IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LISA ANN NASH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76098-COA

ORDER OF AFFIRMANCE

Lisa Ann Nash appeals from a judgment of conviction, pursuant to a jury verdict, of three counts of child abuse, neglect, or endangerment, and battery constituting domestic violence. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

In 2014, fifteen-year-old S.S. moved from Maryland to Las Vegas to live with her biological aunt, Nash. Over the course of approximately four months, Nash physically and verbally abused S.S. Nash's daughter, Megan Nash, recorded two of the incidents with her cellphone and eventually reported the abuse to the Las Vegas Metropolitan Police Department (LVMPD).

Based on Megan's complaint, LVMPD and Child Protective Services (CPS) investigated the matter. The State charged Nash with six counts of child abuse, neglect, or endangerment, battery constituting domestic violence, and coercion. After a five-day trial, the jury returned a guilty verdict on three counts of child abuse, neglect, or endangerment and battery constituting domestic violence. The district court sentenced Nash to concurrent suspended sentences and imposed probation for a period not to exceed three years.

On appeal, Nash argues that (1) the district court abused its discretion by admitting evidence of uncharged conduct, (2) the district court

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violated her Sixth Amendment right to confrontation, and (3) there was insufficient evidence to support her conviction.[1] We disagree.

First, Nash argues that the district court abused its discretion in admitting evidence of uncharged conduct in violation of NRS 48.045(2). Specifically, Nash contends the district court erred in admitting Megan Nash's written statement, which alleged that Nash abused S.S. two or three times per month.

We review a district court's decision to admit or exclude prior-bad-act evidence for an abuse of discretion. *Newman v. State*, 129 Nev. 222, 231, 298 P.3d 1171, 1178 (2013). It is the appellant's responsibility to provide this court with the "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). Here, Nash failed to provide this court with a copy of Megan's written statement, which purports to contain evidence of either prior bad acts or uncharged conduct.

Nevertheless, based on the record that was produced, we are unconvinced that the district court admitted evidence of uncharged conduct. At trial, Megan affirmed relevant portions of her written statement, namely, that Nash abused S.S. two or three times per month. Similarly, the State's amended information alleged that Nash abused S.S. over the course of approximately four months. Thus, Megan's written statement and testimony (i.e., that the abuse occurred two or three times per month) appears consistent with the State's theory of the case, making it evidence of charged, not uncharged, conduct. Therefore, based on

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[1]Nash also raises for the first time in her reply brief a cumulative error argument. Because that issue is not properly before this court, we decline to address it. NRAP 28(c); *see also Leonard v. State*, 114 Nev. 639, 662, 958 P.2d 1220, 1237 (1998) (declining to consider an issue raised for the first time in appellant's reply brief). Additionally, there were no errors to cumulate.

the record provided, we cannot conclude that the district court abused its discretion.

Nash also argues that her Sixth Amendment right to confrontation was violated when a CPS investigator testified regarding S.S.'s previously diagnosed medical conditions. At trial, Nash objected, arguing that the statements were inadmissible hearsay. The district court overruled the objection, reasoning that the information provided context for the jury.

Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of *testimonial hearsay statements* unless the declarant is unavailable to testify at trial and the defendant previously had an adequate and meaningful opportunity for cross-examination. *Chavez*, 125 Nev. at 337, 213 P.3d at 483 (emphasis added) (citing *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)).

After reviewing the record, we conclude that the diagnoses and opinions in S.S.'s medical file did not implicate the Confrontation Clause. For an out-of-court statement to implicate the Confrontation Clause under *Crawford*, it must be both testimonial and hearsay. *See id.* Thus, if a statement if found to be nontestimonial, it is irrelevant whether it is hearsay for Confrontation Clause purposes. *See Crawford*, 541 U.S. at 51, (explaining that the admissibility of nontestimonial hearsay is governed by the rules of evidence because such statements do not implicate the Sixth Amendment's primary concerns).

Here, the medical diagnoses and opinions contained in the medical report were not testimonial, as the doctors who rendered them, pre-

2014, would have had no reason to believe that they would be used in a future criminal prosecution. *Flores v. State*, 121 Nev. 706, 716, 120 P.3d 1170, 1177 (2005) (explaining that a statement is testimonial when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (quoting *Crawford*, 541 U.S. at 52)). Nor does the record demonstrate that they were the product of government inquiry, investigation, or prosecutorial evidence gathering. *See, e.g., Harkins v. State*, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (providing factors to consider for determining whether a statement is testimonial). Therefore, we conclude that statements and opinions in S.S.'s medical file were not testimonial and did not implicate the Confrontation Clause. Furthermore, because we conclude that the statements were nontestimonial, and thus outside the scope of the Confrontation Clause, it is unnecessary to our disposition to address whether the statements were hearsay.

Finally, Nash argues that absent improperly admitted evidence, a rational jury would not have convicted her. She also contends that there was no evidence indicating that S.S. was physically or mentally injured.[2]

When reviewing the sufficiency of the evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d

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[2]To the extent that Nash is arguing the State was required to prove physical injury as it relates to her conviction of battery constituting domestic violence (NRS 200.481, 200.485, and 33.018), such an argument lacks merit. Under NRS 200.481, battery is defined as "any willful and unlawful use of force or violence upon the person of another." Thus, physical injury is not required.

1378, 1380 (1998). Moreover, the jury, not the reviewing court, is charged with assessing "the weight of the evidence and determin[ing] the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, "a verdict supported by substantial evidence will not be disturbed by a reviewing court." *Id.*

Having already concluded that the district court did not improperly admit evidence, we are unpersuaded by the first prong of Nash's argument. And, although NRS 200.508(1) requires the State to prove abuse or neglect, *Clay v. Eighth Judicial Dist. Court*, 129 Nev. 445, 453, 305 P.3d 898, 904 (2013), it need not make a showing of physical or mental injury. Indeed, "NRS 200.508(1) criminalizes five different kinds of child abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment." *Id.* at 452, 305 P.3d at 903. The latter is implicated in this case and relies on NRS 432B.140 for its definition of abuse or neglect, which does *not* require a showing of physical or mental injury.[3] *See* NRS 200.508(4)(a).

The relevant iteration of NRS 432B.140, stated in pertinent part that "[n]egligent treatment or maltreatment . . . occurs if a child has been abandoned, [or] *is without proper care, control* and supervision." (Emphasis added.) At trial, the State specifically argued, *inter alia*, that NRS 432B.140 was applicable, stating "we believe the evidence, the video, [shows] that the Defendant was not providing [S.S.] the proper care and control, based upon NRS 432(b) [sic]." Under that theory, the State was not required to show

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[3]NRS 432B.140 was amended in 2015 and now contains additional language not relevant to this appeal. *See* 2015 Nev. Stat., ch. 399, § 26, at 2245. Accordingly, we cite to the prior version of the statute herein. *See* 1985 Nev. Stat., ch. 455, § 16, at 1370.

that S.S. suffered physical or mental injury, only that she was neglected or mistreated.

Furthermore, the State's theory of the case was supported by substantial evidence. The State presented video evidence, which showed Nash physically and verbally abusing S.S. on multiple occasions, produced several eyewitnesses, including Megan Nash and S.S., and provided testimony from various investigators who offered additional corroborating evidence. Accordingly, we conclude that the conviction was supported by substantial evidence, and, therefore, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.[4]

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Ristenpart Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]We carefully considered Nash's argument that the district court committed plain error by issuing an incomplete jury instruction. We conclude that Nash's argument is without merit as the challenged jury instruction was a complete and accurate statement of the law and not error, plain or otherwise. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) ("[W]hether a proffered instruction is a correct statement of the law presents a legal question which we review de novo.").