's first statement to police

Colon contends that the district court should not have excluded certain statements made by Perez in her first voluntary statement[6] to police. Specifically, he asserts that he should have been allowed to introduce Perez's statements to police that (1) C.F. had a large bruise on her back due to an accidental fall that occurred before the night of the murder, (2) she spanked C.F. the night before the murder, and (3) she was previously investigated by Child Protective Services (CPS) and worried she would be investigated again. Colon claims that these statements were against Perez's penal interest and thus fell within a hearsay exception.

NRS 51.345(1) provides that statements that are against the declarant's interest are admissible. This court has explained that under this hearsay exception, a statement is admissible, provided:

> (1) at the time of its making, the statement tends to subject the declarant to civil or criminal liability; (2) a reasonable person in that position would not have made the statement unless he believed it to be true; and (3) the declarant is unavailable as a witness at the time of trial.

Walker v. State, 116 Nev. 670, 675, 6 P.3d 477, 480 (2000).

"If the statement is offered to exculpate an accused, however, an additional requirement exists: corroborating circumstances must

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[6]Perez made two voluntary statements to the police, both of which were excluded by the district court.

clearly indicate the trustworthiness of the statement." Id. (emphasis added). The test for determining the admissibility of such a statement is "whether the totality of the circumstances indicates the trustworthiness of the statement or corroborates the notion that the statement was not fabricated to exculpate the defendant." Id. at 676, 6 P.3d at 480.

Here, Perez's statement that C.F. got a bruise on her back from an accidental fall was offered by Colon to prove that C.F.'s injury was accidental and that he was not responsible. Perez's statement that she spanked C.F. the night before the murder was offered by Colon to prove that Perez did, in fact, spank C.F. and that it was therefore more likely that it was Perez who delivered the fatal blows to C.F. The statement that Perez had previously been investigated by CPS was offered to prove that she indeed had been investigated by CPS and was the type of mother who would beat her children. Thus, because Perez's statements were each offered to prove the truth of the matters asserted, they were hearsay.[7]

Perez's statement that C.F.'s bruise came from an accidental fall was not against her interests and thus was not admissible under the hearsay exception contained in NRS 51.345. But her statements that she had spanked C.F. and that she was worried about CPS arguably tended to subject her to criminal liability. At the time Perez made these statements,

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[7]We note that these statements were not exempt from the hearsay rule as party admissions under NRS 51.035(3)(a) because Colon was not a party adverse to Perez. See Weber v. State, 121 Nev. 554, 577, 119 P.3d 107, 123 (2005) (explaining that under NRS 51.035(3)(a), "statements by a party opponent" are exempt from the hearsay rule (emphasis added)). Thus, only the State, not Colon, could introduce these statements under the hearsay exemption contained in NRS 51.035(3)(a).

she had just been arrested and was being questioned by the police about the murder of C.F. Thus, a reasonable person in such a situation would not have made such statements unless they believed them to be true. Finally, Perez was unavailable as a witness because she exercised her constitutional right to not testify. See Funches v. State, 113 Nev. 916, 923, 944 P.2d 775, 779 (1997) (explaining that a defendant who chooses not to testify is considered "unavailable" because the prosecution is constitutionally precluded from compelling him or her to testify).

Colon offered these statements to exculpate himself by shifting blame onto Perez, and thus, under NRS 51.345, these statements were admissible only if the totality of the circumstances clearly indicated that they were trustworthy or that they were not fabricated.

The trustworthiness of Perez's first statement was undermined by subsequent statements that she made to police. In her first statement, Perez indicated that the bruise on C.F.'s back was caused by an accidental fall, but in her subsequent statement, she indicated that she had lied in her first statement and that the bruise was caused by Colon. Thus, the trustworthiness of Perez's statement was suspect. See generally Walker v. State, 113 Nev. 853, 862, 944 P.2d 762, 768 (1997) (statements with inconsistencies are not admissible under NRS 51.075, the general exception to the rule against hearsay for statements containing special assurances of accuracy). Accordingly, we cannot conclude that the district court abused its discretion by excluding Perez's first statement to police. Severance would not have produced a different result because the evidence would still be inadmissible hearsay in a separate trial. Therefore, this evidentiary ruling does not show that Colon's joint trial prejudiced him.

Because none of the district court's evidentiary rulings constituted abuses of discretion, Colon concomitantly fails show that any of his specific trial rights were violated by the district court's denial of his motion for severance. The lack of prejudice to Colon is evinced by the fact that the district court's evidentiary rulings would likely have been identical at a separate trial. Moreover, the reliability of the jury's verdict about Colon's guilt or innocence was not compromised by his joint trial because the State presented overwhelming evidence of his guilt in the form of eyewitness accounts, his own admissions, and his consciousness of guilt as displayed by his flight and attempts to conceal the crime. Accordingly, we conclude that the district court did not abuse its discretion in denying Colon's motion for severance.

The district court did not err in restricting Colon's cross-examination of Perez's expert

Colon recasts his argument regarding the district court's exclusion of Perez's statements to police and contends that his right to confront witnesses was violated when the district court restricted his ability to cross-examine Dr. Paglini. In particular, with regard to Perez's first voluntary statement to police, Colon asserts that he should have been permitted to contradict Dr. Paglini's testimony by cross-examining him regarding evidence that Colon drove Perez and C.F. to the hospital but that Perez did not want to get out of the vehicle because she was frightened that she would be implicated in C.F.'s death. Colon asserts that this would have shown that contrary to Dr. Paglini's testimony on direct examination, he did not control Perez. We disagree.

"Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de

novo." Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006). The right to cross-examination is included within the right to confrontation. Id. This right, however, does not include "limitless cross-examination." U.S. v. Bridgeforth, 441 F.3d 864, 868 (9th Cir. 2006). In United States v. Larson, 460 F.3d 1200, 1207 (9th Cir. 2006), the Ninth Circuit Court of Appeals explained:

> [To] evaluate a claim that the trial court has violated the Confrontation Clause by excluding evidence[, courts should consider]: (1) whether the excluded evidence was relevant; (2) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness.

Evidence that Perez did not want to take C.F. into the hospital was marginally relevant to proving that she was not controlled by Colon. But Colon offered Perez's statement for its truth—that is, to show that Perez did, in fact, refuse to go into the hospital with C.F. Therefore, this statement was hearsay. See NRS 51.035. Thus, Colon was attempting to use cross-examination as a backdoor to introduce inadmissible hearsay. See generally Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999) ("Cross-examination is not . . . a 'universal solvent' that somehow renders all evidence admissible. Substantive evidence introduced during cross-examination must comply with the same requirements as evidence introduced during direct examination." (citation omitted)). Moreover, the reliability of the statements that Colon sought to introduce was questionable because, as previously noted, Perez later indicated that these statements were not accurate. We therefore conclude

that Colon's interest in presenting this evidence was outweighed by legitimate interests in excluding it.

Finally, Colon was not precluded from calling Dr. Paglini's credibility into question on cross-examination. Colon took this opportunity to point out that Dr. Paglini was paid by Perez and had an interest in giving favorable testimony to Perez. Colon cross-examined Dr. Paglini at length and was also able to elicit from Dr. Paglini that although Perez suffered from battered-spouse syndrome, she could make independent choices. Thus, while Colon's cross-examination of Dr. Paglini was not as extensive as Colon would have liked, the jury was left with sufficient information to assess Dr. Paglini's credibility. See Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) ("'[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986))). Accordingly, we conclude that the district court did not err in restricting Colon's cross-examination of Perez's expert.

Cumulative error does not warrant reversal

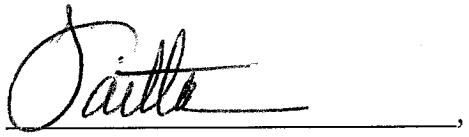
Finally, Colon argues that cumulative error warrants reversal of his convictions. We disagree.

In addressing a claim of cumulative error, this court considers: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Although the crimes with which Colon was charged are serious, as discussed above, Colon failed to demonstrate that there were errors at trial and the question of his guilt is not close.

Therefore, we conclude that cumulative error does not warrant reversal of Colon's convictions.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Saitta

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk