IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER MATTHEW BERGNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40434

FILED

DEC 20 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Bergna contends that the district court abused its discretion when it admitted inadmissible bad act evidence and opinion testimony, refused to give his proposed jury instructions and refused to admit evidence of consumer complaints concerning defective brake systems in other Ford trucks. Bergna also contends that the district court committed reversible error when it failed to dismiss the indictment upon learning of the State's destruction of evidence and because it admitted inadmissible bad act and opinion evidence. We conclude that Bergna's arguments are without merit.

Evidence of other wrongs and acts

Bergna contends that the district court abused its discretion when it permitted State's witnesses to testify concerning Bergna's prior bad acts.

Evidence of other wrongs cannot be admitted at trial for the purpose of proving that a defendant has a certain character trait and that he acted in conformity with that trait on the occasion in question. NRS 48.045(1)(a), however, permits the State to offer character evidence to

rebut similar character evidence of good character offered by the accused. Additionally, evidence of other acts is admissible under NRS 48.045(2) for limited purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting evidence of other uncharged acts, the district court must conduct a hearing[1] to determine whether the evidence is relevant to the charged offense, whether it is proven by clear and convincing evidence and whether its probative value is substantially outweighed by the danger of unfair prejudice.[2] The decision to admit or exclude evidence rests within the sound discretion of the district court.[3] Absent a manifest abuse of that discretion, we will not overturn the district court's decision on appeal.[4]

Violence against ex-wife

Bergna contends that the district court abused its discretion when it permitted Bergna's ex-wife, Rebecca Tillery, to testify concerning Bergna's temper and about an incident in which Bergna became angry and upset with her.

During his case-in-chief, Bergna offered numerous character witnesses who testified that Bergna did not have a temper, was not violent and that, when he did get angry, he was just blowing off steam. After holding a Petrocelli hearing, the district court permitted Tillery to testify

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[1]Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985) (holding that before a trial court decides to admit prior bad act evidence, it must conduct a hearing on the matter outside the presence of the jury).

[2]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

[3]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

[4]Id.

to rebut Bergna's character witnesses. The district court limited the scope of Tillery's testimony, permitting Tillery to testify only in regard to Bergna's temper, the nature of their relationship and Bergna's attitude concerning money. While the district court noted that the testimony might also be probative of motive, it clearly admitted the testimony as rebuttal evidence under NRS 48.045(1)(a). The district court also prohibited Tillery from testifying as to certain incidents that it determined created a danger of unfair prejudice.

Bergna argues that Tillery's testimony is irrelevant because it occurred sixteen years before his wife, Rinette Riella Bergna, died. Because the State offered Tillery's testimony to rebut the Bergna's own evidence of his good character, the time remoteness related to the weight, if any, the jury might give to the evidence, not to its admissibility.[5] Furthermore, as the State emphasizes, Bergna offered two witnesses, including Bergna's sister and a friend, who testified as to Bergna's character based upon observations during the same time period as covered by Tillery's testimony. Accordingly, we conclude that the district court did not abuse its discretion when it admitted Tillery's testimony to rebut character evidence offered by Bergna.

Bergna's relationships with other women

Bergna contends that the district court erred when it admitted the testimony of Brenda Redl-Harge concerning certain "lewd" advances made by Bergna within two months of his wife's death, including Brenda's

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[5]See Bails v. State, 92 Nev. 95, 100, 545 P.2d 1155, 1158 (1976) (noting that "[t]he time remoteness of such evidence in relation to the date of the homicide impeached its weight to some degree, but not its admissibility").

discovery of pornography on Bergna's television, Bergna's statement concerning his needs and Brenda's testimony that Bergna grabbed her breast in the hot tub. Bergna also contends that the district court abused its discretion when it admitted testimony from several witnesses concerning Bergna's date requests both before and after Rinette's death.

NRS 48.045(2) permits the admission of evidence of other wrongs and uncharged bad acts to prove, among other things, motive. Bergna argues that testimony concerning his relationships with other women was not relevant to the State's case because the State's theory was that Bergna murdered his wife for financial reasons, and not that Bergna killed his wife because he was "horny." Although the State theorized that Bergna murdered his wife for financial reasons, it also sought to prove that he was intent on ending his marriage, in part, so that he could pursue other relationships. The district court determined that evidence of Bergna engaging in intimate activity so soon after his wife's death supports this motive and was relevant to and probative of Bergna's intention that Rinette would soon be removed from the way of his relationships with other women and if his intention to end his marriage. Likewise, Bergna's advances toward other women soon after Rinette's death were relevant and probative of Bergna's desire to pursue other relationships.

