

IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDA KAY CARBARY A/K/A LINDA  
KAY JONES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36038

FILED

AUG 21 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *Richard*  
CHIEF DEPUTY CLERK

Linda Kay Carbary appeals her judgment of conviction for the murder of her husband. We conclude that none of Carbary's arguments has merit, and accordingly, we affirm her judgment of conviction.

First, Carbary asserts that the district court erred when it instructed the jury on attempted murder because the court used a generic attempted crime instruction, instead of a specific attempted murder instruction. Additionally, Carbary argues that the district court supplied the jury with instructions on malice and intent that misled the jury into believing that implied malice was sufficient to support a conviction for attempted murder.<sup>1</sup>

"The district court has broad discretion to settle jury instructions and decide evidentiary issues."<sup>2</sup> Accordingly, this court will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error.<sup>3</sup> However, the "failure to object to

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<sup>1</sup>We note that Carbary did not object to attempted murder, malice or intent instructions at trial.

<sup>2</sup>Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

<sup>3</sup>Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986).

alleged errors at trial generally precludes review of an issue on appeal."<sup>4</sup>  
This court may always address plain or constitutional error on appeal.<sup>5</sup>

We conclude that the district court's use of the attempted crime instruction did not amount to plain or constitutional error because the instruction adequately instructed the jury on the elements necessary to find Carbary guilty of attempted murder. There is no evidence that the jury ignored the unambiguous command of the instruction by deciding that implied malice was enough to support a conviction for attempted murder.<sup>6</sup> Additionally, the intent instruction merely explained to the jury that it is permissible to infer a defendant's intent from her actions.<sup>7</sup> Accordingly, we conclude that the jury was properly instructed with regard to the crime of attempted murder.

Second, Carbary asserts that the district court abused its discretion when it denied her motion for a mistrial and excluded evidence of her husband's membership in a survivalist organization. Carbary asserts that the evidence was relevant to her theory of self-defense.

The decision to admit or exclude evidence rests within the

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<sup>4</sup>Mitchell v. State, 114 Nev. 1417, 1426, 971 P.2d 813, 819 (1998).

<sup>5</sup>Id.

<sup>6</sup>See Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (holding that a jury is presumed to follow the instructions that it was given).

<sup>7</sup>See Cooper v. State, 94 Nev. 744, 745, 587 P.2d 1318, 1319 (1978) (holding that the jury could infer that the defendant had a specific intent to kill the victim because the defendant had turned and fired his gun at the victim).

sound discretion of the district court.<sup>8</sup> Accordingly, absent a manifest abuse of that discretion, the district court's decision will not be overturned on appeal.<sup>9</sup> Similarly, a district court's denial of a motion for mistrial rests within the discretion of the district court, and accordingly, the decision will not be overturned unless there is an abuse of discretion.<sup>10</sup>

We conclude that the district court did not abuse its discretion when it excluded the testimony regarding Carbary's husband's membership in a survivalist organization, his gun collection or his bomb making ability because the testimony was not relevant to Carbary's theory of self-defense. NRS 48.055(2) permits the admission of evidence that shows the defendant's state of mind for a claim of self-defense, and NRS 48.045(1)(b) permits the admission of evidence that tends to prove that the victim was the likely aggressor. However, under either provision, the evidence must still be relevant.<sup>11</sup> Here, the excluded testimony did not demonstrate that Carbary's husband had a character for violence or that Carbary had a reasonable basis for believing that her husband was about to shoot her. As noted by the district court, the mere fact that Carbary's husband was a survivalist who collected firearms did not tend to prove that he was violent. Accordingly, we conclude that the district court did

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<sup>8</sup>Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

<sup>9</sup>Id.

<sup>10</sup>Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980).

<sup>11</sup>See NRS 48.025 (providing that relevant evidence is generally admissible, and irrelevant evidence is inadmissible); see also NRS 48.015 (defining relevant evidence).

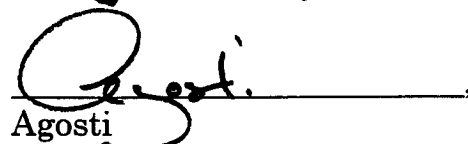
not abuse its discretion by excluding the evidence concerning Carbary's husband.

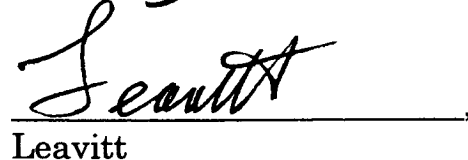
Third, Carbary asserts that the district court should have granted her motion for a mistrial because one of the jurors had been married to a Japanese woman who had pointed a gun at him.

The district court did not abuse its discretion by denying Carbary's motion for a mistrial because the district court questioned the juror extensively, and the juror repeatedly assured the district court that he could be fair and impartial. Although the juror's initial disclosure about his past experiences with his ex-wife raised a legitimate concern, the district court adequately addressed the issue and made a reasonable determination that the juror could be fair and impartial. Therefore, we conclude that there was no probable prejudice under the totality of the circumstances.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, J.  
Young

 \_\_\_\_\_, J.  
Agosti

 \_\_\_\_\_, J.  
Leavitt

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<sup>12</sup>Layton v. State, 91 Nev. 363, 364-65, 536 P.2d 85, 87 (1975) (holding that a district court does not err when it refuses to grant a mistrial so long as there is no probable prejudice under the totality of the circumstances).

cc: Hon. Lee A. Gates, District Judge  
Special Public Defender  
Attorney General  
Clark County District Attorney  
Clark County Clerk