IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER WILFRED HUDON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36897

FILED

DEC 14 2001

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of second-degree murder and battery causing substantial bodily harm. At the sentencing hearing, the State conceded that the battery was not separable from the murder, and the district court sentenced appellant Roger Hudon to serve a term of life in prison with the possibility of parole after ten years for the second-degree murder. Nevertheless, the district court filed a judgment of conviction for both counts.

As this court stated in Hewitt v. State, "[w]here one offense is necessarily included in another, a defendant can be convicted of only one."[1] We conclude that in this case battery causing substantial bodily harm is a lesser included offense of second-degree murder and that the district court erred by convicting Hudon of both counts. Therefore, we reverse the conviction against Hudon for the battery.

Hudon contends the district court erred by admitting certain prior bad act evidence at trial. More specifically, Hudon argues that the evidence in question is impermissible character evidence merely

[1]113 Nev. 387, 391, 936 P.2d 330, 333 (1997), overruled on other grounds by Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999).

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demonstrating his propensity to act in the manner of "a wife beater or killer" and violates NRS 48.045(2).[2] We disagree.

Hudon is correct in stating that evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[3] Nevertheless, NRS 48.045(2) also states that evidence of other bad acts may be admitted at trial "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Prior to admitting the evidence, the district court must determine during an evidentiary hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is substantially outweighed by the danger of unfair prejudice.[4] Further, "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[5]

After reviewing Hudon's contention, we conclude that the district court's determination to admit the evidence of four incidents of verbal and physical domestic violence by Hudon against his wife, the victim, did not amount to manifest error. The district court conducted an evidentiary hearing, applied the three-pronged admissibility test to the evidence offered by the State, and even excluded some evidence which it concluded did not meet the test. As the district court ruled, and in light of Hudon's defense based on accident or mistake,[6] the evidence of Hudon's verbal and physical abuse of the victim was admissible and relevant for

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[2]NRS 48.045(2) provides in part: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

[3]See id.

[4]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996), modified on rehearing, 114 Nev. 321, 955 P.2d 673 (1998).

[5]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000), cert. denied, 121 S. Ct. 1617 (2001).

[6]Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846-47 (1993).

establishing the intent, motive, and absence of mistake or accident. Accordingly, we conclude that the district court acted within its discretion in admitting the evidence.

Hudon next contends that on two occasions the district court erred by allowing a State expert witness to testify that in her opinion the death of the victim was the result of a homicide. Hudon argues that such a determination must be left to the jury.

The first time the State's expert witness, the forensic pathologist who performed the autopsy on the victim, gave her opinion that the victim's death was the result of a homicide was during the State's case-in-chief on direct examination. Counsel for Hudon, however, waived for purposes of appeal any claim of error related to this line of questioning or the testimony by failing to object below.[7]

The second instance of alleged error occurred during the State's redirect examination of the same expert witness. The following exchange took place:

> Q. BY MR. SCHLEGELMILCH: And how did you classify the manner of death?
>
> A. I don't classify means of death. It's the coroner's job.
>
> Q. In your opinion, what was the manner of death?
>
> MR. LAWTON: Your honor, I don't think she's able to have that opinion. She can only tell the cause.
>
> Q. BY MR. SCHLEGELMILCH: That's an opinion you regularly make at your job?
>
> THE COURT: Hang on. There's an objection. What's the response?
>
> MR. SCHLEGELMILCH: Your Honor, it's an opinion that as a pathologist she makes on a daily bases [sic] at the King County Medical Examiner's Office.
>
> THE COURT: Can you answer that question?
>
> THE WITNESS: Yes, I can.
>
> THE COURT: Okay. Overruled.
>
> Q. BY MR. SCHLEGELMILCH: What was the manner of death?
>
> A. In my opinion, it was homicide.

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[7]Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

(Emphasis added.)

Hudon's objection at trial to the expert's opinion was that the forensic pathologist was only qualified to give an opinion as to the cause of death of the victim, and that she was not qualified to give an opinion as to the manner of death. On appeal, Hudon bolsters the same argument by stating that such a determination as to the manner of death must be left to the jury.

This court has stated that "[t]he threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue."[8] Further, "the goal . . . is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity."[9] An expert's opinion would not be admissible, however, if "it transcended the test of jury enlightenment and entered the realm of fact-finding that was well within the capacity of a lay jury."[10]

In this case, the issue at trial was whether the victim's brain trauma which led to her death months later was the result of Hudon pushing her to the floor, or the result of an accidental fall. The expert never stated the basis for her conclusion that the death of the victim was the result of homicide or how it was the result of being pushed rather than accidentally falling. Other than discussing her medical findings and concluding that the victim's eventual death was the result of the initial brain trauma, the expert's testimony never linked any act of Hudon to the injury suffered by the victim. The expert's specialized knowledge in the field of forensic pathology did not allow her to ultimately determine whether the victim was pushed or whether she accidentally fell; by stating that the manner of death was homicide, in effect, the expert bolstered the

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[8]Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); see also NRS 50.295 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

[9]Townsend, 103 Nev. at 117, 734 P.2d at 708.

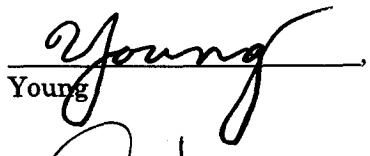
[10]Id. at 118, 734 P.2d at 708; cf. Winiarz v. State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988) (holding that psychiatrist's diagnosis of defendant as murderer went beyond bounds of permissible expert opinion because testimony came very close to answering impermissible question of whether defendant was guilty).

credibility of the State's case. Therefore, we agree with Hudon that the district court erred in allowing the State's expert to opine as to the manner of death.

Nevertheless, we further conclude that the error by the district court in allowing the testimony was harmless beyond a reasonable doubt.[11] The impact of the expert's statement was softened when Hudon's counsel got the expert to admit during recross examination that she did not see how the victim fell, that she relied on what she was told by others concerning the circumstances surrounding the victim's injury, and that the victim was intoxicated. Also, the expert did not impermissibly testify to Hudon's intent. The State provided at trial several witnesses who testified to the events leading to the victim's injury thus allowing the jury to determine the degree of Hudon's participation and the manner of death.

Having considered Hudon's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART, AND WE REMAND THIS MATTER FOR CORRECTION OF THE JUDGMENT OF CONVICTION CONSISTENT WITH THIS ORDER.[12]



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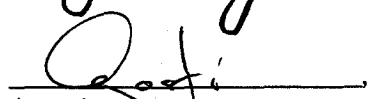

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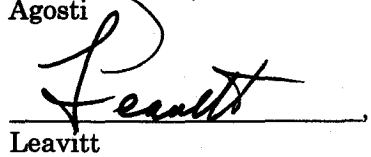

_____, J.
Leavitt

cc: Hon. Archie E. Blake, District Judge
Attorney General/Carson City
Lyon County District Attorney
Rick Lawton
Lyon County Clerk

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[11]See Townsend, 103 Nev. at 118-19, 734 P.2d at 708-09.

[12]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.