

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMIE L. NICHOLS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38169

**FILED**

**NOV 21 2002**

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of coercion, two counts of sexual assault, and one count of battery with substantial bodily harm. Appellant Jimmie L. Nichols was sentenced to two concurrent terms of life with the possibility of parole after ten years, a concurrent term of twenty-eight to seventy-two months, and a concurrent term of fourteen to thirty-six months.

Nichols had a two year, turbulent domestic relationship with Brenda Grim, the victim in the current matter. Nichols shared Grim's apartment during the term of their relationship. During that time, on at least two occasions, the State brought charges against Nichols for acts of domestic violence against Grim. In the first instance, occurring sixteen months prior to the current matter, Grim recanted her testimony and refused to participate in Nichols' prosecution as the couple had reconciled. The second instance, occurring two weeks prior to the current matter, involved the destruction of property in Grim's apartment where Grim had told Nichols to move out.

On July 18, 2000, Nichols attacked, battered, and vaginally and digitally raped Grim without her consent. DNA evidence unequivocally established that Nichols had engaged in sexual intercourse with Grim. Grim had multiple physical injuries consistent with her

allegations of forcible sexual intercourse. Prior to trial, the State sought admission of the prior acts of domestic violence, which the district court allowed pursuant to NRS 48.045(2). The State also presented expert witness testimony regarding domestic violence, generally. Nichols contended the sexual acts were consensual and that Grim lied to the police because she was angry with Nichols. Following trial, the jury found Nichols guilty.

First, Nichols argues that the district court erred in permitting the admission of two prior bad acts following a Petrocelli hearing: (1) an incident of battery with intent to commit a crime and robbery against Grim occurring on February 17, 1999; and (2) an incident of malicious destruction of Grim's property occurring on July 2, 2000. Nichols contends that: (1) there was no correlation between the two prior bad acts and the alleged sexual assault; (2) the prior bad acts are so dissimilar that they have no relevance to the sexual assault; and (3) the prior bad act involving domestic violence (i.e., the February 17, 1999, incident) should have been excluded as being more prejudicial than probative.

The State argues that the district court properly admitted the prior bad acts subsequent to a Petrocelli hearing wherein the State proved the acts by clear and convincing evidence. The State contends that the prior bad acts were relevant to prove motive, lack of consent, and absence of mistake under 48.045(2). We agree.

“The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to

be given great deference.”<sup>1</sup> Such determinations will not be reversed absent manifest error.<sup>2</sup> The district court must determine whether “(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.”<sup>3</sup>

In the present case, Nichols was charged with battery with intent to commit a felony and robbery for the February 17, 1999, incident. This charge was reduced to misdemeanor disorderly conduct where the State had no witnesses to substantiate Grim’s initial claims and where Grim refused to cooperate with the State in its prosecution. The second incident, occurring two weeks prior to the current matter, involved the destruction of Grim’s personal property after Grim ended her relationship with Nichols and told him to move out.

The district court did not err in permitting the admission of either of the prior charged bad acts. The district court concluded that both acts were proven by clear and convincing evidence and were admissible to show motive and lack of consent. Further, although the February 17, 1999, act occurred more than a year before the charged acts, the conduct is not substantially different from the charged conduct when the prior bad act is viewed in the context of domestic violence, generally.<sup>4</sup>

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<sup>1</sup>Braunstein v. State, 118 Nev. \_\_\_, \_\_\_, 40 P.3d 413, 416 (2002); Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

<sup>2</sup>Id.

<sup>3</sup>Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

<sup>4</sup>See Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998).

Second, Nichols argues that the district court erred in allowing testimonial evidence during the course of trial regarding three uncharged prior bad acts that were not subject to a Petrocelli hearing: (1) Nichols use of controlled substances; (2) Grim's attempted suicide following the February 17, 1999, battery/domestic violence charge; and (3) a prior incident wherein Nichols had allegedly broken into Grim's apartment damaging the front door. The district court denied Nichols' motions for a mistrial as to admission of controlled substance use and Grim's attempted suicide. Nichols argues that admission of the evidence was improper character evidence that prejudiced him and cast him in a negative light.

