IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK DEWAYNE MORSE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37940

FILED

AUG 23 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving while under the influence of alcohol resulting in the death of another (Count I), driving while under the influence of alcohol resulting in substantial bodily harm to another (Count II), leaving the scene of an accident (Counts V-XI), and driving on a revoked license (Count XIII).[1] The district court sentenced appellant Clark DeWayne Morse as follows: to a prison term of 96 to 240 months for Count I, to a consecutive prison term of 96 to 240 months for Count II, to seven concurrent prison terms of 35 to 156 months for Counts V-XI, three of which were ordered to run consecutive to Count I, and to a 30-day jail term for Count XIII. Morse filed the instant appeal.

Morse first contends that the district court erred in admitting the testimony of third-party claims representative Kerry Faye Berry. Specifically, Morse contends that Berry's testimony should have been excluded under both the attorney-client and work-product privileges. We disagree.

This court has held "the attorney-client privilege applies to insurers only when the statement is taken by the insurer at the express

[1]Counts III, IV, and XII were dismissed.

direction of counsel for the insured."[2] Likewise, this court has held that the work-product privilege only protects materials resulting from an insurance company's investigation when the investigation was performed at an attorney's request.[3]

In the instant case, Morse failed to show that Berry's interview with him was conducted under an attorney's direction or request. Berry testified that, on March 15, 2001, an insurance company representative asked her to meet with Morse and "get a statement of fact from him regarding his use of the vehicle and the facts of the accident." At the beginning of the interview, Berry informed Morse that she was not an attorney, and then interviewed Morse for approximately forty-five minutes. Because Morse failed to elicit any testimony that the interview with Berry was directed by an attorney, we conclude that the district court did not err in allowing Berry's testimony.[4]

Morse next contends that the district court erred in excluding evidence the victim was not wearing her seatbelt, which Morse alleges is relevant to the proximate cause of the victim's death. We disagree.

Generally, evidence of an intervening cause of an injury is relevant to the jury's determination of proximate cause where the

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[2]Ballard v. District Court, 106 Nev. 83, 85, 787 P.2d 406, 407-08 (1990).

[3]See id. at 84-85, 787 P.2d at 407.

[4]Even assuming Berry's testimony was erroneously admitted, the error was harmless in light of the overwhelming evidence of Morse's guilt. In particular, a television reporter testified that Morse told her he had been drinking, rear-ended a car at a traffic light, and was afraid, so he fled the scene. Additionally, an eyewitness identified Morse as the driver of the vehicle causing the five-car fatal accident. Finally, Morse's blood alcohol level, tested several hours after the accident, was well over the legal limit.

intervening cause is the "sole cause of the injury [thereby] completely excus[ing] the prior criminal act."[5] In applying this general principle to evidence concerning the failure to wear a seatbelt, other jurisdictions have held that such evidence is inadmissible because the failure to wear a seatbelt cannot alone cause injury without some other force.[6] We agree with those jurisdictions and conclude that evidence concerning a victim's failure to wear a seatbelt is not relevant to the jury's determination of proximate cause. We therefore conclude the district court did not abuse its discretion in excluding the evidence that the victim was not wearing her seatbelt at the time of the accident.

Finally, Morse contends that the district court erred in admitting evidence obtained from a blood alcohol test administered to Morse more than two hours after the accident. Morse claims that the evidence should have been excluded because it was irrelevant to whether he was driving under the influence of alcohol at the time of the accident. We conclude that Morse's contention lacks merit.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable."[7] The district court has broad discretion with regard to the admission of evidence, and its decision to admit evidence will not be disturbed unless manifestly wrong.[8]

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[5]Etcheverry v. State, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991).

[6]See Union v. State, 642 So .2d 91 (Fla. Dist. Ct. App. 1994); State v. Lund, 474 N.W.2d 169 (Minn. Ct. App. 1991); State v. Nester, 336 S.E.2d 187 (W. Va. 1985); State v. Turk, 453 N.W.2d 163 (Wis. Ct. App. 1990).

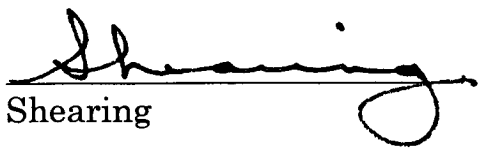
[7]NRS 48.015.

[8]Woods v. State, 101 Nev. 128, 136, 696 P.2d 464, 470 (1985).

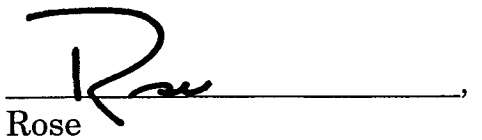
In the instant case, we conclude that the district court did not abuse its discretion in admitting the evidence of Morse's blood alcohol level two hours after the accident. That evidence was relevant to whether Morse was under the influence of alcohol at the time of the accident.[9]

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

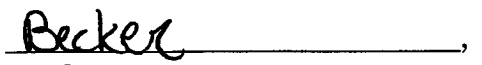
ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[9]See Anderson v. State, 109 Nev. 1129, 1135, 865 P.2d 318, 321 (1993) (holding that jury may infer that a defendant operated a vehicle while under the influence of alcohol in reliance, in part, on expert testimony of a forensic chemist who "extrapolated backwards" in time estimating the defendant's blood alcohol level at the time of the accident).