While the testimony cast Bergna in a bad light and may have discredited the defense's theory that Bergna had a loving relationship with Rinette, the district court determined that the testimony was admissible and relevant to Bergna's motive to murder Rinette and rebutted the defense's theory that Bergna was a loving and devoted husband. Consequently, we will not disturb the district court's determination that the probative value of the testimony was not substantially outweighed by

the danger of unfair prejudice. Accordingly, we conclude that the district court did not abuse its discretion when it admitted testimony concerning Bergna's advances on other women.

Snowblower incident

Bergna contends that the district court abused its discretion when it permitted Cynthia Glatz to testify concerning an incident where Bergna aimed, with full force, a snowblower at the victim. Bergna asserts that, because Glatz was not in a position to hear what Bergna and Rinette had said to each other or to see Bergna's expression when the snow hit Rinette, the State did not prove the misconduct by clear and convincing evidence. Bergna therefore argues that Glatz could not really confirm whether Bergna's conduct was intentional rather than merely negligent.

Glatz witnessed the event from across the street. She testified that she had been able to see Rinette's face as well as the body language of both Rinette and Bergna; from these observations she concluded that Bergna and Rinette were not just playing around.[6] The defense cross-examined Glatz on her ability to see the events across the street. The defense also presented testimony from Mark Jenness, a neighbor directly across the street from Bergna's home, who testified that in his opinion Glatz would not have been able to see the incident from her front yard. It was within the district court's discretion to override Bergna's objections to Glatz's testimony, based upon her ability to observe, since his objections go to the weight that might be accorded the evidence, rather than its admissibility.

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[6]NRS 50.265 permits such a lay opinion to be offered in testimony.

Bergna also argues that Glatz's testimony was not relevant to the State's case. The State theorized that Bergna felt threatened and did not like Rinette's new career choice. Because the testimony suggested that Bergna was causing Rinette harm as she was preparing to leave for one of her trips, the State argues that the snowblower incident was one example of Bergna's dislike of Rinette's travel. Additionally, the testimony was relevant to rebut Bergna's contentions that he was a loving and devoted husband.

Having determined that the State proved the act by clear and convincing evidence and that it was relevant to the murder charge, the district court left it to the jury to weigh the competing testimony.[7] We perceive no error in the district court's decision to admit Glatz's testimony.

Genuineness of grief testimony

Bergna contends that the district court abused its discretion when it admitted opinion testimony concerning Bergna's grief immediately following Rinette's death.

The State first responds that Bergna did not adequately preserve this issue for appeal because he did not object to this testimony at trial. Generally, a defendant must raise a contemporaneous objection at trial to preserve the issue on appellate review.[8] A motion in limine, however, will preserve an issue for appeal when the "objection has been fully briefed, the district court has thoroughly explored the objection

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[7]See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[8]McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

during a hearing on a pretrial motion, and the district court has made a definitive ruling."[9]

In a pretrial motion, Bergna sought to exclude testimony characterizing his grief behavior as odd or unusual. Bergna did not seek to exclude testimony describing Bergna's emotional state, the issue on appeal. At a pretrial hearing, Sergeant James Beltron testified concerning Bergna's reaction to his wife's death; neither party raised the issue of Bergna's grief itself during discussion with the district court at that hearing, nor did any other witness testify on this subject. After the hearing, the district court denied Bergna's motion in limine to exclude Sergeant Beltron's testimony, but did not resolve the testimony of others that characterized Bergna's behavior. The district court also cautioned that, although the motion was denied, it was not making a blanket ruling on the admissibility of all issues alluded to in the motion. Because Bergna failed to formulate an objection in reference to Bergna's grief and because the district court did not explore the issue of Bergna's grief during the pretrial hearing and failed to make a definitive ruling on testimony concerning Bergna's grief, we conclude that Bergna did not preserve this issue for appeal.

Despite failing to preserve the issue for appeal, this court may address, sua sponte, plain errors affecting a defendant's substantial rights.[10] In reviewing the record on appeal, we conclude that the admission of this testimony neither prejudicially impacted the jury's verdict nor seriously affected the integrity or public reputation of the

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[9]Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

[10]NRS 178.602.

judicial proceedings, and therefore we need not consider Bergna's argument.[11]

Even if Bergna had adequately preserved his arguments for appeal, we cannot conclude that the district court abused its discretion when it admitted the testimony concerning the genuineness of Bergna's grief. Bergna argues that the grief testimony impermissibly went beyond an objective description of his behavior and served only to convince the jury that an innocent person would have acted differently. Bergna cautions that this danger increases when the witness testifying is a police officer because the jury might give more credibility to the testimony of an authority figure. To support his contentions, Bergna relies on State v. Haga.[12] In Haga, the State elicited testimony that the witness, an ambulance driver, had experience in dealing with people at the scene of a death and questioned whether, based on the witness's experience, he thought the defendant's demeanor was unusual. The witness testified that the defendant did not exhibit any signs of grief after the death of his wife and daughter. The Washington Court of Appeals held that, because the testimony implied that the defendant was guilty, it was wrongfully admitted.[13]

At least three more recently decided cases from the Washington Court of Appeals have distinguished Haga. All three cases permitted testimony concerning the sincerity of a defendant's grief where the witness did not purport to testify as an expert, where the witness's

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[11]See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

[12]507 P.2d 159 (Wash. Ct. App. 1973).

[13]Id. at 167.

personal observation of the defendant's conduct logically supported his conclusion and where the testimony did not contain a direct opinion on the defendant's guilt.[14]

In United States v. Meling, the Ninth Circuit held that a trial court properly admitted the lay opinion testimony of a 911 operator and a paramedic.[15] The court stated, "Paramedics are trained to respond quickly in emergency situations, and while treating [the defendant's] wife, the paramedic had ample time to form the impression that [the defendant] was feigning grief."[16] The court reasoned that the testimony of the 911 operator "was rationally based on her perception of [the defendant's] agitation during his emergency call" and that she was able to "compare [the defendant's] behavior with that of other emergency callers."[17]

NRS 50.265 permits lay witnesses to render opinions so long as these opinions are "[r]ationally based on the perception of the witness; and. . . [are] [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."

Here, each witness described Bergna's behavior and conduct either immediately after the crash or shortly thereafter. The witnesses had ample time to observe Bergna and testified based on their personal

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[14]See State v. Craven, 849 P.2d 681, 683 (Wash. Ct. App. 1993); State v. Allen, 749 P.2d 702, 706 (Wash. Ct. App. 1988); State v. Day, 754 P.2d 1021, 1025 (Wash. Ct. App. 1988).

[15]47 F.3d 1546, 1556 (9th Cir. 1995).

[16]Id.

[17]Id. at 1557.

observations.[18] None of the witnesses gave their opinion as to Bergna's guilt. Their opinions also assisted the jury to understand Bergna's reactions to Rinette's death and to evaluate whether the crash was accidental or intentional. The defense had ample opportunity to cross-examine and impeach each witness. Furthermore, Bergna elicited testimony concerning the genuineness of Bergna's grief, specifically, from Jeffrey Zambrano. On appeal, Bergna takes issue with several specific statements made by Zambrano. All these statements, however, were elicited by defense counsel during cross-examination. Accordingly, we conclude that the district court did not abuse its discretion when it admitted all the within described testimony concerning Bergna's grief.

Grand jury proceedings

Bergna contends that the grand jury proceedings were fatally infected with inadmissible opinion and bad act evidence, requiring dismissal of the indictment.

"'The grand jury can receive none but legal evidence, and best evidence in degree, to the exclusion of hearsay or secondary evidence.'"[19] "However, regardless of the presentation of inadmissible evidence, the indictment will be sustained if there is the slightest sufficient legal evidence."[20]

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[18]See United States v. Jackson, 688 F.2d 1121, 1125 (7th Cir. 1982) (stating that "[t]he amount of time that the witness had to observe the defendant goes to the weight to be accorded to the testimony by the jury rather than to its admissibility").

[19]Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997) (quoting NRS 172.135(2)).

[20]Id.

Bergna argues that testimony from several witnesses at the grand jury proceedings was inadmissible bad act evidence. As discussed above, we conclude that the bad act testimony was relevant, probative of motive and necessary to rebut Bergna's character witnesses, and that the opinion testimony concerning Bergna's grief was admissible pursuant to NRS 50.265.

Bergna also contends that the grand jury should not have heard testimony from Trooper John Schilling referencing the findings of Sye Linowitz, an engineer from Ford Motor Company, without also hearing Linowitz's initial, erroneous findings concerning the airbag. A pretrial hearing indicates that Linowitz's report contained errors concerning speed and distance and, therefore, the timing of the airbag deployment. However, while Trooper Schilling's grand jury testimony refers to Linowitz's reports, Schilling did not make any direct statement about the results from Linowitz's report. Instead, Trooper Schilling simply testified that he was aware that Linowitz was investigating the crash. Therefore, we conclude that the reference to Linowitz having investigated the crash was harmless and did not require the submission of his initial erroneous report to the grand jury or dismissal of the indictment. Accordingly, Bergna's argument is without merit.

Bergna also contends that the submission to the grand jury of Bergna's entire, unredacted statement, which included reference to a polygraph test, prejudiced Bergna. A copy of Bergna's statement was not included in the record on appeal. The State summarized that the remark concerning the polygraph was brief, that the results of the test were never discussed and that the State never used the information against Bergna. The State asserts that the statement revealed only that officers requested

Bergna take a polygraph, that he agreed to take the test and that he had never taken the test before. Bergna does not dispute this assertion.

In the absence of a written stipulation from both parties, the results of a polygraph test are inadmissible.[21] Furthermore, evidence "that a defendant in a criminal trial either refused to take a polygraph test or offered to submit to one is inadmissible and incompetent evidence."[22] Because there is nothing in the record on appeal that the statement included either a refusal or an offer by Bergna to take the polygraph test or that the statement included polygraph test results, Bergna's argument is without merit.

Finally, Bergna has not demonstrated that the alleged errors in the grand jury proceeding prejudiced his right to a fair trial.[23] Even if Bergna's contentions regarding the inadmissibility of certain evidence before the grand jury may have merit, sufficient evidence existed to support the grand jury's determination and the subsequent indictment, including, but not limited to: (1) a baseball hat found on the roadway several feet in front of the guardrail, while Bergna was found 80 feet down the hillside and allegedly ejected out of the window after hitting the guardrail; (2) testimony that the passenger airbag was turned off; (3)

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[21]Santillanes v. State, 102 Nev. 48, 50, 714 P.2d 184, 186 (1986).

[22]Id.

[23]See Lisle v. State, 113 Nev. 540, 552, 937 P.2d 473, 480-81 (1997); see also United States v. Mechanik, 475 U.S. 66, 67, 70 (1986) (holding that, because the defendants were convicted beyond a reasonable doubt, probable cause undoubtedly existed to bind them over for trial; therefore, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt").

expert conclusions that Bergna was not in the vehicle when it went over the guardrail and that Bergna could not have been realistically ejected from the vehicle; (4) lack of evidence of any attempt to stop the vehicle from crashing through the guardrail; (5) lack of evidence indicating that the vehicle was out of control; (6) lack of evidence demonstrating that brake fluid had leaked or that the steering or braking systems were defective; (7) testimony that the roadway near the crash was not overly steep; (8) a reenactment test indicating that a simple turn could have prevented the vehicle from crashing into the guardrail; (9) the condition of the roadway, which banked to the left, and not to the right, where the guardrail was located; (10) expert conclusions that damage to Bergna's shoes was more consistent with dragging on the roadway than rolling down the hillside; (11) lack of visible signs of trauma or torn clothing on Bergna; and (12) the presence of two gasoline cans in a dangerous condition in the back of Bergna's vehicle, which were purchased just prior to Bergna picking the victim up from the airport. Accordingly, we conclude that the district court did not err when it refused to dismiss the indictment.

State's failure to preserve evidence

Bergna contends that the district court abused its discretion when it failed to dismiss the indictment based upon the State's failure to preserve and test evidence that Bergna contends would have likely proven that his wife's death was an accident.

