

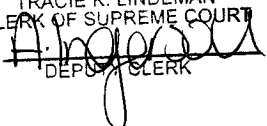
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD EARL NICHOLSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57221

**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 entered pursuant to a jury verdict of one count of burglary while in possession of a dangerous weapon, two counts of battery constituting domestic violence with the use of a deadly weapon resulting in substantial bodily harm, one count of child abuse and neglect with substantial bodily harm, and two counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

First, appellant Richard Earl Nicholson contends that the district court erred by refusing to give the jury an advisory instruction to acquit because the State failed to present sufficient evidence to support the two counts of child abuse and neglect. A district court may give the jury an advisory instruction to acquit if it believes that there is insufficient evidence to warrant a conviction. NRS 175.381(1). We review the district court's decision to give this instruction for an abuse of discretion. Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995). Here, the district court found there was sufficient evidence from which a "jury could determine that these two children were present and would have been witness to some of what was going on," acknowledged that it did not know

whether there was enough evidence for a jury to find Nicholson guilty of the child abuse and neglect charges beyond a reasonable doubt, and denied Nicholson's motion for an advisory instruction. We conclude that the district court did not abuse its discretion by refusing to give the advisory instruction.

Second, Nicholson contends that the district court erred by admitting the testimony of Drs. Michael Brown and Thomas Kim because the State failed to disclose these witnesses as required by NRS 174.234(1)(a)(2). We review a district court's decision to allow an undisclosed witness to testify for abuse of discretion. Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Here, the State's witness list stated that it would be calling the "treating physician" and listed the address for the Sunrise Hospital. At trial, the State argued that Drs. Brown and Kim were the treating physicians, their names were in the medical records that were provided as part of the discovery that Nicholson received three years earlier, and they would not be testifying as experts. The district court ruled that if the doctors' names were in the medical records, they would be allowed to testify. We conclude from these circumstances that the district court did not abuse its discretion by admitting the doctors' testimony.

Third, Nicholson contends that the district court erred by admitting the expert testimony of Dr. Brown because the State failed to make the disclosures required by NRS 174.234(2), Nicholson was unaware of Dr. Brown's existence and did not have an opportunity to interview him, and the district court failed to determine whether Dr. Brown was qualified to testify as an expert. The State responds that Dr. Brown testified as a lay witness and, even if the district court erred in admitting Dr. Brown's

testimony, the error was harmless. The trial transcript reveals that Nicholson objected to Dr. Brown's expert testimony, the district court determined that the doctor was qualified to testify as an expert after requiring the State to lay a foundation, and the doctor's testimony regarding the nature and cause of the comminuted fracture reflected the expert knowledge of a witness with specialized experience, training, and education. See NRS 50.275. There is no indication that the State acted in bad faith by calling Dr. Brown as a witness, see NRS 174.234(3)(b); Mitchell, 124 Nev. at 819, 192 P.3d at 729, and, while the district court erred by admitting the undisclosed expert witness's testimony, the error was harmless because the expert testimony was immaterial to the issues that had to be decided by the jury, see Valdez v. State, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (discussing non-constitutional harmless-error review).

Having considered Nicholson's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.  
Douglas

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge  
Wendy D. Leik  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk