

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROSHOUN MALONE, A/K/A ROSHAUN
NATAI MALONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73029

FILED

MAY 18 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Roshoun Malone appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of child abuse, neglect, or endangerment, and one count of child abuse, neglect, or endangerment with substantial bodily harm. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Malone was present when her then-boyfriend, Kenneth Robinson, beat her seven-year-old son to death.¹ Malone did not intervene or attempt to stop Robinson from attacking her son whose hands and feet were bound during the attack. After her son lost consciousness, Malone called 911. The emergency personnel who responded determined that Malone's son was dead when they arrived.

Robinson was charged with murder for the boy's death.² Malone was charged with two counts of child abuse, neglect, or endangerment for acts occurring over a one-month period before her son's death, and second degree kidnapping; and one count of child abuse, neglect, or endangerment with

¹We do not recount the facts except as necessary to our disposition.

²Robinson pleaded guilty to one count of second-degree murder and two counts of child abuse, neglect, or endangerment, and was sentenced to life with the possibility of parole after a minimum of 12 years and 4 months of incarceration.

substantial bodily harm for the acts that occurred on the day of her son's death.

Malone pleaded not guilty and her case proceeded to a jury trial. At trial, Malone testified that she failed to intervene because Robinson had abused her previously and she feared for her life and the lives of her other children. The district court instructed the jury on the defense of duress.

Ultimately, the jury found Malone guilty of the two counts of child abuse, neglect, or endangerment, and the one count of child abuse, neglect, or endangerment with substantial bodily harm. The district court entered its judgment of conviction imposing an aggregate sentence of 10 to 26 years of incarceration on Malone.

Malone appeals from the judgment of conviction raising two issues. First, she argues the district court improperly limited the scope of voir dire during jury selection. Second, she argues the district court abused its discretion by excluding part of her testimony as inadmissible hearsay.

The district court did not abuse its discretion by limiting the scope of voir dire during jury selection

“Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion, and draw considerable deference on appeal.” *Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (internal citation and quotation marks omitted). “The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court.” *Johnson v. State*, 122 Nev. 1344, 1354, 148 P.3d 767, 774 (2006) (internal quotation marks omitted).

Malone argues the district court abused its discretion by limiting her counsel's voir dire questions concerning the presumption of innocence. Malone also argues the district court improperly prevented her counsel from

asking the jury venire about the possible reasons a criminal defendant may choose not to testify at trial.

The district court permitted Malone's counsel to inquire at some length about the presumption of innocence. The district court also explained the presumption of innocence to the venire and asked the venire whether anyone did not understand or accept that presumption. However, the district court sustained the State's objection to extended questioning on this topic. We conclude the district court did not abuse its discretion by limiting this questioning under these circumstances as these complex questions had become repetitive and unnecessary. *See Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (holding that a district court does not abuse its discretion by excluding repetitive questions during voir dire).

Later, Malone's counsel attempted to ask the venire what it thought were possible reasons a criminal defendant may elect not to testify at trial. The district court halted this line of questioning sua sponte and limited Malone's counsel to questioning the venire about whether they took issue with a criminal defendant not testifying. Again, we conclude the district court did not abuse its discretion in limiting voir dire in this instance because preventing questions "aimed more at indoctrination than acquisition of information" concerning bias or an ability to apply the law is not an abuse of discretion. *Id.*

The district court did not commit reversible error by excluding a part of Malone's testimony on hearsay grounds

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." NRS 51.035. Hearsay is generally inadmissible unless it meets a recognized exception. NRS 51.065(1). Alleged hearsay errors are subject to harmless-error analysis. *Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993). The trial court is vested with broad discretion

in determining the admissibility of evidence, and a decision to admit or exclude particular evidence will not be reversed absent a clear abuse of discretion. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

Malone argues the district court abused its discretion when it sustained the State's objection to a question posed to her, during her direct examination, on hearsay grounds. In particular, the district court sustained the State's objection when Malone's counsel asked her to share specific threats Malone claimed Robinson made to her in relation to her trying to leave him. Still, the district court permitted Malone to testify generally that Robinson made threats that carried consequences and about Robinson choking and hitting her in the past, and to introduce testimony that she was afraid of Robinson.

On appeal, Malone argues the specific threats she sought to introduce were not offered for the truth of those statements, but, rather, for the effect they had on her. She argues that, without this testimony, her duress defense was improperly undermined, violating her federal constitutional right to put on a complete defense. She further argues that excluding this testimony was not harmless because the actual threats would have given the jury a fuller understanding of her mental state when Robinson attacked her son.

The State counters that the statement was offered to prove that Robinson had, in fact, made certain, specific threats to Malone such that it was offered for the truth of the matter asserted. Moreover, the State contends that, because Malone had the opportunity to introduce other evidence of Robinson's abusive conduct towards her, including her own testimony that Robinson had previously choked and hit her, any error the district court may

have committed in excluding the relevant proffered testimony was harmless error.³

We conclude that Malone's proffered testimony about the specific threats Robinson made to her was not hearsay because it was not offered to prove the truth of the matter asserted, but to demonstrate the effects of these threats on Malone herself. *See Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay."). Nevertheless, even if the district court's ruling was erroneous, it was harmless.

Malone testified at-length about how Robinson physically and emotionally abused her. She described how Robinson had hit and choked her, and had taken money from her. She also introduced other evidence that she feared Robinson through another witness. Additional testimony about threats that may have prevented Malone from leaving Robinson appears to

³The State also argues, without citing authority, that Malone recanted her trial testimony in a post-trial letter in which she stated that Robinson had abused her and she was afraid of him after the trial and so Malone should not be able to raise an argument concerning additional perjured testimony on appeal. The record on appeal does not contain Malone's letter recanting her trial testimony though it does include Malone's statements during her sentencing hearing indicating that she recanted her testimony. Nevertheless, because Malone's letter does not appear in the record on appeal, we will not consider this argument. *See Tabish v. State*, 119 Nev. 293, 312 n.53, 72 P.3d 584, 596 n.53 (2003) ("This court cannot consider matters not properly appearing in the record on appeal . . .").

be cumulative and does not explain why she failed to attempt to protect her child when Robinson beat him to death.⁴

Moreover, as Malone failed to make an offer of proof as to the excluded statements, we cannot conclude the ruling to exclude the statements had any effect on the outcome of the trial. *See generally Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (“If such material [to which an appellant takes issue] is not contained in the record on appeal, the missing portions of the record are presumed to support the district court’s decision, notwithstanding an appellant’s bare allegations to the contrary.”), *rev’d on other grounds*, 504 U.S. 127 (1992). Therefore, even if the district court erroneously excluded part of her testimony on hearsay grounds, Malone’s ability to present a complete defense was unaffected by this error. Thus, we conclude that this alleged error was harmless beyond a reasonable doubt. *Cf. Coleman v. State*, 130 Nev. 229, 243, 321 P.3d 901, 911 (2014) (holding that the district court’s erroneous exclusion of evidence that supported the defendant’s defense that he did not cause certain injuries to the victim on hearsay grounds affected the defendant’s “right to a meaningful opportunity to present a complete defense”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁴What’s more, this additional testimony, if introduced, would not have exculpated Malone on the first two counts of child abuse, neglect, or endangerment, which stemmed from allegations that she physically abused her son herself prior to his death.

cc: Hon. Michelle Leavitt, District Judge
Jonathan E. MacArthur, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk