IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFERY LYNN CLEVELAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84225

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted sexual assault, battery which constitutes domestic violence with a prior felony conviction for domestic violence, and possession of a dangerous weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

A jury found appellant Jeffery Lynn Cleveland guilty of the above charges; however, it found Cleveland not guilty of one count each of sexual assault and domestic battery with use of a deadly weapon. The district court sentenced Cleveland to serve concurrent and consecutive jail and prison terms totaling 8-20 years in the aggregate.

As relevant here, Cleveland showed up at the victim's home around 3:30 a.m. The two had been dating on and off for around seven years. Cleveland started to call her obscene names and, at one point, struck the victim in the face. Cleveland followed the victim throughout her home; during the altercation, he tripped her and "slammed" a cup of coffee in front of her face. He poured milk on the victim's bed and threw her belongings everywhere. When the victim tried to grab her laptop, Cleveland pulled the power cord out of the laptop. Cleveland laid on top of the victim and started to touch and rub against her in a sexual manner. The victim testified that he behaved in such a manner to "squash" fights. When she asked Cleveland

to stop, he laughed at her and tried to shove something in her vagina. At a later point, Cleveland started to yell at the victim and took her belongings, including her phone, credit cards, and money. At trial, the victim testified that Cleveland did not penetrate or try to penetrate her and that she did not remember many of the allegations she made in a written statement to police.

On appeal, Cleveland challenges (1) the district court's decision to allow the State to add attempted sexual assault to the verdict form after the close of its case, (2) the district court's instructions on specific intent, (3) the district court's admission of other-act evidence under NRS 48.035(3), and (4) the sufficiency of evidence for the jury's conviction on attempted sexual assault. We address each of his arguments in turn.

The district court did not err in allowing the State to add attempted sexual assault as a charge after the close of the State's case-in-chief

Cleveland argues that the district court erred in allowing the jury to return a verdict on attempted sexual assault because the State failed to charge the offense, seek to amend the information before trial, argue for Cleveland's conviction for attempted sexual assault, and present sufficient evidence to support the conviction, particularly in light of the jury's acquittal on the sexual-assault count.

Under a sufficiency-of-the-evidence standard, we affirm a jury's verdict where "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (emphasis and internal quotation marks omitted) (observing that due process requires basing a conviction on proof beyond a reasonable doubt of every fact necessary for the charged crime). We "view[ ] the evidence in the light most favorable to the prosecution." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson*

v. Virginia, 443 U.S. 307, 319 (1979)). Moreover, conflicting evidence does not inherently present a sufficiency-of-the-evidence issue as the jury assumes the role to "assess the weight of the evidence and determin[e] the credibility of witnesses." *Barber v. State*, 131 Nev. 1065, 1071, 363 P.3d 459, 464 (2015) (internal alteration omitted) (quoting *Rose*, 123 Nev. at 203, 163 P.3d at 414).

NRS 175.501 permits the State to "charge a defendant with the completed crime" and still "obtain a conviction for attempt." *Crawford v. State*, 107 Nev. 345, 351, 811 P.2d 67, 71 (1991) (stating that the elements of an attempt offense include "(1) the intent to commit the crime; (2) performance of some act toward the commission of the crime; and (3) the failure to consummate its commission"). Such an outcome is "just . . . because, in a generic sense, every consummated crime is necessarily preceded by an attempt to commit the crime." *Id.* However, the jury may convict on an uncharged attempt offense only if "there is evidence to support an attempt." *Id.* at 352, 811 P.2d at 71.

Attempted sexual assault requires the State to prove "that (1) the defendant intended to commit sexual assault; (2) the defendant performed some act toward the commission of the crime; and (3) the defendant failed to consummate its commission." *Lipsitz v. State*, 135 Nev. 131, 139, 442 P.3d 138, 145 (2019) (internal alterations omitted) (quoting *Van Bell v. State*, 105 Nev. 352, 354, 775 P.2d 1273, 1274 (1989)). However, "mere indecent advances, solicitations, or importunities do not amount to an attempt" to sexually assault. *Van Bell*, 105 Nev. at 354, 775 P.2d at 1275 (internal alteration omitted) (quoting *State v. Pierpoint*, 38 Nev. 173, 174, 147 P. 214, 214 (1915)). But "slight acts done in furtherance of that crime"

constitute an attempt to commit the crime "when the design of a person to commit [such] a crime is clearly shown." *Id.*

Here, sufficient evidence supports the jury's conviction of attempted sexual assault and, likewise, demonstrates that the district court's decision to add attempted sexual assault to the verdict form was not erroneous. We agree that evidence of Cleveland rubbing against and touching the victim, who Cleveland had been dating on and off for seven years, in a sexual manner during a heated fight does not by itself establish an attempt to sexually assault her. *Id.* Although the victim offered conflicting testimony, the jury may have rejected this testimony, and instead, believed other evidence in the record that Cleveland performed these acts with the intent to penetrate the victim without or regardless of her consent. For example, shortly before the touching, Cleveland harassed and displayed dominance over the victim by hitting her, tripping her, following her throughout the house, slamming coffee in front of her face, ripping out the power cord of her laptop, and getting on top of her again in the living room, at which point he began the sexual rubbing and touching. And according to the victim's statements to police, Cleveland laughed and tried to shove a finger or another object into her vagina when she told him to stop. Moreover, pictures and police body-cam footage confirmed some of the victim's injuries. Finally, the jury heard about the prior incident with another victim, which may have bolstered the victim's pretrial account of what happened between her and Cleveland.

Thus, a rational jury could have concluded beyond a reasonable doubt that Cleveland touched and rubbed the victim with the intent to penetrate her without her consent. As sufficient evidence supports the attempted sexual-assault conviction, we find no error on the part of the

district court in adding attempted sexual assault to the verdict form, even though the State did not originally charge the offense or amend the information.

The district court did not commit plain error in instructing the jury on attempted sexual assault and specific intent

Cleveland contends that the district court committed reversible plain error because the combined effect of the jury instructions on sexual assault, attempted sexual assault, general intent, and specific intent permitted the prosecution to establish only general intent, rather than the requisite specific intent, for attempted sexual assault.[1]

We review whether a jury instruction reflects a correct statement of the law de novo, *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007), while we review the decision to give or decline to give a jury instruction for an abuse of discretion, *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion occurs if the district court makes an "arbitrary or capricious" decision or "exceeds the bounds of law or reason." *Id.* But the district court is not required "to act sua sponte to protect a defendant's right to a fair trial" absent "patently prejudicial error" in a jury instruction. *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996). And under our plain-error review, we reverse for an unpreserved error only if the error appears "unmistakable" on "a casual inspection of the record." *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013,

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[1]Although the State argues that Cleveland's participation in and promulgation of the error in proposing the specific-intent instruction precludes review, *Carter v. State*, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal."), the State misconstrues Cleveland's argument as resting solely on the specific-intent instruction.

1022 (2000), *overruled in part on other grounds by Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

Attempted sexual assault is a specific-intent crime. *See Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997) ("An attempt crime is a specific intent crime . . . ."). It requires proof not only that the actor intended the acts that constitute the offense but also that the actor intended "to bring about a desired result" prohibited by the statute. *Curry v. State*, 106 Nev. 317, 319, 792 P.2d 396, 397 (1990) (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). However, it does not require that the actor know that their actions violate a specific statute or constitute a specific offense. *See Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005), *receded from on other grounds by Cortinas v. State*, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008) (noting that "specific intent is *the intent to accomplish the precise act* which the law prohibits" (emphasis added)). Applying these principles to attempted sexual assault, the State proves the offense if it shows that an actor who failed to consummate sexual assault nevertheless intended to commit the acts that constitute sexual assault and intended for those acts to subject another to penetration against their will. *Lipsitz*, 135 Nev. at 139, 442 P.3d at 145 (discussing elements of attempted sexual assault).

Here, the instructions did not mislead the jury or lessen the State's burden of proof on specific intent. The attempted sexual-assault instruction stated that the defendant must willfully and unlawfully attempt to subject another person to sexual penetration against the will of that person. The district court instructed that willfulness "implies . . . a purpose or willingness to commit the act in question" but not "any intent to violate law, or to injure another, or to acquire any advantage." The willfulness

instruction, although generally used for general-intent offenses, was accurate and supported by our caselaw. *See Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984) (approving of an instruction that stated "[t]he word 'willfully,' when applied to the intent with which an act is done or omitted, . . . implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.").

And contrary to Cleveland's assertion, specific intent in the context of an attempt offense does not require a conscious awareness that one's acts constitute a crime. *See Bolden*, 121 Nev. at 923, 124 P.3d at 201; *see also* 21 Am. Jur. 2d *Criminal Law* § 114 (noting that specific intent requires "the additional deliberate and conscious purpose or design of accomplishing *a very specific and more remote result*" (emphasis added)). Additionally, the jury received Cleveland's proposed and accurate instruction on specific intent, which tracked closely with our caselaw. *See Bolden*, 121 Nev. at 923, 124 P.3d at 201.

Thus, we perceive no error insofar as the jury was told that the State needed to prove an intent to accomplish a certain result, as opposed to an intent to violate the law or harm the victim. We conclude that, as the instructions pertaining to attempted sexual assault and specific intent accurately stated the law, no plain error occurred in providing the at-issue instructions. They neither misled the jury nor lessened the State's burden to prove Cleveland's specific intent.[2]

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[2]Because the "jury instructions, as a whole, correctly state[d] the law," *see Harrison v. State*, 96 Nev. 347, 350, 608 P.2d 1107, 1109 (1980), we also reject the argument that the district court's failure to provide sua sponte an

The district court did not abuse its discretion in permitting the State to introduce bad act evidence under NRS 48.035(3)

Cleveland asserts that the district court abused its discretion in admitting evidence of other uncharged acts under NRS 48.035(3), such as that Cleveland poured milk on the victim's bed, slammed a cup of coffee in front of her face, and took some of her belongings during the altercation, because there was no need to refer to these acts to describe the charged crimes.

We review evidentiary decisions for abuses of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). But we do not reverse a conviction based on a preserved evidentiary error unless the error "had a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Newman v. State*, 129 Nev. 222, 236, 298 P.3d 1171, 1181 (2013) (quoting *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001)). Admissible evidence must, at a minimum, tend to make a fact "of consequence . . . more or less probable than . . . without the evidence." NRS 48.015 (defining relevancy); NRS 48.025. Relevant evidence is excluded if the "probative value is substantially outweighed by the danger of unfair

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instruction based on our decision in *Robey v. State*, 96 Nev. 459, 611 P.2d 209 (1980), amounted to an unmistakable, plain error. Regardless, although in *Robey*, we rejected a willfulness instruction like that used here, our decision addressed a distinguishable statute that required the State to "prove the *conscious commission of a wrong*." 96 Nev. at 462, 611 P.2d at 211 (emphasis added). However, we never purported to establish such a requirement for all specific-intent crimes. *See id.* at 460-61, 611 P.2d at 210-11. Indeed, such a requirement conflicts with the very nature of an attempt as "a failure to accomplish what one *intended* to do. Attempt means to try; *it means an effort to bring about a desired result.*" *See Keys*, 104 Nev. at 740, 766 P.2d at 273 (second emphasis added).

prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

Nevertheless, NRS 48.035(3) precludes exclusion of "[e]vidence of another act or crime which is so closely related to an act in controversy or [to] a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act." "However, the 'complete story of the crime' doctrine must be construed narrowly." *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). Accordingly, "the crime must be so interconnected to the act in question that a witness cannot describe the act in controversy without referring to the other crime." *Id.* (quoting *Bletcher v. State*, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995)).

As a threshold matter, we note that, although unclear from the record, the district court may have relied on an improper basis to admit the uncharged acts under NRS 48.035(3) by permitting the State to use such evidence to rebut the suggestion that the victim fabricated the allegations out of revenge. *See Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005) (noting that NRS 48.035(3) does not provide a basis "to introduce evidence of other acts to make sense of or provide a context for a charged crime"), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 697-99, 405 P.3d 114, 119-20 (2017). But even if true, we may affirm a district court's decision if it reached the right result, albeit on erroneous grounds. *See Jackson v. State*, 128 Nev. 598, 614 n.12, 291 P.3d 1274, 1284 n.12 (2012). And here, we conclude that a valid basis to admit the other act evidence under NRS 48.035(3) existed as the victim's testimony required her to discuss the uncharged acts to provide a complete account of how the altercation with Cleveland unfolded.

During most of her trial testimony, the victim claimed to have no memory of the events, necessitating reference to her written statement to police given shortly after the altercation occurred. Combining her trial testimony with her written statement, the objectionable other act evidence was so interconnected to the ultimate crimes charged that the testimony was incomplete without reference to those acts. For one, the uncharged acts happened simultaneously to the charged crimes and indeed encompassed what the victim witnessed as the offenses occurred. *See, e.g., id.* (concluding that evidence of threats made by the defendant to detectives after the crime did not qualify as "so interconnected with the events surrounding [the] murder or [the defendant's] flight and subsequent arrest"). For another, the events described by the victim were connected to or related to Cleveland's apparent motive or mindset. *See, e.g., Bletcher*, 111 Nev. at 1480, 907 P.2d at 980-81 (reasoning that evidence of drug possession unrelated to the apparent motive to attack the victim did not "complete [the] story of" a second-degree murder charge). Accordingly, we find no error in the district court's decision to admit the other act evidence as the victim's description of the offenses as they unfolded would have been incomplete without reference to that conduct.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED.

Cadish, J.

Cadish

Pickering, J.

Pickering

Bell, J.

Bell

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