The State argues that the district court did not err in denying Nichols' motions for mistrial. The State also notes that Nichols' objection to testimony pertaining to the damaged apartment door was sustained and, as such, there can be no error.<sup>5</sup>

A prosecutor's improper question can be the basis for granting a mistrial if the remarks are enduringly prejudicial.<sup>6</sup> To be reversible error, the remarks must be "so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury."<sup>7</sup> To make this determination, the district court must consider whether: (1) the prosecutor solicited the remark; (2) the district court immediately admonished the jury; (3) the

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<sup>5</sup>We agree with the State that there is no error where Nichols objected to the comments and his objection was sustained.

<sup>6</sup>See Middleton v. State, 114 Nev. 1089, 1113, 968 P.2d 296, 312 (1998).

<sup>7</sup>Id. (quoting Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983)).

statement was clearly and enduringly prejudicial; and (4) evidence of guilt was convincing.<sup>8</sup> However, this court will not disturb a district court's decision to deny a motion for mistrial absent a clear showing of abuse of discretion.<sup>9</sup> When evidence of guilt is overwhelming, the denial of a motion for mistrial is not an abuse of discretion.<sup>10</sup> Additionally, inadvertent references to other criminal activity not solicited by the prosecution, which are blurted out by a witness, can be cured by the trial court's immediate admonishment to the jury to disregard the statement.<sup>11</sup>

In the present case, the State did not specifically solicit testimony regarding drug usage by Nichols. Grim made a reference to drug usage when responding to the State's questions about one of the prior acts when she said "he was full of his stuff." The district court, in denying Nichols' motion for a mistrial, concluded that the State's questions were broad, there was no specific mention of drugs, and allowed Nichols to propose a cautionary instruction that drug use testimony was not to be considered by the jury. Therefore, the district court did not err in denying Nichols' motion for a mistrial.

Nichols also moved for a mistrial where the court admitted testimony pertaining to Grim's suicide attempt. Grim made an unsolicited comment that she had tried to commit suicide for Nichols. Defense counsel's objection was sustained, and the district court admonished the

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<sup>8</sup>Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

<sup>9</sup>Id.

<sup>10</sup>See Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998).

<sup>11</sup>Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).

jurors to disregard Grim's statement regarding the suicide attempt. The district court then denied Nichols' motion for a mistrial and indicated that Nichols could propose a jury instruction limiting the jury's consideration of any testimony pertaining to Grim's suicide attempt. No instruction was requested.

We conclude that the district court did not err in denying Nichols' motion for a mistrial as to Grim's suicide attempt. It was unsolicited, the objection was sustained, and the jury properly admonished. There is no showing that the remark was so prejudicial that it deprived Nichols of his right to a fair trial.

Third, Nichols argues that the district court erred by permitting the admission of prior consistent statements made by Grim to the investigative officer following the alleged assault. Specifically, Nichols argues that the district court erred where it allowed the police officer who interviewed Grim at UMC on July 18, 2000, to recite over two pages of statements given by Grim. We disagree.

In the present case, Nichols did not object to the recitation of Grim's statements as made to the investigating officer at the hospital following the alleged assault. Because Nichols failed to object, the court need not address this argument sua sponte where the alleged error does not rise to the level of plain error.<sup>12</sup> The statements were arguably

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<sup>12</sup>See Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (stating that plain error is that "error [which] is so unmistakable that it reveals itself from a casual inspection of the record").

Conversely, we note without deciding that Grim had sufficient reason to fabricate claims against Nichols based upon their past  
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admissible under 51.035. Thus, their admission does not amount to plain error and we reject Nichols' contentions on this issue.

Fourth, Nichols argues that the district court erred by allowing expert testimony by Dr. Mortillaro regarding domestic violence. The district court refused to strike Dr. Mortillaro's testimony as being too prejudicial where it found the testimony to be sufficiently broad regarding domestic abuse. Nichols argues that Dr. Mortillaro's testimony amounted to inadmissible propensity evidence where Dr. Mortillaro offered information about destruction of property and battery (i.e., regarding the forms of violence domestic violence can take, generally) – both prior bad acts committed by Nichols and permitted into evidence following the Petrocelli hearing. Nichols contends that Dr. Mortillaro's testimony was equivalent to presenting an opinion as to Nichols' guilt.

The State argues that Dr. Mortillaro's testimony regarding the domestic abuse and post-traumatic stress syndrome was beyond the scope of ordinary lay people, was helpful to the jury in order to help them understand why Nichols committed the criminal acts against Grim, why Grim initially refused to assist in the State's prosecution of Nichols, and why Grim repeatedly forgave Nichols for abusing her. As such, the State contends that the district court did not err in admitting Dr. Mortillaro's testimony, which, it asserts, was admissible pursuant to NRS 50.275 and 50.285.

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interactions. However, the admission of her prior statements would amount to harmless error.

The admissibility of expert testimony is within the sound discretion of the district court.<sup>13</sup>

“The threshold test for the admissibility of testimony by a qualified expert is whether the expert’s specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue . . . . Moreover, expert testimony must also withstand the challenge to all relevant evidence, i.e., whether probative value exceeds prejudicial effect.”<sup>14</sup>

In the present case, the district court did not err in permitting the testimony of Dr. Mortillaro regarding the general aspects of domestic violence. His testimony was general in nature and did not amount to an opinion that Nichols was an abuser or on any other ultimate fact. Further, given the history of interactions between Nichols and Grim and the complexity of domestic violence, Dr. Mortillaro’s testimony may have assisted a layperson jury in understanding Grim’s behavior.<sup>15</sup>

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<sup>13</sup>Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987); Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984); see also NRS 50.275 (permitting a qualified expert to testify to matters within his or her specialized scope of knowledge where to do so aids the trier of fact); NRS 50.285 (allowing a qualified expert to rely on the facts or data of a particular case which are made known to him at or before the hearing or where other qualified experts rely on similar materials in forming their opinions).

<sup>14</sup>Townsend, 103 Nev. at 117-18, 734 P.2d at 708.

<sup>15</sup>We note that the jury also heard testimony from Domestic Violence Unit Chief Abbi Silver regarding domestic violence characteristics. Although Nichols did not object to the presentation of her testimony, we note that Ms. Silver’s testimony may violate Nevada’s Rules of Professional Conduct. See SCR 178 and 179 as well as our own case law regarding vouching for the credibility of a witness or case. We caution the State to avoid such behavior in the future.



Lastly, Nichols argues that the State's closing argument amounted to prosecutorial misconduct because it improperly shifted the burden of proof. Nichols asserts that the State improperly commented on Nichols' failure to call a witness. Nichols contends that the comments impermissibly shifted the burden of proof by suggesting to the jury that it was Nichols' burden to produce proof explaining the absence of witnesses or evidence.

Upon objection by Nichols, the district court advised the jury that the State can comment on Nichols' closing argument and that arguments made by either party are not evidence but, merely, what the attorneys believe the evidence has shown.

If a prosecutor commits misconduct, "it must be . . . determined whether the [prosecutor's comments] were harmless beyond a reasonable doubt."<sup>16</sup> "Error is harmless if this court concludes, 'without reservation that the verdict would have been the same in the absence of error.'"<sup>17</sup>

In this case, the prosecutor commented on Nichols' failure to present any evidence or witnesses in support of Nichols' theory that Grim had consensual rough sex with Nichols. Nichols objected to the comment and the district court cautioned the jury that any comments by counsel were argument and not evidence. Even if the prosecutor's comments were impermissible rebuttal argument, we conclude any error was harmless.

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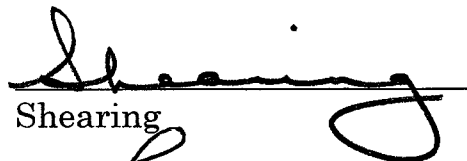
<sup>16</sup>See Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

<sup>17</sup>Steese v. State, 114 Nev. 479, 496, 960 P. 2d 321, 332 (1998) (quoting Witherow, 104 Nev. at 724, 765 P.2d at 1156).


The jury heard all of the evidence and weighed Grim's testimony and credibility. Her physical appearance and emotional state shortly after the incident were observed by several independent witnesses. The comment was made in response to arguments given by the defense. After carefully considering all the evidence and testimony, the jury did not accept Nichols' defense and found him guilty.<sup>18</sup> Looked upon in the context of the totality of the trial, any error was harmless.

Accordingly, we


ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.

Shearing

  
\_\_\_\_\_, J.

Leavitt

  
\_\_\_\_\_, J.

Becker

cc: Hon. Mark W. Gibbons, District Judge  
David M. Schieck  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk

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<sup>18</sup>See Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975). (“[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.”).