IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH ELIAS RICHARDS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81834-COA

ORDER OF AFFIRMANCE

Joseph Elias Richards appeals from a judgment of conviction, pursuant to a jury verdict, of seven counts of lewdness with a child under the age of 14 and three counts of sexual assault of a child. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Jasmine Ulloa met Richards through her former babysitter, and Richards quickly became close to Ulloa and her child, M.[1] At some point, Ulloa introduced Richards to her sister-in-law, Sheena Rogers, who had five young children of her own – A, R, D, J, and T. Richards formed strong relationships with Ulloa, Rogers, and their children, attending the children's birthday parties, family functions, and other events. Ulloa described Richards as part of the family and the children referred to him as "Uncle Joe." Over time, Richards began taking Ulloa's and Rogers' children to a drive-in theater with parental consent, but on occasion took only one child, M, to the drive-in theater.

Subsequently, Richards became friends with Lindsey Foley and her wife, Nicki. Again, Richards became close with Foley and Nicki and their children, as he visited often and brought games and treats for them. Eventually, Foley too considered Richards to be part of the family. At some

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

point, Foley was prepared to take her daughter, K, and Richards, to another child's birthday party. However, before leaving for the party, Foley received a phone call from the child's mother, notifying Foley that Richards was unwelcome at the birthday party because K had told one of the other children that Richards touched her inappropriately. When confronted by Foley, K confirmed this version of events. Foley subsequently ceased all contact with Richards, contacted law enforcement, and brought K to the child advocacy center. Soon thereafter, Detective Andrew Schreiber suggested Foley call Richards and see if she could get him to admit what he had done to K. Foley obliged. During their conversation, Richards admitted to Foley that he had touched K's genitalia, but blamed K, age 11, saying that she manipulated Richards' hand while he was sleeping.

Detective Schreiber asked Richards to come to the station for an interview, during which Richards again blamed K for the sexual acts. However, Detective Schreiber indicated that he did not believe Richards and encouraged him to tell the truth. After the interview, Richards left, but Detective Schreiber directed police officers to follow and arrest him. After Richards' arrest, Ulloa was notified of the nature of Richards' alleged crimes. Ulloa questioned M, who confided that Richards had touched her in a sexual way at the drive-in theater on multiple occasions.

Rogers also questioned her children A, R, D, J, and T about their interactions with Richards, but the children denied that any inappropriate behavior had occurred. After observing D's hesitant responses to her inquiries, Rogers placed D in therapy. Later, D recounted Richards' sexual abuse towards her to her therapist.

Richards was charged with ten category A felonies involving sexual assault and/or lewdness with three children: D, K, and M. During the five-day jury trial, the State called Dr. JoAnn Behrman-Lippert as an expert

witness to testify regarding grooming behavior and the behavior of victims reporting sexual abuse. Additionally, the three minor victims and their family members testified at trial. Ultimately, a jury found Richards guilty on all counts and he received consecutive and concurrent prison sentences resulting in an aggregate prison term of 65 years to life.

On appeal, Richards argues that (1) the district court abused its discretion in admitting expert testimony regarding Richards' child grooming behavior because the testimony did not meet the assistance standard under *Hallmark*[2]; (2) insufficient evidence supported Richards' conviction as to count X (lewdness with a child under the age of 14); and (3) the district court abused its discretion in denying Richards the opportunity to question K about an allegedly false prior accusation of sexual abuse against her father. We disagree with Richards and therefore affirm his judgment of conviction.

First, Richards argues on appeal that Dr. Behrman-Lippert's testimony should have been excluded under the assistance requirement of *Hallmark*. Specifically, he asserts that Dr. Behrman-Lippert's expert testimony regarding Richards' grooming behavior was inadmissible and prejudicial. The State argues evidence regarding grooming behavior is admissible pursuant to NRS 50.350 and Richards fails to argue otherwise,[3]

---

[2]*Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

[3]NRS 50.350(1) provides that in criminal actions, "expert testimony offered by the prosecution or defense which concerns the behavior of a defendant in preparing a child under the age of 18 years . . . for sexual abuse by the defendant is admissible for any relevant purpose." NRS 50.350(1) further provides that "[s]uch expert testimony may concern, without limitation:"

as Richards only argues that Dr. Behrman-Lippert's testimony should have been excluded under the assistance requirement of *Hallmark*. Because Richards did not oppose the State's argument that the statute conclusively allows this type of evidence, with which we agree, Richards cannot prevail on appeal as to this point.[4] Nevertheless, even if we considered Richards' *Hallmark* argument on appeal, we are unpersuaded and conclude that the district court did not abuse its discretion in admitting this testimony.

We recognize that Richards' objection to Dr. Behrman-Lippert's testimony below, but not raised on appeal, was based on inadmissible character evidence. Therefore, we review Richards' claim on appeal that Dr. Behrman-Lippert's testimony should have been excluded under *Hallmark* for plain error. NRS 178.602. Richards, however, fails to meet the first and second parts of the plain error test under *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018).

> (a) [t]he effect on the victim from the defendant creating a physical or emotional relationship with the victim before the sexual abuse; and
>
> (b) [a]ny behavior of the defendant that was intended to reduce the resistance of the victim to the sexual abuse or reduce the likelihood that the victim would report the sexual abuse.

[4]The failure to respond to this argument is a concession that the argument is meritorious and the State is correct that the statute is dispositive. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

"[T]he decision whether to correct a forfeited error [by engaging in plain error review] is discretionary." *Id.* "Before [the] court will correct a forfeited error, an appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Id.* at 50, 412 P.3d at 48 (internal quotation marks omitted). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotation marks omitted).

NRS 50.275 governs the admissibility of expert witness testimony. Under *Hallmark*,

> [t]o testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of [his or her specialized] knowledge (the limited scope requirement).

124 Nev. at 498, 189 P.3d at 650 (second alteration in original) (internal quotation marks omitted); *see also* NRS 50.275.[5]

"The 'assistance' requirement has two components: whether the testimony is (1) relevant and (2) the product of reliable methodology."[6] *Perez*

---

[5]Richards does not dispute the qualification or limited scope requirements of NRS 50.275; thus, we need not address them here.

[6]As to the reliable methodology component of the assistance requirement, aside from one fleeting reference, Richards does not dispute on appeal that Dr. Behrman-Lippert's expert testimony was the product of

v. State, 129 Nev. 850, 858, 313 P.3d 862, 867 (2013) (citing *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (holding that "[a]n expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology") (footnote omitted)).

As to the relevance component, "[e]vidence is relevant when it tends 'to make the existence of any fact that is of consequence to the determination of the action more or less probable.'" *Id.* (quoting NRS 48.015). "Generally, all relevant evidence is admissible. However, relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury, or if it amounts to needless presentation of cumulative evidence." *Id.* at 858, 313 P.3d at 868 (citation omitted); *see also* NRS 48.025; NRS 48.035.

Here, Richards does not dispute that Dr. Behrman-Lippert's testimony was relevant; however, Richards argues that Dr. Behrman-Lippert's testimony unfairly prejudiced him by mischaracterizing his seemingly innocent acts with the children as having malevolent intent. Particularly, Richards asserts that he was unfairly prejudiced when Dr. Behrman-Lippert testified that Richards' instructing and encouraging of D, age 8, and M, age 9, to pole dance, which he videotaped, indicated grooming behavior.

