IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BROCK PATRICK MCCANN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86969-COA

FILED

MAY 28 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Brock Patrick McCann appeals from a judgment of conviction, pursuant to a jury verdict, of one count of battery constituting domestic violence with a prior felony conviction for domestic battery. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

McCann and Nichole Herndon began a romantic relationship in 2014.[1] McCann was convicted of felony domestic battery in 2016 and 2017 and misdemeanor domestic battery in 2021, and Herndon was the victim in all three prior cases.

In August 2022, at the Sparks Marina, McCann and Herndon were in a verbal argument that turned into a physical altercation. Pamela Willey witnessed the altercation as she was walking nearby. Willey saw a man push a woman, then strike the woman on the head with a stick. Willey called 9-1-1, and Sparks Police Department Officers Stephany Sullivan and Lorenzo Sampson responded to the scene.

Herndon told the officers that she and McCann were arguing over a prescription; then, she shoved him, he shoved her back, and he hit her over the head with a stick "out of anger." She added that she had a lump on her head from being hit with the stick. McCann told the officers that

[1]We recount the facts only as necessary for our disposition.

Herndon put her hands around his neck, which Herndon denied. Officer Sullivan also contacted Willey, who repeated her observations. Willey identified Herndon as the woman she saw earlier and recognized McCann only by his hat. McCann was then arrested.

McCann was charged with one count of battery constituting domestic violence with a prior felony domestic battery conviction. Before trial, the State filed a motion to introduce evidence of McCann's three prior domestic battery convictions, as well as the conduct underlying those convictions. The State argued that the incidents were admissible to provide context for McCann's relationship with Herndon and Herndon's anticipated recantation, which would make her credibility a central issue in this case. The district court conducted a *Petrocelli*[2] hearing and concluded that the evidence was relevant, introduced for a non-propensity purpose, proven by clear and convincing evidence, and not unfairly prejudicial. The district court determined that the evidence would be admissible in the event Herndon recanted her statement to police, and directed the State to request a recess outside the jury's presence if the anticipated recantation occurred.

McCann's two-day jury trial commenced in April 2023. The first witness, Willey, testified that she saw a man use his "full strength" to hit a woman on the side of the head with a stick. However, Willey stated that she did not see how the incident started. Next, Herndon took the stand and testified that on the day of the incident, "I was the aggressor. I started the argument with [McCann] after he was trying to walk away. And I put both—I put my hands around his neck, and he pushed me away, I fell and hit my head." Herndon gave evasive answers when asked whether McCann hit her head with a stick, repeatedly stating that she could not recall reporting that

[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

to law enforcement. Shortly after, the State asked for a recess as the district court previously directed.

Outside the presence of the jury, the State argued that it should be permitted to ask about the prior incidents of domestic violence because Herndon had just recanted her previous statements to law enforcement. Specifically, her testimony diverged from her statements to Officer Sullivan that she did *not* put her hands on McCann's neck and that her head injury resulted from McCann hitting her with a stick. McCann argued that Herndon had not recanted, though he acknowledged that she previously denied putting her hands around his neck. The district court determined that Herndon's testimony constituted "a material or substantive recantation" and, consistent with its earlier ruling, allowed the State to ask Herndon about the prior domestic violence incidents involving McCann. The court also permitted the State to ask about McCann's previous domestic battery convictions but excluded the certified copies of those convictions. When the jury returned, the district court gave an oral limiting instruction.

Herndon's testimony resumed, and the State asked Herndon if her relationship with McCann had ever become physically violent before the current incident. She responded that there were multiple instances of domestic violence between her and McCann in the past, with the most recent incident occurring about a year ago. Herndon further testified that McCann was only convicted of domestic battery once. Herndon added that she was not injured by a stick, but rather because she fell onto a rock, and she could not remember if she fell from being pushed or from tripping on a stick.

Officers Sampson and Sullivan testified next. Both officers stated that Herndon reported that McCann hit her head with a stick and that she suffered a head injury from the incident. Officer Sullivan further testified that she determined McCann was the primary aggressor. During

Officer Sullivan's testimony, her body camera recording from the morning of the incident was played for the jury, corroborating the officers' testimony about Herndon's initial statements to police.

Before closing arguments, the jury received a written limiting instruction related to McCann's prior domestic battery incidents and conviction. In its closing argument, the State briefly pointed out that Herndon testified this incident of domestic battery was not "the first time that this has happened" with McCann, but immediately noted such information was only to be considered for limited purposes.

McCann was found guilty as charged and sentenced to three to ten years in prison. He timely appealed and now argues that the district court abused its discretion in admitting evidence of his prior domestic battery incidents under *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).[3] Additionally, McCann contends that because Herndon did not "completely recant" at trial and her testimony could have been impeached with her prior inconsistent statements, the evidence was unfairly prejudicial. We disagree.

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[3]Although McCann generally asserts that evidence of his past domestic battery *convictions* were erroneously admitted, even though the district court did not allow admission of documents reflecting his judgments of conviction, he offers no cogent argument in support of this assertion, nor does he argue that evidence of his prior convictions should be treated any differently from evidence of his prior *incidents* of domestic battery under *Bigpond*. *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); *see also Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present."). Therefore, we do not address these arguments.

This court reviews a district court's decision to admit prior bad act evidence for an abuse of discretion. *McLellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). To admit bad act evidence, the trial court must determine, outside the presence of a jury, that: (1) the prior bad act is relevant to the crime charged and introduced for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the danger of unfair prejudice does not outweigh the probative value of the evidence. *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), *holding modified by Bigpond*, 128 Nev. at 117, 270 P.3d at 1250. If the evidence is admitted, the State is also responsible for requesting that the jury receive a limiting instruction at the time the prosecutor "introduces the evidence and in the final charge to the jury." *Tavares v. State*, 117 Nev. 725, 727, 30 P.3d 1128, 1129 (2001).

In *Bigpond*, the appellant, who was convicted of domestic battery, argued that the district court erroneously admitted evidence of his prior acts of domestic violence against the same victim. 128 Nev. at 111, 270 P.3d at 1246. In that case, the State had filed a pretrial motion to admit Bigpond's prior acts of domestic violence against the same named victim to explain their relationship and "provide a possible explanation for the victim's anticipated recantation." *Id.* At trial, the victim recanted and testified that Bigpond never hit her. *Id.* at 118, 270 P.3d at 1250. The district court conducted a *Petrocelli* hearing, found that the *Tinch* factors were satisfied, and permitted the State to question the victim about the prior acts but excluded Bigpond's prior convictions. *Id.* at 111, 270 P.3d at 1246.

On appeal, the Nevada Supreme Court affirmed Bigpond's conviction and concluded that the district court did not abuse its discretion in admitting the prior acts of domestic violence. *Id.* at 117, 270 P.3d at 1250. The supreme court determined that the prior acts "were relevant where the

victim recanted her pretrial accusations against the defendant because the evidence placed their relationship in context and provided a possible explanation for the recantation, which assisted the jury in evaluating the victim's credibility." *Id.* at 110, 270 P.3d at 1246. The court noted that the victim's credibility was "clearly a central issue" because the victim was the sole witness to the alleged incident. *Id.* at 118, 270 P.3d at 1250. It further concluded that the prior acts were proven by Bigpond's guilty pleas to those charges, and the danger of prejudice was minimized by limiting the victim's testimony to Bigpond's conduct, excluding his prior convictions, and issuing a limiting instruction. *Id.* at 118, 270 P.3d at 1250-51.

Though the instant case presents very similar facts, McCann argues that *Bigpond* is distinguishable because in this matter the altercation was observed by an independent witness. Unlike *Bigpond*, where the named victim was the sole witness to the battery, here Willey also witnessed part of the physical altercation. However, Willey testified that she did not see how the altercation began. Thus, notwithstanding Willey's partial eyewitness account, Herndon was the sole witness for the beginning of the incident, and the jury was still required to make a credibility determination as to whether McCann was the primary physical aggressor. *See id.* at 110, 270 P.3d at 1246.[4] And like *Bigpond*, the disputed evidence

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[4]McCann also argues that Herndon did not "completely recant" her accusations, unlike the victim in *Bigpond*. However, McCann did not provide authority to support his contention that a victim must "completely recant" allegations in their entirety to admit bad act evidence, and so we decline to address this claim. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6. Further, McCann does not argue that the district court abused its discretion by finding Herndon's trial testimony constituted a recantation. *Cf. Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (stating, for impeachment purposes, that "when a trial witness fails, for whatever reason, to remember

was introduced for non-propensity purposes that assisted the jury in evaluating the victim's credibility.

McCann contends that Herndon could have been impeached with her "less prejudicial" prior inconsistent statements. *Tinch* and *Bigpond* require the district court to find that the prior bad acts' probative value is not substantially outweighed by its danger of unfair prejudice. *See, e.g., id.* at 117, 270 P.3d at 1250. However, they do not require the district court to use less prejudicial alternatives, and McCann did not provide any authorities in support of his assertion. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Finally, McCann fails to demonstrate that the district court abused its discretion in finding that the prior bad acts were not unfairly prejudicial. *See Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (defining unfair prejudice as "appealing to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence"). McCann's prior domestic battery incidents were admitted for the same non-propensity reasons as in *Bigpond*, and any prejudice was minimized by the district court excluding copies of McCann's prior convictions and giving limiting instructions. *See* 128 Nev. at 119, 270 P.3d at 1251. Further, Herndon's testimony about the prior bad acts was brief, as was the State's passing reference to them in closing argument. McCann does not demonstrate how the prior incidents inhibited the jury's intellectual ability to evaluate the evidence, and consequently, he fails to establish that the prior domestic battery incidents were unfairly prejudicial.

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a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement"). As such, McCann fails to meaningfully distinguish *Bigpond*.

See Krause Inc., 117 Nev. at 935, 34 P.3d at 570; *see also Summers v. State*, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006) (recognizing that "jurors are intellectually capable of properly following instructions regarding the limited use of prior bad act evidence"). Because McCann has not shown that the district court abused its discretion in admitting evidence of his prior domestic battery incidents, he is not entitled to relief. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[5]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Barry L. Breslow, District Judge
Washoe County Alternate Public Defender
Marc Picker Law
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[5]Insofar as McCann has raised other arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.