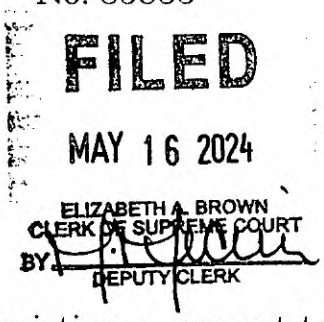
IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAYTON DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85833



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and burglary with the use of a deadly weapon. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

After an eight-day trial, a jury convicted Appellant Clayton Davis of the first-degree murder of John Whittaker and burglary while in possession of a deadly weapon. The State's case focused primarily on DNA evidence placing Davis at the scene and two eyewitness identifications claiming Davis stabbed Whittaker at the home of Rick Cariveau. Whittaker's girlfriend, Nicole Lister, identified Davis as the stabber for the first time while testifying at trial. Lister also testified that Cariveau identified Davis as the stabber while Lister was on the phone with 911. Cariveau, now deceased, was not available at trial, and the statement was admitted as an excited utterance.

Davis challenges the conviction, arguing (1) the district court abused its discretion in admitting Cariveau's out-of-court statement as an excited utterance, (2) Lister's in-court identification of Davis should have been excluded as unreliable, (3) the district court abused its discretion when it precluded the defense's expert on eyewitness identifications from testifying on the impact of drugs and alcohol on memory formation, (4) the

district court impermissibly allowed the State to impeach Davis's DNA expert with extrinsic evidence of other wrongs and, (5) cumulative error warrants reversal. Finding no substantive error, we affirm the judgment.

The district court did not abuse its discretion in admitting an out-of-court identification as an excited utterance

Generally, out-of-court statements offered for the truth of the matter asserted are inadmissible hearsay. NRS 51.035; NRS 51.065. Nevada law, however, provides certain exceptions to this general rule, including an exception for "excited utterances." NRS 51.095. Excited utterances are "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* We review the district court's decision to admit a statement under a hearsay exception for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009).

Here, Cariveau informed Lister that Davis was the man who stabbed Whittaker while Lister was on the phone with a 911 operator. Cariveau's statement was made less than ten minutes after the stabbing while Cariveau was "panicked" and cleaning Whittaker's blood from the floor. Cariveau fled his home before emergency responders arrived. Prior to trial, Cariveau died from an unrelated drug induced heart attack.

Davis asserts that Cariveau's statement was inadmissible because Cariveau had a warrant out for his arrest and any excitement was caused by the impending arrival of police officers, not Whittaker's stabbing. This argument lacks merit. Even if we accept Davis's claim that Cariveau's excitement was primarily related to the approaching police presence, that presence related directly to the underlying crime. *See Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006) (explaining that to determine if an out-of-court statement is an excited utterance, courts must "examine all of

the facts and circumstances surrounding a statement in addition to the time elapsed from the startling event" to determine whether the declarant is still under the stress caused by the event); *see also* FRE 803, Notes of Advisory Committee on Proposed Rules (noting the analogous federal rule contemplates "a broader scope of subject matter coverage"). The district court was within its discretion to conclude Cariveau remained under stress caused by the stabbing when identifying Davis. As to any reliability concerns, Davis was free to offer evidence or elicit testimony calling into question the validity of Cariveau's statement and the jury ultimately remained responsible for the weight given to the identification.

While Cariveau's untimely death prevented Davis from confronting the identifying witness, Davis's counsel expressly waived any claims based on the possible Confrontation Clause violation during oral argument. *See Bishop v. State*, 95 Nev. 511, 516, 597 P.2d 273, 275-76 (1979) (stating "[d]uring oral argument before this Court, appellant, who was represented by his 'standby counsels', abandoned his claim concerning the legality of the guilty plea, and challenged on the legality of the sentencing hearing" and not reaching the plea issue); *see also Las Vegas Sun, Inc. v. Eighth Jud. Dist. Ct.*, 104 Nev. 508, 513, 761 P.2d 849, 853 (1988) (overruled on other grounds in *Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 878, 883, 313 P.3d 875, 878 (2013)). As a result, we decline to address the constitutional issue. Under the facts of the case, the district court did not abuse its discretion in admitting Cariveau's statement as an excited utterance.

The in-court identification in this case did not depart from normal identification procedures

Davis next challenges the admission of Lister's first-time, in-court identification when Lister struggled to provide a description of the

perpetrators to police immediately following the crime. Primarily, we review Davis's claim that identification of a defendant at trial, especially where the defendant in this case is the only native American in the courtroom, is inherently unreliable.

In-court identifications are evaluated for independent reliability on a case-by-case basis under facts enumerated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *See Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016) (discussing *Neil* factors to be considered on case-by-case basis in evaluating whether an in-court identification is independently reliable). *Neil* asks us to consider the following factors: (1) opportunity of the witness "to view the criminal at the time of the crime", (2) "the witness' degree of attention", (3) "the accuracy of the witness' prior description of the criminal", (4) "the level of certainty demonstrated by the witness at the confrontation", and (5) "the length of time between the crime and the confrontation." *Neil*, 409 U.S. at 199-200.

Here, the district court did not abuse its discretion by admitting Lister's identification of Davis. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (providing this court reviews a district court decision to admit or exclude evidence for an abuse of discretion). Lister's identification was independently reliable as she testified she had the opportunity to see the perpetrator's face at the time of the crime and she demonstrated no doubt or inconsistency in her identification since first informing police Davis was the perpetrator, prior to trial. While a first-time in-court identification is disfavored, our caselaw supports its admission. *See Riley v. State*, 86 Nev. 244, 245, 468 P.2d 11, 12 (1970) (determining independent evidence existed for an in-court identification where the witness observed the defendant for about seven seconds); *Boone v. State*, 85

Nev. 450, 453, 456 P.2d 418, 420 (1969) (upholding the in-court identification of a witness who testified he got "one good look" at the defendant); *see also Truax v. State*, 91 Nev. 600, 602, 540 P.2d 104, 105 (1975) (allowing in-court identification from a witness who failed to identify the defendant on two prior photo lineups).

Moreover, the appropriate weight afforded to a particular identification is the province of the jury. *See Stesse v. State*, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998). At trial, Davis conducted an extensive cross-examination of Lister and, as the district court noted pretrial, any concerns regarding the accuracy of the identification could be addressed on cross-examination. Davis has raised nothing here, beyond the structure of the criminal trial, to indicate suggestiveness in the identification procedure that would compel us to disturb the district court's decision to admit the identification. Likewise, we decline to adopt heightened standards to govern in-court identifications, finding ordinary protections satisfactory in the present case.

We decline to disturb the district court's decision to prevent Davis's expert from testifying on the unnoticed subject of substance use

Next, Davis contends the district court abused its discretion when it prevented defense expert, Dr. Ayanna Thomas, from testifying on the impact of drugs and alcohol on memory formation when the required notice did not indicate such testimony. *See* NRS 174.234(2)(a) (held unconstitutional on other grounds in *Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008)) (requiring a "brief statement" on the subject matter of the expert testimony); *Higgs v.* State, 126 Nev. 1, 13, 222 P.3d 648, 656 (2010) (providing that this court reviews a district court's determination regarding expert testimony for an abuse of discretion). Notice for Dr. Thomas's testimony provided:

> Dr. Thomas is the Dean of Arts and Science at Tufts University where her research focuses on the process of memory formation and retrieval. Her testimony will focus on the growing science about how the brain makes memory, how the creation of memories can be distorted both when they are stored in the mind and when they are retrieved. She will further provide context regarding how these episodic memory failures can impact eye-witness identifications and recollections in the forensic arena.

Nothing in the notice provided, nor in Dr. Thomas's attached CV, would place the State on notice that Davis intended to call into question the validity of the proffered identifications based on witness intoxication. *See Turner v. State,* 136 Nev. 545, 553, 473 P.3d 438, 447 (2020) (concluding an expert could not testify on stippling on human skin when the expert was only noticed as a firearm and toolmarks expert). Davis provided nothing to suggest Dr. Thomas had any expertise in the interplay between drugs or alcohol and memory and we cannot say the district court abused its discretion in so limiting the expert testimony.

Other acts may not be used to impeach expert witnesses without a proper Petrocelli hearing

Lastly, Davis argues the State could not impeach DNA expert Dr. Phillip Danielson by reading into evidence large portions of an order from a federal trial court that criticized Dr. Danielson's prior lab's procedures. Because Davis raises this issue for the first time on appeal, we review for plain error. *See Lamb v. State*, 127 Nev. 26, 40, 251 P.3d 700, 709 (2011). To prevail under plain error review, Davis must demonstrate admission of the prior order was in error, that error was plain, and the error affected Davis's substantial rights, causing prejudice or a miscarriage of justice. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Before admitting evidence of "other crimes, wrongs or acts," the district court must conduct a hearing where it finds the evidence relevant, proven by clear and convincing evidence, and not substantially more prejudicial than probative. NRS 48.045(2); *Petrocelli v. State*, 101 Nev. 46, 51, 692 P.2d 503, 507 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004). "The plain language of NRS 48.045(2) uses the term 'person,' rather than 'defendant' or 'accused.'" *Mortensen v. State*, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999). Here, the State unquestionably offered the prior order evidence as, facially, evidence of other "wrongs" committed by Dr. Danielson and that because his lab used improper procedures before he likewise did so here. While the district court conducted a brief hearing without evidence outside the presence of the jury, the court made no findings on the quality of proof underlying the evidence nor its relative probative value compared to the danger of unfair prejudice. The district court did not seem to consider NRS 48.045(2), despite its clear relevance, and did not conduct a full *Petrocelli* hearing. This was plain error.[1]

Nevertheless, this error did not affect Davis's substantial rights and caused no prejudice. *See Green*, 119 Nev. at 545, 80 P.3d at 95. Dr. Danielson's expertise was at least marginally relevant to the expert testimony and the other acts were proven by clear and convincing evidence.

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[1] Davis's alternate argument, that the State's extensive quoting from the other order constitutes impermissible impeachment through extrinsic evidence, has never been addressed by this court and is therefore not appropriately considered under plain error review. *See Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (noting "[f]or an error to be plain, it must, at minimum, be clear under current law" (quoting *U.S. v Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001))(internal quotation marks omitted).

While prejudicial, the evidence was not substantially more prejudicial than probative. *See Petrocelli*, 101 Nev. at 51, 692 P.2d at 507. Had the district court properly conducted a *Petrocelli* hearing, the evidence could have been admitted. Additionally, Davis had the opportunity to rehabilitate Dr. Danielson on redirect examination through appeals to his otherwise unblemished record, minimizing any risk of prejudice. Finally, this being the only error, relief is not warranted for cumulative error. Accordingly, we ORDER the judgment of the district court AFFIRMED.

_____, J.
Herndon

_____, J.
Bell

LEE, J., concurring:

While I concur with the result reached by the majority, I write separately to voice my disagreement with the majority's conclusion that the district court did not abuse its discretion when it prevented Davis's expert, Dr. Ayanna Thomas, from testifying on the impact of drugs and alcohol on memory formation because the required notice did not specifically indicate such testimony.

When a criminal defendant intends to call an expert witness, NRS 174.234(2) merely requires that the defendant provide the State with, *inter alia*, a *brief statement* about the subject matter and substance of the expert's expected testimony. Here, Davis's notice stated that Dr. Thomas's "research focuses on the process of memory formation and retrieval. Her testimony will focus on . . . how the creation of memories can be distorted both when they are stored in the mind and when they are retrieved." Given the facts of the instant case, it is axiomatic that Dr. Thomas's testimony on "how the creation of memories can be distorted," would have included memory distortion by the use of drugs and alcohol. However, in light of the substantial evidence evincing guilt, I conclude that this error was ultimately harmless. *See Patterson v. State*, 129 Nev. 168, 178, 298 P.3d 433, 440 (2013) ("An error is harmless if this court can determine, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction.").

Lee, J.

cc: Hon. Egan K. Walker, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe County District Court Clerk