"Loss or destruction of evidence by the State violates due process 'only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory

value of the evidence was apparent before it was lost or destroyed.'"[24] "'To establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense.'"[25] A mere hope that an examination of the destroyed evidence would be helpful to the defense is insufficient.[26]

Bergna contends that the district court abused its discretion when it failed to dismiss the indictment upon learning that the airbag and cornstarch granules had not been preserved. Bergna first contends that, if the State had removed the airbag from the vehicle on the day of the incident, the airbag would be in a testable condition. Bergna, however, fails to explain how he would have tested the airbag or what he expected the test results to reveal or how this evidence would have been exculpatory. Bergna seems to argue that preservation of the airbag would have demonstrated that the cornstarch particles found on Bergna's jacket were from the airbag, thereby placing him in the vehicle at the moment of impact, supporting Bergna's theory that he was ejected from the vehicle after it hit the guardrail. However, because experts testified that it is impossible to determine the source of a particular cornstarch granule, testing of the cornstarch particles would support neither the State's nor the defense's theory. NHP's first concern upon arrival at the crash site was the safety of those involved in the accident rather than contamination

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[24]Daniel v. State, 119 Nev. __, __, 78 P.3d 890, 905 (2003) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)).

[25]Id. (quoting Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998)).

[26]Id.

of evidence. As standard procedure, rescue and emergency personnel wore latex gloves, which typically are dusted on the inside with cornstarch. Consequently, the cornstarch particles found on Bergna's clothing could just as easily have come from the latex gloves. Therefore, Bergna failed to demonstrate that the State should have reasonably anticipated that the airbag would have been material, exculpatory evidence. Accordingly, we conclude that Bergna's argument is without merit.

Next, Bergna contends that, because the State destroyed guardrail post 108, the district court should have dismissed the indictment. Bergna argues that the State's failure to preserve the evidence and immediately investigate the evidence after the crash prejudiced his right to a fair trial.

The State's expert testified that he did not conduct any tests on the wood because the pieces of wood found in the truck's undercarriage, which were presumably from post 108, were irrelevant to the determination of the speed of the truck or the approaching angle. Indeed, even assuming that the pieces of wood were from post 108, Bergna does not explain how this evidence is material or exculpatory or how it would support his theory of the case. The defense's expert testified that the pieces of wood found in the truck's undercarriage were not natural growth and were treated with chemicals. The State did not dispute this testimony. The defense also did not attempt to compare the pieces of wood with the other existing posts. Even had the State had preserved post 108, there is no indication that the evidence would have been exculpatory.

Finally, Bergna contends that, because the State failed to preserve the vehicle's master cylinder, the district court should have dismissed the indictment. Bergna first argues that the State knew from

the date of the incident that a murder investigation was realistically in the future, and therefore should have preserved the truck. Bergna also argues that the State was on notice that the brakes on Bergna's vehicle were defective and, therefore, should have preserved the braking system. Yet, during Bergna's first trial in October 2001, the defense did not argue that the brakes on the truck were defective. It was not until March 2002 that the defense attempted to investigate and examine the truck. Moreover, the State's examination of the vehicle in June 1998 did not reveal the presence or possibility of brake failure. Accordingly, the record does not support Bergna's contention that the State knew of any existing or possible brake problems.

Bergna argues that, the presence of brake fluid on the surface of the vacuum booster warrants the inference that the master cylinder seal had been leaking. The State's expert testified that, if the master cylinder were defective, investigators would have found fluids on the roadway, which they did not. Crime scene investigators testified that there were no fluids found on the roadway nor any other evidence that the master cylinder had leaked. Furthermore, Bergna's expert was unable to determine whether the hypothetical leak occurred pre-crash or post-crash. Bergna's expert testified that, due to the master cylinder's deteriorated condition in March 2002, there was no way to test it. However, the State's expert testified that the rust, dirt and corrosion on the master cylinder could have resulted from the vehicle tumbling 800 feet down the hillside, its four-day stay there through rain and snow, its helicopter flight with the attendant wind and dust, its transport to the impound lot and, finally, the deteriorating effects of time over four years. Experts testified that dry air causes deterioration to rubber, and that, even if the vehicle had been

covered or kept indoors, simply through the passage of time, the rubber seal on the master cylinder could have easily deteriorated. These circumstances were unavoidable. Therefore, even if the State had taken additional measures to preserve the master cylinder, Bergna has failed to show how the master cylinder would have been material or exculpatory to his defense. Accordingly, Bergna's argument is without merit.

Bergna contends that the instant case is similar to Cook v. State,[27] Crockett v. State[28] and Sparks v. State.[29] However, in those cases, the lost or destroyed evidence was material to the defendant's innocence and was exculpatory, and therefore the destruction or loss of the evidence prejudiced the defendant's right to a fair trial. Here, Bergna has not demonstrated that either the airbag, post 108 or the master cylinder was

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[27]114 Nev. at 124-26, 953 P.2d at 715-16 (concluding that the defense was unduly prejudiced by the State's loss of photographs of the crime scene, the victim's bruises and a blood stain, the victim's initial statement to police, a detective's notes taken during the defendant's initial interview and the victim's sweater, which were material and relevant to determine whether a struggle had occurred in the bedroom, whether the bruise conformed to the victim's testimony, whether the victim's statement was inconsistent with her trial testimony and whether the sweater contained evidence of blood).

[28]95 Nev. 859, 864-66, 603 P.2d 1078, 1081-82 (1979) (reversing the conviction and dismissing the indictment where defendant was prejudiced by the State's loss of test results taken from the victim's body, which indicated the presence of two blood types, indicating that perhaps someone other than the defendant had raped and killed the victim).

[29]104 Nev. 316, 318-20, 759 P.2d 180, 181-82 (1988) (reversing a conviction and ordering dismissal of all charges where the State admitted the possibility that prints on the murder weapon could have supported the defendant's theory and where the defendant was prejudiced by the State's mishandling of the murder weapon).

material or exculpatory or that the loss of such evidence prejudiced his right to a fair trial. Furthermore, there is no evidence, nor does Bergna allege, that the State acted in bad faith. Accordingly, we conclude that Bergna's arguments are without merit.

Jury instructions

Although a defendant has a right to have the jury instructed on his theory of defense, his theory must be supported by at least some evidence.[30] Determining the appropriateness of a jury instruction is within the sound discretion of the district court.[31] Accordingly, we "will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error."[32]

Bergna first contends that, if this court determines that Bergna's due process rights were violated by the State's failure to preserve evidence, then the district court abused its discretion when it refused to give to the jury Bergna's proffered spoliation of evidence instruction. We conclude that, because the evidence does not support a spoliation of evidence theory, the district court did not abuse its discretion when it refused to submit the spoliation of evidence instruction to the jury.

Bergna next contends that the district court abused its discretion when it refused to submit his proffered jury instruction on proximate cause. Bergna contends that his instruction is a correct statement of the law pursuant to McCord v. State.[33] McCord, however,

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[30]Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002).

[31]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[32]Id.

[33]107 Nev. 162, 807 P.2d 1378 (1991).

determined only that the State's submitted instruction was improper and did not rule on the accuracy of the defendant's proffered instruction.[34] McCord held that "[t]he State may not impose a 'beyond a reasonable doubt' burden to prove an affirmative defense which negates an element of the offense."[35]

The State responds that, to warrant an instruction on proximate causation, Bergna must demonstrate the existence of a superseding or intervening cause. The State responds that the facts of Lay v. State are directly applicable here.[36] In upholding the trial court's refusal to give the jury the proffered proximate cause instruction in Lay, we determined that, even if a third party's negligence was a direct cause of the victim's death, "[a] defendant will not be relieved of criminal liability for murder when his action was a substantial factor in bringing about the death of the victim."[37] Furthermore, in Etcheverry v. State, we concluded that a superseding cause would relieve a defendant of criminal liability only when he can establish that he did not proximately cause the harm to the victim.[38] Furthermore, "[a]ny 'intervening cause must, effectively,

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[34]Id. at 163-64, 807 P.2d at 1379.

[35]Id. In McCord, the defendant shot the victim in the forehead. The victim was recovering in the hospital until he contracted pneumonia. Experts testified that the pneumonia was a result of the victim's weakened condition from the shooting. However, evidence also demonstrated the existence of a bacteria outbreak in the hospital; a possible superseding or intervening cause. Id. at 162-63, 807 P.2d at 1378.

[36]110 Nev. 1189, 886 P.2d 448 (1994).

[37]Id. at 1192-93, 886 P.2d at 450.

[38]107 Nev. 782, 785, 821 P.2d 350, 351 (1991).

break the chain of causation.' Thus, an intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act."[39]

Here, there is no evidence that the Nevada Department of Transportation's allegedly poor maintenance of the guardrail system on Slide Mountain was the sole cause of Rinette's death, as would be required in order to relieve Bergna from criminal liability. Instead, the evidence indicates that Bergna's intentional act of driving the vehicle into the guardrail was a substantial factor in Rinette's death. Expert testimony also suggested that, even if the guardrail had been in prime condition, it was only designed to protect against low-angle collisions. Moreover, the jury received several instructions on the State's burden to prove the elements of the crime beyond a reasonable doubt. Because there is no evidence indicating that NDOT's actions constituted a superseding cause, we conclude that the district court did not abuse its discretion when it refused to give the jury Bergna's proffered proximate cause instruction.

Finally, Bergna argues that if the district court did not agree with his proffered instruction, it had a duty to craft an appropriate instruction and submit it to the jury, sua sponte. The case law that Bergna relies upon indicates that a court must sua sponte instruct on general principles of law, rather than specific areas of law, and only where evidence supports the giving of such an instruction.[40] Because no evidence supported Bergna's proposed proximate cause instruction, we conclude

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[39]Id. (quoting Bostic v. State, 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988)).

[40]See People v. Bernhardt, 35 Cal. Rptr. 401, 416 (Ct. App. 1963).

that the district court did not abuse its discretion when it refused to sua sponte submit a jury instruction on proximate cause.

Records of defective brake components

Bergna contends that the district court abused its discretion when it refused to admit approximately five binders of documents from the Ford Motor Company relating to warranty complaints and repairs on the brake systems of Ford F-150 trucks. Bergna asserts that, because his expert could not pinpoint the precise cause of the crash, a possibility exists that there were serious failures in two or three mechanical systems. Therefore, Bergna argues, consumer complaints relating to key brake components were relevant.

The decision to admit or exclude evidence rests within the sound discretion of the district court.[41] Accordingly, absent a manifest abuse of that discretion, we will not overturn the district court's decision on appeal.[42]

The district court permitted the defense's expert to testify as to his examination of the vehicle, his experience in the field, his opinion that additional tests were available to the State to test certain brake components and his reliance on Ford documents to form his opinion, but held that the Ford documents themselves were not admissible. The district court noted that during trial the defense failed to establish that the vacuum booster, the master cylinder and the RABS valve were defective, and therefore the Ford documents were irrelevant and would have likely confused the jury. The district court also determined that

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[41]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

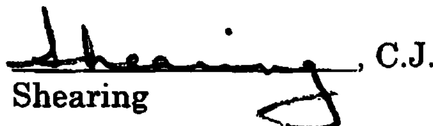
[42]Id.

admitting the five binders of documents, which contained consumer complaints from around the country over the course of the years concerning various brake problems, would be unduly prejudicial to the State. Due to the voluminous appendix of documents, the district court examined four complaints chosen by the defense. The district court noted that the complaints from the other consumers differed from the complaints concerning Bergna's truck, in that the allegedly defective part, or combination of parts, were different. The district court concluded that Bergna's expert's testimony speculating that several brake components had failed did not warrant the introduction into evidence of unrelated consumer complaints concerning other Ford trucks. We agree. Accordingly, we conclude that the district court did not abuse its discretion when it refused to admit the Ford documents into evidence.

CONCLUSION

We conclude that none of Bergna's arguments on appeal have merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.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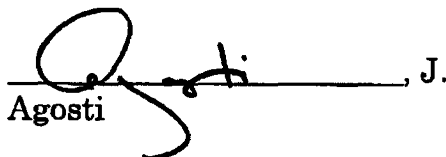
Shearing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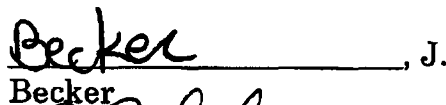
Agosti

_______________, J.
Rose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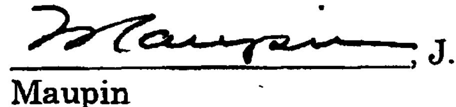
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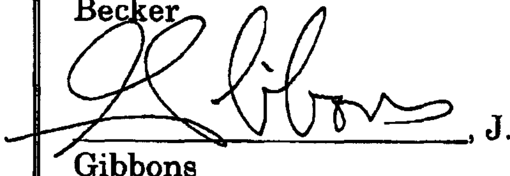
Maupin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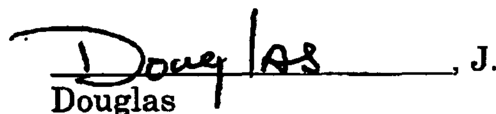
Gibbons


_______________, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk