

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY RIGGS, III A/K/A LARRY
EDWARD RIGGS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58505

FILED

FEB 08 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of preventing or dissuading a witness from testifying or producing evidence. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Sufficiency of the evidence

Appellant Larry Riggs contends that insufficient evidence was adduced to support the jury's verdict. We disagree and conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

At the time of the instant offense, another criminal case involving the same victim was pending against Riggs. Although the victim either recanted or testified that she could not recall many of the details pertaining to the incident which led to the instant charges,¹ her handwritten, voluntary statement, properly admitted pursuant to NRS

¹Riggs was also charged with and found not guilty of burglary.

51.035(2)(a), indicated that Riggs told her not to testify against him and threatened to kill her and her family. An investigating officer who responded to the victim's 9-1-1 call the day after the incident testified that the victim told her that Riggs threatened to kill her and her 19-month-old daughter if she testified against him. It is for the jury to determine the weight and credibility to give conflicting testimony, and a jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict. See NRS 199.230(1); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Bad acts evidence

Riggs also contends that the district court erred by allowing the State to introduce evidence of prior bad acts, specifically (1) the details surrounding the earlier criminal case involving the same victim, and (2) that he threatened to kill the victim's neighbor if she allowed her to use the telephone and call 9-1-1 during the instant offense. We agree with Riggs' contention.

First, the State sought to introduce details pertaining to the earlier battery for *res gestae* purposes: "to appreciate how effective [Riggs'] dissuading was" and to prove "that [the victim] had reason to be fearful." See NRS 48.035(3). In the underlying criminal case, it was alleged that Riggs attacked and threatened to kill the victim and her 19-month-old daughter and, at one point, held a knife to the child's throat; he ultimately pleaded guilty to attempted battery with substantial bodily harm. The victim's state of mind, however, is not an element of the instant offense and need not be shown. See NRS 199.230(1). The district court found that the battery was proven by clear and convincing evidence,

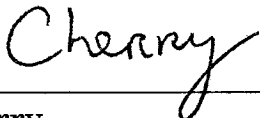
relevant, and an admissible prior bad act. See NRS 48.045(2). The district court, however, did not state for what purpose the evidence was relevant and there is no indication in the record that the district court provided the jury with a limiting instruction either prior to introduction of the evidence or deliberations. See Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001), limited by Mclellan v. State, 124 Nev. 263, 268, 182 P.3d 106, 110 (2008). Further, the State provides no persuasive authority for the proposition that “[i]t is axiomatic that where a defendant faces charges of Witness Tampering or Intimidation, the facts of the underlying crime that motivated the intimidation are admissible as res gestae evidence.” We also note that at the start of the trial, Riggs offered to stipulate to the fact of an underlying, pending case, but the State insisted on presenting its highly prejudicial and irrelevant details. We conclude that the district court abused its discretion by admitting this evidence. See Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008).


Second, the State sought to admit evidence that Riggs threatened to kill the victim’s neighbor if she allowed the victim to use her telephone and call 9-1-1 during the incident which led to the instant charges. The district court overruled Riggs’ objection and found that the evidence was relevant for res gestae purposes under Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59, 63 (1988). We disagree. The evidence was irrelevant to the charged crime, highly prejudicial, and not res gestae. See Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (explaining scope of the res gestae statute); Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005) (noting that application of the res gestae statute is “extremely narrow”). Therefore, we conclude that the district court abused

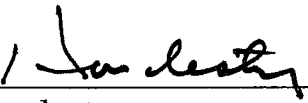
its discretion by admitting this evidence. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

Although we concluded above that the State presented sufficient evidence to support the jury's verdict, it was not overwhelming and the State cannot demonstrate that admission of the bad acts evidence was harmless. See Polk v. State, 126 Nev. ___, ___ n.2, 233 P.3d 357, 359 n.2 (2010) (the burden to prove that an error was harmless rests with the State); see also Valdez v. State, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008) (discussing non-constitutional harmless-error review). Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Cherry


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²In light of the disposition of this appeal, we need not address the several instances of prosecutorial misconduct alleged by Riggs.