IN THE SUPREME COURT OF THE STATE OF NEVADA

MELANIE ANN OCHS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55618

FILED

OCT 27 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 first-degree murder. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Melanie Ochs was convicted of first-degree murder for the killing of her 7-month-old foster child. On appeal, Ochs argues that (1) the district court abused its discretion in allowing the State's experts to testify concerning the baby's injuries and cause of death; (2) the district court abused its discretion in excluding part of her own expert testimony; (3) the district court improperly introduced character evidence; (4) the jury instructions omitted essential elements of the crime for which she was charged and that they were unconstitutionally vague; (5) the district court erred by failing to record bench conferences; and (6) cumulative error warrants reversal of the judgment of conviction. We conclude that Ochs's contentions lack merit, and we affirm the judgment of conviction.

The parties are familiar with the facts, so we do not recount them except as pertinent to our disposition.

Admission and exclusion of expert testimony

Ochs argues that the district court erroneously permitted testimony from the State's experts regarding force and biomechanical principles in relation to the baby's injuries because that testimony was unqualified and highly prejudicial. Ochs contends that the State's witnesses gave unqualified testimony that failed to assist the trier of fact as required under NRS 50.275, because they lacked training or expertise as biomedical engineers. We disagree.

This court reviews a district court's decision to admit or exclude evidence and its decision whether a witness is qualified to be an expert for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006); Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000). The threshold test for admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. NRS 50.275; Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987). Once this requirement is met, a qualified witness may testify to any matters within the scope of his or her expertise. NRS 50.275.

Ochs's argument presupposes that the State's sole purpose for presenting the expert testimony was to discredit the biomechanical principles underlying her theory of causation.[1] However, the State's case was not about biomechanics. The State's experts testified specifically

[1]A review of the record belies Ochs's suggestion that the State's experts were unqualified. The experts testified based on their first-hand knowledge resulting from treating the baby, inspecting the baby or his records, and their knowledge of available research and data.

about the baby's injuries based on their knowledge from treating him or inspecting his body or CT scans. While one of the State's experts did testify specifically about biomechanics, his testimony was based on the same studies and research on which Ochs's own experts relied. Through their testimony, the State's experts assisted the jury in understanding the nature of the baby's injuries and the possible causes, which were material facts in issue. Therefore, we conclude that the district court did not abuse its discretion in allowing the State's expert testimony.

Additionally, Ochs argues that the district court erroneously excluded expert testimony regarding current medical research on biomechanical principles. In reviewing this contention, we must examine the language of NRS 174.295(2), which states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295, inclusive, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

(Emphasis added.) The State specifically requested the production of any articles Ochs intended to use at trial pursuant to NRS 174.245(1)(c), which requires the disclosure of "[b]ooks, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant . . . within the possession, custody or control of the

defendant . . . ." Ochs neither objected to nor complied with that request.[2] Moreover, Ochs did not designate her expert, Dr. Shuman, as a biomechanics expert, nor did she provide adequate notice that he was going to testify as to the principles of biomechanics. Therefore, we conclude that the district court did not abuse its discretion in excluding Dr. Shuman's expert testimony.[3]

Admission of bad act evidence

Although she did not raise an objection below, Ochs now argues that the district court improperly allowed the admission of evidence of her prior bad acts during the State's questioning of her neighbor, a defense witness. Specifically, she contends that the State had

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[2]Ochs also challenges the district court's interpretation of NRS 174.245 to include turning over documents when an expert proposes to testify as to their contents. She cites to Born v. Eisenman in support of her assertion that the statute does not require each piece of research that an expert relies on to be put into evidence. 114 Nev. 854, 861, 962 P.2d 1227, 1231 (1998). However, Born does not deal with the issue of introducing evidence that was not previously disclosed. Id. Here, during direct examination, Ochs's expert proposed to testify regarding the contents of articles that were not previously disclosed to the State. The trial court found that Ochs was in effect attempting to introduce those articles into evidence. We conclude that the district court did not abuse its discretion in excluding the testimony regarding these previously undisclosed articles.

[3]Ochs also contends that the district court abused its discretion by allowing the State's experts to give their opinion on her guilt or innocence. Because Ochs failed to object below, we will not review her contention on appeal. See Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996).

no basis for questioning her neighbor and that the admission of these prior bad acts was prejudicial. We disagree.

A failure to object during trial generally precludes appellate review. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). However, we have the discretion to review an unpreserved error where the error is plain and it affected a defendant's substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001); see NRS 178.602. Plain error is error "so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotations and citations omitted).

The record reveals that the State only presented the evidence in question for impeachment purposes under NRS 48.045(1)(a),[4] after Ochs purposely solicited testimony regarding her good character. Under these circumstances, we conclude that there was no error in the district court's decision to allow the State to question Ochs's neighbor or present evidence of specific instances of conduct for the purpose of impeachment.[5]

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[4]NRS 48.045 states, in pertinent part

> 1. Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) Evidence . . . offered by an accused, and similar evidence offered by the prosecution to rebut such evidence[.]

(Emphasis added.)

[5]Ochs also argues that evidence of these same bad acts was improperly admitted during rebuttal on the last day of trial because it was

continued on next page . . .

Jury instructions

Ochs argues that the jury instructions omitted essential elements of the crime for which she was charged and that they were unconstitutionally vague. There is no evidence that Ochs objected to these instructions, and her argument is based on an isolated reading of the disputed instructions. Read together, the jury instructions contained all of the elements of the charged crimes. Furthermore, Ochs has failed to show prejudice. See Rose v. State, 86 Nev. 555, 558, 471 P.2d 262, 264 (1970). This argument has no merit.

Failure to record bench conferences

Ochs argues that the district court's failure to record bench conferences and off-record substantive discussions (particularly those regarding juror questions) prevented her from demonstrating prejudice before this court. However, the burden is on the appellant to provide an adequate record enabling this court to review assignments of error; it would be illogical to allow Ochs to benefit from a failure for which she is responsible. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004). Moreover, the district court substantially complied with procedural safeguards relating to juror questions, and Ochs has not shown prejudice to warrant reversal. See Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998); Knipes v. State, 124 Nev. 927, 933, 192 P.3d

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. . . continued

irrelevant in the context of the murder case. However, by soliciting rebuttal testimony as to the same subject matter, Ochs opened the door for the State to introduce evidence of these prior bad acts.

1178, 1182-83 (2008). We conclude that these arguments are without merit.

Cumulative error

Ochs argues that the cumulative error in this case is overwhelming and highly prejudicial as to affect the outcome of this case. "'The cumulative effect of errors may violate a defendant's constitutional right to fair trial even though errors are harmless individually.'" Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004) (quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)). As discussed above, Ochs's claims of error have no merit. Accordingly, there was no cumulative error.

Having considered all of Ochs's arguments, we conclude that they lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Robert L. Langford & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk