IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN BARCUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88535-COA

FILED

NOV 26 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kevin Barcus appeals from a judgment of conviction, entered pursuant to a jury verdict, of third-degree arson. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Barcus argues the district court abused its discretion by allowing two witnesses to provide specialized, technical, or scientific testimony without requiring them to be qualified as experts. "A qualified expert may testify to matters within their 'special knowledge, skill, experience, training or education' when 'scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Burnside v. State*, 131 Nev. 371, 382, 352 P.3d 627, 636 (2015) (quoting NRS 50.275). In contrast, "[a] lay witness may testify to opinions or inferences that are '[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.'" *Id.* (quoting NRS 50.265). Whether testimony constitutes lay or expert testimony depends on the substance of the testimony: "does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized

knowledge or skill beyond the realm of everyday experience?" *Id.* at 382-83, 352 P.3d at 636. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

First, Barcus contends that a game warden for the Nevada Department of Wildlife, J. Williams, improperly gave expert testimony at various times during the trial. The first instance Barcus contends was improper was when Williams testified that summer rains had influenced her opinion that no other vehicles had recently driven in the area.

Williams testified that she saw a plume of smoke in the mountains around some trees while she was on patrol and that she drove around trying to find where the smoke was coming from. Williams drove up a dirt road and looked for tire tracks in the road to see if anyone had been there recently but did not see any tracks. Williams testified that there had been some rainy weather and that summer rains were very helpful in identifying fresh tire tracks because the rain created a "great contrast." Specifically, Williams testified that the rain "creates a darkness on the top of the dirt, and when a car goes through, it disrupts that and you have the lighter dirt underneath." Williams' testimony regarding how rain affected her ability to identify tire tracks in dirt roads concerned her personal observations and did not require any specialized knowledge. Therefore, we conclude the district court did not abuse its discretion by admitting this testimony as that of a lay witness.

Barcus also contends that Williams improperly testified that it did not appear the fire had spread but instead that multiple spot fires had been ignited in the area. Williams testified that she saw burnt grasses and shrubbery leading up to Barcus' van. Williams also testified that there was

no burning or scorching between the burn marks, which "show[ed] this is a little bit different from something that is spreading. It looks to be each one was lit on its own." She also testified that, "in a season where the grass is dead and dry if a fire was spreading, you would see that those would be burned as well. There would be a path in between of some scorching and there isn't. There's just individual bunches burned." Williams' testimony that areas of burnt vegetation appeared to be individually lit on fire concerned her personal observations and did not require any specialized knowledge. Therefore, we conclude the district court did not abuse its discretion by admitting this testimony as that of a lay witness.

Barcus next contends that Williams improperly testified that his boot appeared to be burned. Williams testified that she took a photograph of Barcus' boot so she would have his boot tread in case she wanted to use it later in the case. She further testified that the photograph showed "a part of [Barcus'] boot . . . appeared to be burned." Williams' testimony that a part of Barcus' boot appeared to be burned concerned her personal observations and did not require any specialized knowledge. Therefore, we conclude the district court did not abuse its discretion by admitting this testimony as that of a lay witness.

Barcus also contends that Williams improperly testified as to how long a tree had been on fire when she arrived at the scene. When asked if she had a sense for how long the tree had been on fire, Williams replied, "Not for long." Defense counsel objected to this testimony, and the district court sustained the objection for lack of foundation. The district court then instructed the jury not to consider Williams' answer. Thereafter, Williams testified that she had not seen juniper or pinyon trees on fire before and she had not seen a forest fire in her area of patrol before, and the prosecution

did not continue this line of questioning. Because the district court struck the challenged testimony and admonished the jury to disregard the statement, we conclude Barcus is not entitled to relief on this claim. *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) ("Timely objections enable the district court to instruct the jury to disregard improper statements, thus remedying any potential for prejudice."); *see also Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions.").

