IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JAMES TATUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38201

FILED

MAR 17 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, child endangerment, and home invasion. Appellant Michael James Tatum was sentenced to two maximum terms of 240 months in prison and one term of 12 months in the Clark County Detention Center. All sentences are to be served concurrently.

Tatum and Wanda Jackson lived together in a two-bedroom apartment and had one child during their relationship of more than seven years. On June 30, 2000, Jackson confronted Tatum and told him to "get out" of their apartment several times. Tatum left.

Later that same night, Tatum was arrested on unrelated charges and was incarcerated until August 30, 2000. While Tatum was incarcerated, Jackson started a relationship with another man, Christopher Williams, who moved into the apartment.

According to Jackson, while Tatum was incarcerated, she packed up all of his personal belongings, except for some videotapes, and Williams delivered the items to Tatum's mother. She never told Tatum that his personal belongings had been removed from the apartment. He called her repeatedly while incarcerated and she told him Williams was now living at the apartment. In addition, on several occasions, she handed the telephone directly to Williams who spoke with Tatum.

On August 30, 2000, Tatum was released from the unrelated incarceration. Later that day, he confronted Jackson and Williams at a Price-Rite parking lot and then subsequently confronted Jackson at the apartment, demanding to be let inside. She told him, "You are not coming in my apartment," refusing to let him enter, and he eventually left. After Tatum left, Jackson called 911.

The current case arises from the following incident. On August 30, 2000, after Tatum confronted Jackson at the apartment and was told to leave, he returned. Tatum threw a patio chair at the front window of the apartment. As a result, their son, who was sleeping near the front window, received multiple facial lacerations on his cheeks, nose, eye, and lip area from the shattered glass. Tatum reached through the window and unlocked the deadbolt to the front door. He entered the apartment and a verbal and physical confrontation ensued between Tatum, Jackson, and Williams.

Prior to trial, Tatum filed various motions seeking to prevent the admission of the following evidence: Tatum's unrelated incarceration from June 30 to August 30, Jackson's reasons for telling him to "get out," and subsequent bad act testimony. Prior to trial, Tatum filed a motion seeking to introduce extrinsic evidence to impeach Jackson about an alleged drinking problem.

Tatum first argues the evidence adduced at trial was insufficient to support his convictions of burglary, child endangerment, and home invasion. Specifically, Tatum argues the State failed to establish beyond a reasonable doubt that the apartment was not Tatum's residence and, thus, the evidence was insufficient to support a conviction for burglary and home invasion. Tatum also contends there is insufficient

evidence to establish he was aware of their son's location when Tatum threw the chair through the window, and thus, he cannot be convicted of child endangerment.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this [c]ourt is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt.'"[1] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.[2] Finally, circumstantial evidence alone may sustain a conviction.[3]

During his incarceration, Tatum was aware that Williams was living in the apartment. On August 30, the day of the incident, Jackson refused to let Tatum enter the apartment, telling him, "You are not coming in my apartment," and he eventually left. We conclude sufficient evidence was adduced from which the jury, acting reasonably and rationally, could have found that Tatum did not have an unqualified and unconditional possessory right of habitation in the apartment and convict Tatum of burglary and home invasion convictions beyond a reasonable doubt.

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[1]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[2]See Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

[3]McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

As to the child endangerment charge, shortly before the incident, Tatum called the apartment and spoke with their son. Subsequently, he threw a patio chair at the apartment window, shattering the window, and the child received multiple facial lacerations from the shattered glass. Given the testimony regarding the apartment having only two bedrooms and Tatum's knowledge of their son's presence inside the apartment, we conclude sufficient evidence was adduced from which the jury, acting reasonably and rationally, could have found the elements of child endangerment beyond a reasonable doubt. Accordingly, we conclude this conviction was also supported by substantial evidence.

Next, Tatum argues the district court erred by allowing subsequent bad act testimony. We agree. Prior to trial, the district court considered whether to admit the following subsequent bad act testimony. When Tatum was released for the charged incident on December 1, 2000, he returned to the apartment, kicked Jackson's front door in, and engaged in a verbal and physical confrontation with Jackson and Williams. As a result, Williams called 911. In addition, Tatum returned the following morning to the apartment and engaged in another verbal and physical confrontation with Jackson and Williams.

The district court conducted a Petrocelli hearing and determined subsequent bad act testimony was inadmissible because it did not fall within any exception to NRS 48.045(2) and was not relevant to the State's case. The district court expressed concern that the subsequent bad acts might unduly influence the jury.

However, during trial, Tatum cross-examined Jackson about a letter she had written to another district court, before the subsequent bad acts occurred, where she requested Tatum's release and stated that she

believed he had not intended to hurt her or their son on August 30. The State then asked the district court to reconsider its prior ruling regarding the subsequent bad act testimony. The State argued that Tatum's inquiry had opened the door for the State to rehabilitate Jackson with testimony of incidents that occurred after the letter was written.

A district court has the discretion to admit or exclude evidence, and a district court's determination will be given great deference and will not be overturned absent an abuse of discretion.[4] Where the complaining party first questions a witness regarding otherwise inadmissible testimony, that party is barred from preventing the testimony's admission under the open door doctrine.[5] The doctrine provides that the introduction of inadmissible evidence by one party allows the other party, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission.[6] It does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted.[7]

We conclude Jackson's testimony regarding the letter did not leave the jury with a false impression because, in addition to the letter, she had already testified: (1) she did not believe that Tatum meant to hurt their son, (2) she did not know whether he was trying to hurt her,

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[4]See NRS 48.035; see Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

[5]See Taylor v. State, 109 Nev. 849, 851, 858 P.2d 843, 845 (1993).

[6]United States v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988).

[7]Id.

and (3) he had restrained himself from hitting her with a telephone. Thus, we conclude the district court abused its discretion in admitting the subsequent bad act testimony. However, the error was harmless because overwhelming evidence was adduced to support Tatum's convictions.

Next, Tatum contends the district court erred in admitting the following evidence: (1) use of the word "detained" to describe his unrelated incarceration, (2) testimony regarding Jackson's reasons for telling Tatum to "get out," and (3) 911 tapes.

As referenced above, the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[8] "[I]n a criminal case, failure to object to inadmissible evidence precludes the right to assign error on appeal."[9]

As to the first matter, Tatum argues the district court erred in allowing the use of the word "detained" as a substitute for incarcerated when Jackson testified about her contacts with Tatum between June 30 and August 30. Tatum asserts the district court should have granted Tatum's motion in limine to suppress evidence of Tatum's unrelated incarceration in its entirety. The district court determined it would be difficult to explain Tatum's actions without referring to the fact that he could not physically reach Jackson for two months, after she told him to "get out," and he left. The district court determined Tatum's unrelated

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[8]Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

[9]Minton v. Board of Medical Examiners, 110 Nev. 1060, 1086, 881 P.2d 1339, 1357 (1994).

incarceration should be referred to as "otherwise detained" to the extent necessary throughout the trial.

We conclude, although less prejudicial phrases could have been used rather than "otherwise detained," the district court did not abuse its discretion. We further conclude, even if the district court did abuse its discretion, the error was harmless because overwhelming evidence was adduced to support Tatum's convictions.

As to the second matter, Tatum argues the district court erred by admitting evidence that Jackson told Tatum to "get out" on June 30 because she believed he stole money and used drugs. At an evidentiary hearing, the State argued Jackson's reasons for ending her seven-year relationship with Tatum were necessary to demonstrate that Tatum understood Jackson was serious and Tatum no longer had a possessory interest in the apartment. The district court determined Jackson's testimony was admissible for those reasons.

We conclude the permanency of the break-up of Tatum and Jackson's seven-year relationship was a factor in determining whether Tatum had a possessory interest in the apartment. Thus, we conclude the district court did not abuse its discretion in admitting this evidence.

As to the third matter, Tatum argues the district court erred by admitting two 911 tapes into evidence. The first 911 call was made by Jackson approximately thirty minutes after Tatum confronted Jackson and Williams in the Price-Rite parking lot on August 30, 2000. The second 911 call was made by Williams approximately ten minutes after Tatum kicked the front door of the apartment in and entered on December 1, 2000. The district court admitted three 911 tapes, including the two raised on appeal and another tape, under the complete story of the crime

doctrine. At trial, Tatum made a continuing objection to the admission of the first 911 call when the first call was played for the jury, but failed to object to the other 911 calls.

We conclude it was error to admit any of the 911 tapes under the complete story of the crime doctrine because this doctrine does not apply to hearsay. Because the first 911 tape was inadmissible hearsay, where Jackson called 911 approximately thirty minutes after the incident, we conclude the district court abused its discretion in admitting the tape. However, the error was harmless because Jackson's testimony about the incident was otherwise admissible to establish Tatum had notice that he did not have a possessory interest in the apartment. Furthermore, the error was harmless because overwhelming evidence was adduced to support Tatum's convictions.

Because Tatum failed to object to the admission of the second 911 tape at trial, we conclude he waived this issue for further review. However, even if he had timely objected to the admission of the second 911 tape, we conclude any error was harmless because overwhelming evidence was adduced to support Tatum's convictions.

Finally, Tatum argues the district court improperly precluded him from introducing extrinsic evidence of Jackson's drinking problem to impeach her. At an evidentiary hearing, Tatum proffered witnesses who were available to testify that Jackson's alleged drinking problem had resulted in the death of the couple's first-born son and the loss of her job, that custody of their son had been awarded to Jackson's adult daughter, and that Jackson failed to complete an alcohol counseling program three times and consequently failed to regain custody of their son. The district court determined Tatum could not introduce extrinsic evidence to impeach

Jackson, but he could inquire whether she had a drinking problem on cross-examination.

Extrinsic evidence of specific instances of conduct may not be used to attack the credibility of a witness,[10] and such instances are properly the subject of cross-examination.[11] As discussed above, this court will not reverse the district court's ruling to admit or exclude evidence unless it is manifestly wrong.[12]

Because extrinsic evidence of specific instances of conduct used to attack the credibility of a witness is strictly barred by NRS 50.085, we conclude the district court did not abuse its discretion in precluding such testimony. Tatum properly attacked Jackson's credibility on cross-examination by inquiring whether she had a drinking problem.

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[10]See Rembert v. State, 104 Nev. 680, 683, 766 P.2d 890, 892 (1988) (holding the district court erred in permitting respondent to impeach appellant's credibility with extrinsic evidence on a matter entirely collateral to issues being decided at trial).

[11]NRS 50.085(3) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

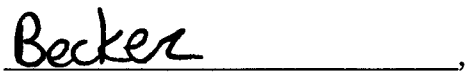
[12]See Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

Having considered Tatum's arguments and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

cc: Hon. Nancy M. Saitta, District Judge
Special Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk