

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT THOMSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60169

**FILED**

FEB 28 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction of first-degree murder and burglary, both with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The parties are familiar with the facts of this matter, and therefore we will not recount them except as necessary for our disposition. Appellant David Thomson was convicted of first-degree murder and burglary, both with the use of a deadly weapon, for the murder of Rachael Gandal, his former tenant. During his trial, Thomson alleges three errors occurred.

I.

Thomson first argues that the district court erroneously admitted testimony from the State's forensic ballistics expert that lead fragments recovered from the victim's body and car matched those from a revolver found in a bag with Thomson's gun registration card. Specifically, Thomson challenges the ballistic expert's qualifications and whether his testimony was reliable enough to assist the jury in understanding the evidence or determining a fact in issue.

This court reviews a district court's decision to allow expert testimony for an abuse of discretion. *Perez v. State*, 129 Nev. \_\_\_, \_\_\_, 313 P.3d 862, 866 (2013). When considering whether a witness is qualified to provide expert testimony, the district court may consider many, nonexhaustive factors, such as the witness's formal schooling and academic degrees, licensure, employment and practical experience, and specialized training. *Id.* at \_\_\_, 313 P.3d at 866-67 (citing *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650-51 (2008)); *Higgs v. State*, 126 Nev. \_\_\_, \_\_\_, 222 P.3d 648, 658 (2010). An expert witness's testimony assists the jury when it is relevant and the product of reliable methodology. *Perez*, 129 Nev. at \_\_\_, 313 P.3d at 867. Whether methodology is reliable may be determined by looking at multiple, nonexhaustive factors, including whether the opinion is: (1) within a recognized field of expertise; (2) testable and tested; (3) published and subjected to peer review; (4) generally accepted in its field; and (5) based on facts rather than assumptions or conjecture. *Id.* at \_\_\_, 313 P.3d at 869 (citing *Hallmark*, 124 Nev. at 500-01, 189 P.3d at 651-52); *Higgs*, 126 Nev. at \_\_\_, 222 P.3d at 660.

Here, the ballistics expert was qualified to opine regarding the ballistics evidence in this case. The expert had a degree in criminalistics and had worked in Las Vegas Metropolitan Police Department's forensic laboratory for over 27 years. He also completed a yearlong firearms identification program offered by the Bureau of Alcohol, Tobacco, and Firearms. And, over the course of 6 years he trained within the

laboratory, where he had completed at least 700 firearm and toolmark identifications and various proficiency tests.<sup>1</sup>

Furthermore, the expert's testimony was relevant and reliable, and therefore assisted the jury in understanding the evidence or determining a fact in issue. Firearms identification through ballistics testing is a recognized field of expertise. See *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004) (“[T]he matching of spent shell casings to the weapon that fired them has been a recognized method of ballistics testing in this circuit for decades.”); *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (stating that “the analysis of fingerprints, ballistics, or DNA” assist juries whereas polygraph testing does not). And here, the expert explained his identification methodology in great detail. He also showed the jury the difference between a match, an inconclusive result, and a non-match so they could compare the enlarged microscopic photos of the fragments to photos of the bullets fired from Thomson's revolver. The expert's opinion was based on his subjective interpretation of the facts, rather than mere conjecture. Therefore, Thomson has not shown that the district court committed manifest error in admitting the ballistic expert's testimony in this case.

---

<sup>1</sup>To the extent Thomson argues that the ballistics expert was biased in the prosecution's favor, Thomson had the opportunity to attack his credibility during his cross-examination of the expert. See *Collman v. State*, 116 Nev. 687, 709, 7 P.3d 426, 440 (2000) (affirming the admittance of impeachment evidence where the witness allegedly was biased in the defendant's favor).

## II.

Second, Thomson argues the district court erroneously admitted an irrelevant and unfairly prejudicial photograph depicting Thomson surrounded by pumpkins that presumably he had shot with an assault rifle. In the photograph, Thomson had a shotgun hung over one shoulder, an assault rifle over the other shoulder, and a handgun in his right hand.<sup>2</sup>

This court reviews a district court's decision to admit evidence for an abuse of discretion. *Ramet v. State*, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009). Generally, all relevant evidence is admissible. NRS 48.025. Relevant evidence is "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. But, relevant evidence may not be admissible if the danger of unfair prejudice from the evidence's admission substantially outweighs its probative value. NRS 48.035(1).

Here, the probative value of the photograph is questionable. It is unclear how a depiction of Thomson carrying multiple guns tended to show that Thomson committed the crimes with which he was charged. However, that Thomson was fond of guns and that he owned many guns was not a contested fact at trial. And, the district court found that the photograph was "relatively innocuous" and was not very prejudicial.

---

<sup>2</sup>This photograph was not included in the record before this court. Therefore, we rely upon the statements made at trial about the photograph.

Thus, on the record before us, we cannot say that the district court abused its discretion in admitting the photograph.

III.

Finally, Thomson argues that the district court erred by failing to include a lesser-included jury instruction on murder. District courts have broad discretion to settle jury instructions. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). And here, Thomson failed to object to the lack of a lesser-included instruction. We thus review for plain error, which is found when the error is “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 omitted); *Bonacci v. State*, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980). Such an inspection of the record reveals that Thomson did not request the lesser-included instruction, and that he had the right to pursue his chosen theory of the case, which was that Thomson did not commit the crimes. Thus, the district court’s failure to sua sponte give a lesser-included jury instruction was not plain error.

Finding no reversible error, we

ORDER the district court’s judgment AFFIRMED.

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

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Valerie Adair, District Judge  
Daniel J. Albregts, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

SAITTA, J., concurring in part and dissenting in part:

I dissent from my colleagues' determination that the district court did not abuse its discretion in admitting the photograph of Thomson holding firearms. The photograph was inadmissible, as it lacked relevance, and its probative value, if any, was far outweighed by its prejudicial value and potential for confusing the jury.

My colleagues concede that it is "unclear" how a photo depicting Thomson with firearms shows that he committed the crime with which he was charged. But despite this lack of clarity, they conclude that the district court did not abuse its discretion after noting that Thomson's fondness for and ownership of guns was uncontested at trial and that the district court characterized the photo as "relatively innocuous."

The lack of clarity about how this photograph showed that Thomson committed the crimes with which he was charged indicates its irrelevance and its weak probative value. See NRS 48.015 (defining relevant evidence as that which tends to make a consequential fact "more or less probable"); NRS 48.025(2) (providing that irrelevant evidence is inadmissible); NRS 48.035(1) (providing that relevant evidence is inadmissible when "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury"). I respectfully disagree with my colleagues' conclusion that the photograph was sufficiently relevant and probative because it was indicative of Thomson's uncontested fondness for and ownership of guns. The crimes with which Thomson was charged were crimes that conditioned his guilt on the use of a deadly weapon—not on the use of a deadly weapon that he was familiar with and fond of.

Given its irrelevance and weak probative value, the photograph's prejudicial value and potential for confusing the jury further indicated its inadmissibility. See NRS 48.035(1). Although the district court concluded that the photograph was relatively innocuous, its opinion did not preclude the jury from developing a different perception of the photograph. "Rightly or wrongly, many people view weapons, especially guns, with fear and distrust." *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). A photograph of a firearm may invoke in jurors "irrational fears and prejudices," and thus, such a photograph often has an inherently prejudicial impact that is augmented when multiple firearms are photographed. *Id.* Here, the photograph of Thomson could serve few purposes but to (a) arouse in the jurors an irrational fear or distrust of Thomson and a belief that he should be incarcerated regardless of his guilt or (b) encourage a prejudicial inference that Thomson used firearms in the past and thus used a firearm to commit the charged crimes.

Accordingly, I concur with the order of affirmance except with its conclusion that the district court did not abuse its discretion in admitting the photograph of Thomson holding firearms.



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