In her testimony, Dr. Behrman-Lippert "did not stray beyond the bounds set by this court and other jurisdictions for expert testimony." *Perez*, 129 Nev. at 859-60, 313 P.3d at 868. Specifically, Dr. Behrman-Lippert addressed how child grooming occurs, its purpose, and offered insights in the

---

reliable methodology; therefore, we need not address it here. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

form of hypotheticals that were based on Richards' actions and indicated that such actions were demonstrative of grooming behavior. *See Shannon v. State*, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989) (providing that experts can testify to hypotheticals about victims of sexual abuse and individuals with pedophilic disorder). Dr. Behrman-Lippert never addressed the credibility of the victims or opined as to whether they were in fact abused. *See Townsend v. State*, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987) (holding that expert testimony was unfairly prejudicial where the expert opined that the child had been sexually assaulted and proceeded to identify the defendant as the perpetrator). As to Dr. Behrman-Lippert's specific testimony regarding the video of D and M pole dancing, Richards cites to no authority nor persuasively argues as to how he was unfairly prejudiced by Dr. Behrman-Lippert's analysis of this evidence. Rather, he voices general disagreement with Dr. Behrman-Lippert's opinion that the videotaping of D and M pole dancing, in combination with Richards' other actions, constituted grooming behavior. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Thus, Richards fails to demonstrate that the district court erred by admitting Dr. Behrman-Lippert's testimony pursuant to the assistance requirement of NRS 50.275. *See also* NRS 50.350(1). Neither could Richards establish plain error because, from a casual inspection of the record, it is undisputed that Dr. Behrman-Lippert's testimony was relevant under NRS 50.350, and a product of reliable methodology. Accordingly, we conclude that Richards did not demonstrate that the district court plainly erred by failing to exclude Dr. Behrman-Lippert's testimony.

Next, Richards asserts that there was insufficient evidence to support his conviction as to count X, lewdness with a child under the age of 14. The State, on the other hand, argues that M's statements to a forensic

interviewer, the drive-in theater movie schedule, and the text messages between Ulloa and Richards provided sufficient evidence for the jury to find against Richards as to count X. We find Richards' argument to be unpersuasive and agree with the State.

Count X alleges that Richards committed a lewd or lascivious act by rubbing M's vagina with his hand, when she was under the age of 14, at the West Wind El Rancho Drive-In. At trial, the State argued that this incident took place when Richards took M to see the movie *Christopher Robin*.[7] Richards asserts that because there was inconsistent testimony as to whether he actually took M to see *Christopher Robin* at the drive-in theater, there was insufficient evidence to support this charge.

In reviewing the sufficiency of the evidence, we 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 1378, 1380 (1998). Further, "it is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Additionally, "[t]he jury determines [how much] weight and credibility to give conflicting testimony." *Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005).

---

[7]Richards was charged and convicted with four counts of lewdness with a child specifically pertaining to his abuse of M at the West Wind El Rancho Drive-In in Sparks, NV. At trial, the State argued that count X pertained to Richards' molestation of M at the *Christopher Robin* movie on or between July 1, 2018, and August 3, 2018.

Here, although there was some conflicting testimony at trial, there is sufficient evidence in the record to support the jury's finding that Richards committed a lewd act with M during *Christopher Robin* at the drive-in theater. First, Jennifer McCann, the forensic interviewer who spoke with M soon after Richards' arrest, testified that M told her that Richards had sexually assaulted her during *Christopher Robin* at the drive-in theater. Second, M was clearly confused when testifying at trial as to which movies she was molested at, saying, "I don't remember how many movies that we went to see where he was touching me."[8] Although M was confused as to which movies she was watching when Richards molested her, she testified that "when we'd go to the drive-ins to watch movies, he would do something bad." M expounded on this, saying that Richards would sometimes rub her genitals while he was sitting next to her at the drive-in theater, or sometimes when she was sitting on his lap. Finally, although Ulloa testified that she had not agreed to allow Richards to take her daughter M to see *Christopher Robin*, the jury was presented with contrary evidence, namely the drive-in theater movie schedule and text messages between Richards and Ulloa, indicating that Ulloa had consented to Richards taking M to see *Christopher Robin* on the date in question.

In sum, M's previous disclosure to McCann regarding her molestation at *Christopher Robin*, the drive-in theater movie schedule, Ulloa's texts to Richards giving consent for Richards to take M to see *Christopher Robin* on the date in question, as well as M's own testimony regarding being sexually assaulted by Richards at the drive-in theater, was the evidence presented to the jury to convict Richards on count X. Viewing

---

[8]At trial, M did not recall seeing *Christopher Robin* with Richards but rather claimed she watched the movie with Ulloa.

this evidence in a light most favorable to the State, we conclude that a rational jury could have found beyond a reasonable doubt that Richards committed the crime of lewdness with a child under the age of 14 as alleged in count X.

Finally, Richards argues that the district court abused its discretion in denying Richards the opportunity to question K about an allegedly prior false accusation of sexual assault against her father. Conversely, the State contends that the district court did not abuse its discretion because Richards failed to meet his burden of proving that K made a prior false accusation. We agree with the State.

At trial, when cross-examining K, who was then age 12, Richards directed her attention to a date in 2011, when K was four years old. Before Richards could inquire further, the State objected, as this line of questioning involved an alleged incident where K supposedly accused her father of sexual abuse, but later told police that she was joking. In response, the district court conducted a hearing outside the presence of the jury, allowing both parties to question K about the incident, after which the court sustained the objection.

We review a district court's decision to admit or exclude evidence of a victim's alleged prior false allegations for abuse of discretion. *Abbott v. State*, 122 Nev. 715, 732, 138 P.3d 462, 473 (2006). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Pundyk v. State*, 136 Nev. 373, 375, 467 P.3d 605, 607 (2020) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

Generally, NRS 50.090 precludes admission of a victim's alleged prior sexual assault. *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). However, NRS 50.090 does not encompass prior false allegations of

sexual assault "because 'it is important to recognize in a sexual assault case that the complaining witness' credibility is critical and thus an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges.'" *Abbott*, 122 Nev. at 732, 138 P.3d at 473-74 (quoting *Miller v. State*, 105 Nev. 497, 500, 779 P.2d 87, 89 (1989)). Accordingly, "defense counsel may cross-examine a complaining witness about previous fabricated accusations, and if the witness denies making the allegations, counsel may introduce extrinsic evidence to prove that, in the past, fabricated charges were made." *Efrain M. v. State*, 107 Nev. 947, 949, 823 P.2d 264, 265 (1991) (quoting *Miller*, 105 Nev. at 501, 779 P.2d at 89). However, before defense counsel can introduce evidence of prior false accusations, the district court must conduct a hearing, outside the jury's presence "to determine the propriety of such questioning and the admissibility of any corroborative evidence." *Miller*, 105 Nev. at 502, 779 P.2d at 90. During this hearing, "the defendant must prove by a preponderance of the evidence that (1) the accusations were made; (2) the accusations were false; and (3) the extrinsic evidence is more probative than prejudicial." *Abbott*, 122 Nev. at 733, 138 P.3d at 474 (internal quotation marks omitted).

In this case, at the *Abbott* hearing, K testified that she could not remember speaking to the police when she was four years old, but that regarding the allegation of sexual abuse by her father, K explained that she "know[s] that it happened" and that her father "molested [her]." K did not recall previously telling an officer that she was joking about the allegation and Richards presented no evidence at the evidentiary hearing disputing K's testimony, aside from an unsubstantiated police report, which the court found to be inadmissible hearsay. At the end of the hearing, the district court found that Richards failed to show by a preponderance of the evidence that

K's prior allegations against her father were false, and precluded Richards from questioning K on this subject or introducing the police report into evidence.[9]

Richards failed to show by a preponderance of the evidence that K's previous accusations against her father were false, or how the district court abused its discretion or otherwise erred in its application of *Abbott*. Thus, we conclude that the district court did not abuse its discretion in denying Richards the opportunity to question K about her accusation against her father. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[9]We note that the district court also indicated that depending on what K recalled during her testimony and testified to at trial, it would reconsider its ruling if Richards could show a basis for admitting K's testimony regarding the incident with her father.