Next, Barcus contends that a special agent for the Bureau of Land Management, S. Fischer, improperly gave expert testimony at various times during trial. To start, Barcus contends that Fischer improperly testified that there was "no continuity of fuel" and that the small "spot" fires had been individually set. Fischer testified that a fire needs fuel to burn and that there were "small spot fires that didn't have continuity of fuel between them so they couldn't spread beyond the small spot fire." He also testified that grass growing between the fires suggested they were individual fires. Fischer's testimony that there was no continuity of fuel between the spot fires and that the fires appeared to be individually lit concerned his personal observations and did not require any specialized knowledge. Therefore, we conclude the district court did not abuse its discretion by admitting this testimony as that of a lay witness.

Barcus also contends that Fischer improperly testified that the fire had been started recently and that he had never seen so many fires in one area. Fischer testified that one area "was still smoldering" and that there "was some smoke coming from the ground." He testified that this "told [him] that the fire had been started recently and had burned recently."

Fischer did not offer an opinion as to the precise time the fire had been set. Fischer further testified that "approximately 82 different fires" were counted and that he had "never seen that many fires in such a small area." Fischer's testimony that one of the fires had started and burned recently and that he had never seen so many fires in a small area concerned his personal observations and did not require any specialized knowledge. Therefore, we conclude the district court did not abuse its discretion by admitting this testimony as that of a lay witness.

Barcus' last contention regarding Fischer is that he improperly testified as to the origin of a large tree fire. Fischer testified that a photograph depicted "what [he] determined to be the ignition area for [a] large tree." Fischer testified that part of his job was "to determine origin and cause of the fire and this is what I determined the origin of the fire to be based on indicators that I saw during the investigation." Fischer did not specify what indicators led him to believe the area depicted in the photograph was the origin of the tree fire.[1]

Because Fischer did not specify how he identified the ignition area for the large tree, it is unclear that his testimony on this subject required some specialized knowledge or skill beyond the realm of everyday experience. However, even assuming Fischer's testimony was not capable of perception by the average layperson and required specialized knowledge, we conclude that any error in admitting this testimony was harmless. *See* NRS 178.598 (harmless error rule); *see also Burnside*, 131 Nev. at 384, 352 P.3d at 637 (recognizing that the erroneous admission of expert testimony will not result in reversal unless "the evidence substantially affected the

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[1]We note that Barcus has not provided this court with any photographs for review on appeal.

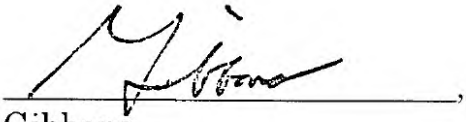
jury's verdict"). Fischer did not provide any additional testimony regarding the ignition point of the large tree. Moreover, several photographs depicting the scene were admitted into evidence, including several photographs of the large tree. Fischer's brief testimony merely described why he took one photograph of the large tree. The State also presented overwhelming evidence of Barcus' guilt. Therefore, we conclude the admission of this testimony did not substantially affect the jury's verdict, and Barcus is not entitled to relief on this claim.

Barcus also argues the district court abused its discretion by imposing a prison term rather than suspending his prison sentence and placing him on probation. Here, the granting of probation was within the district court's sentencing discretion. *See* NRS 176A.100(1)(c); *Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in imposing a sentence . . . ."). Generally, this court will not interfere with a sentence imposed by the district court that falls within the parameters of relevant sentencing statutes "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); *see Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

Barcus' sentence of 19 to 48 months in prison is within the parameters provided by the relevant statutes. *See* NRS 193.130(2)(d); NRS 205.020. And Barcus does not allege that the district court relied on impalpable or highly suspect evidence. Rather, Barcus contends that the district court failed to give due consideration to certain mitigating factors: he suffers from schizophrenia, he had not received treatment and medication, and he has significant familial support. Defense counsel argued

these mitigating factors at sentencing, and the district court considered these mitigating factors in rendering its sentencing decision and found that they did not overcome Barcus' significant criminal history. Having considered the sentence and the crime, we conclude the district court did not abuse its discretion in sentencing Barcus. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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