IN THE SUPREME COURT OF THE STATE OF NEVADA

COREY JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 43539
COREY JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44449
COREY JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44450

FILED

OCT 0 3 2005

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

ORDER OF AFFIRMANCE

These are consolidated appeals. Docket No. 43539 is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of gross misdemeanor false imprisonment and felony battery causing substantial bodily harm. Docket Nos. 44449 and 44450 are appeals from district court orders denying appellant's first and second motions for a new trial. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge. The district court sentenced appellant Corey Johnson to serve a jail term of 12 months for the false imprisonment count and a consecutive prison term of 24 to 60 months for the battery count.

First, Johnson contends that the district court abused its discretion in denying his first motion for a new trial. Johnson's first motion for a new trial was based on what he contended was newly discovered evidence of "a pattern of prosecutorial misconduct." Specifically, after the trial, Johnson discovered that the jury received: (1) inadmissible medical records, dated August 9, 2003, detailing the treatment of the victim for an unrelated battery, which were improperly included in exhibit 1; and (2) an erroneous jury instruction, jury instruction number 2, that enlarged the date of the charged offense to include the date of the August 9 battery. We conclude that the district court did not abuse its discretion in denying Johnson's first motion for a new trial.

A new trial must be granted in cases where jurors consider inadmissible evidence unless it appears beyond a reasonable doubt that prejudice has not resulted.[1] "The determination of whether reversible prejudice has resulted from jurors' consideration of inadmissible evidence in a given case "is a fact question to be determined by the trial court'" and will only be reversed upon a showing of abuse of discretion.[2] In considering whether reversible error has occurred, this court considers three factors: "'whether the issue of guilt or innocence is close, the

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[1]Winiarz v. State, 107 Nev. 812, 814, 820 P.2d 1317, 1318 (1991).

[2]Id. (quoting Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 942-43 (1989)).

quantity and character of the error, and the gravity of the crime charged.'"[3]

In this case, after hearing arguments from counsel, the district court denied the first motion for a new trial, ruling that the errors alleged involving the August 9 battery were harmless. In light of the overwhelming evidence of guilt presented at trial and the relative insignificance of the evidence of the August 9, 2003, battery, we conclude that the district court did not abuse its discretion in denying the motion for a new trial.

Second, Johnson contends that reversal of his conviction is warranted because the change in the date of the charged offense set forth in jury instruction number 2 "is akin to a secret amendment" of the information after the close of evidence. Citing to NRS 173.095,[4] Johnson argues that he was prejudiced by the amendment because he was not given formal notice of the change in the date, and the prosecutor referred to the August 9 battery in cross-examining Johnson. We reject Johnson's argument.

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[3]Id. (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

[4]NRS 173.095(1) authorizes the district court to "permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

We conclude that NRS 173.095 is inapplicable to this case because the State did not file, and the district court did not grant, a motion to amend the information to include the August 9, 2003, date and, in fact, the State presented no evidence about the August 9 battery in its case-in-chief. Rather, the inclusion of the August 9 date in jury instruction number 2 was attributable to a typographical error that was overlooked by the prosecutor, defense counsel, and the district court. Moreover, although Johnson notes that the prosecutor cross-examined him about the August 9 battery, Johnson opened the door to that line of questioning by testifying about the August 9 battery on direct examination.[5]

Third, Johnson contends that reversal of his conviction is warranted because the August 9 medical records, included in exhibit 1, amounted to prior bad act evidence that was admitted at trial without a Petrocelli hearing[6] or a limiting instruction.[7] We conclude that Johnson's contention lacks merit. We note that the inclusion of the victim's August 9 medical records in exhibit 1 was inadvertent and, at trial, neither counsel nor the district court were aware that the August 9 records were admitted

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[5]See Taylor v. State, 109 Nev. 849, 857, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part, dissenting in part) ("ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who first broached the issue").

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

[7]See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).

into evidence. Nonetheless, we disagree that the August 9 medical records were prior bad act evidence. NRS 48.045(2) defines prior bad act evidence as evidence of other wrongs admitted at trial to prove the defendant acted in a similar manner on a particular occasion. In this case, although the August 9 medical records indicate that the victim was battered, they do not identify Johnson as the perpetrator but instead merely summarize the victim's medical treatment for the prior battery. Because there is nothing in the medical records indicating that Johnson committed a prior battery, we conclude that it is not evidence of a prior bad act.

Fourth, Johnson contends that his conviction should be reversed because the State failed to provide him with the August 9 medical records, which he alleges was exculpatory Brady evidence.[8] In particular, Johnson alleges the August 9 medical records were exculpatory because they show that another person battered the victim and contradict the prosecutor's assertion that the victim told Dr. Moore that Johnson assaulted her on August 9. We conclude that Johnson's contention lacks merit. The August 9 medical records do not identify the perpetrator of the battery and, therefore, do not show that another individual battered the victim. Nonetheless, even assuming the medical records were exculpatory, we conclude that they were not material because there is no reasonable

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[8]Brady v. Maryland, 373 U.S. 83 (1963).

possibility that the medical records would have changed the result of the proceeding.[9]

Fifth, Johnson contends that the district court erred in admitting the expert testimony of Dr. Moore because he was not properly noticed as an expert witness. In particular, Johnson alleges that the State did not comply with NRS 174.234 because it did not provide a copy of Dr. Moore's curriculum vitae and did not provide a copy of all of the medical reports made by or at the direction of the expert witnesses.

NRS 174.295(2) sets forth the remedy for discovery violations pursuant to NRS 174.234. Specifically, where there has been a discovery violation, the district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."[10] "However, where the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to

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[9]See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (if evidence is specifically requested, it is material if there is a "reasonable possibility" that the claimed evidence would have affected the outcome of the trial).

[10]NRS 174.295(2).

protect the defendant against prejudice, there is no error justifying dismissal of the case."[11]

In this case, after hearing argument on the issue, the district court allowed Dr. Moore to testify, but twice continued the trial date so that the defense had an opportunity to review the victim's medical records and prepare a defense. The district court also ordered the medical records unsealed so that the defense had an opportunity to review them. We conclude that the district court did not err in allowing Dr. Moore to testify. The record does not indicate that the prosecutor's failure to provide the curriculum vitae or the medical records was intentional. Additionally, Johnson was not prejudiced by the discovery violation because he was granted two continuances and given ample time to prepare a defense. Accordingly, the district court did not err in allowing the testimony.

Sixth, citing to Crawford v. Washington,[12] Johnson contends that the district court erred in admitting Dr. Moore's testimony detailing the contents of medical records prepared by other hospital doctors because his right to confrontation was violated. We conclude that Johnson's contention lacks merit.

In Crawford, the United States Supreme Court held that the Confrontation Clause of the United States Constitution bars the

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[11]State v. Tapia, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992) (construing NRS 174.295).

[12]541 U.S. 36 (2004).

admission of testimonial statements made by a witness who does not appear at trial, unless the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the witness regarding the statement.[13] Although the Court did not expressly define the term "testimonial," it did state that the term applies to accusatory statements, explaining "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[14] Additionally, the Court noted that a "core class of 'testimonial' statements exist," including affidavits, police interrogations, and "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[15]

We conclude that Crawford is not specifically implicated here because the statements contained in the medical records were not testimonial in nature. The statements detailing the victim's medical condition and treatment contained in the medical records were not accusatory and were not made to be used at trial, but instead were made for the purpose of diagnosis and treatment.[16] Accordingly, Johnson's

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[13]Id.

[14]Id. at 51.

[15]Id. at 51-52 (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et. al. at 3).

[16]See NRS 51.115.

confrontation rights were not violated by the admission of the medical records.

Seventh, Johnson contends that the prosecutor committed misconduct by: (1) purposely concealing the August 9 medical records from the defense; (2) including the August 9 medical records in exhibit 1; (3) including the August 9 offense date in jury instruction number 2; (4) mischaracterizing Dr. Moore's potential testimony about the victim's account of the incident occurring on August 9; (5) bringing in testimony that Johnson was smoking marijuana at the time of the battery; and (6) commenting on Johnson's failure to bring in other witnesses to testify.[17]

In reviewing allegations of prosecutorial misconduct, this court reviews the trial record to determine whether the prosecutor's conduct was improper and, if so, whether the conduct "'so infected the proceedings with unfairness as to make the results a denial of due process.'"[18]

In this case, we conclude that the district court did not err in rejecting Johnson's allegations that the prosecutor acted in bad faith or engaged in intentional misconduct with respect to the evidence involving

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[17]After Johnson testified that he was over at a good friend's for a few hours during the three-day period at issue, the prosecutor asked: "How come he didn't come in and testify for you?"

[18]See Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 83 (2004) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)).

the August 9 battery of the victim.[19] Moreover, we conclude that the prosecutor did not act improperly by asking the victim whether Johnson was using drugs or alcohol during the time of the battery; that question was permissible because it concerned the victim's description of the charged crime, not a prior bad act.[20] Finally, although we agree that the prosecutor's question involving Johnson's failure to bring in witnesses was improper, defense counsel objected, the district court sustained the objection, and Johnson did not answer the question. Nonetheless, even assuming prosecutorial misconduct occurred, it did not rise to the level of infecting the proceedings with unfairness as to make the results a denial of due process.

Finally, Johnson contends that cumulative error denied him the ability to obtain a fair trial. Because we have rejected Johnson's assignments of error, we conclude that his allegation of cumulative error lacks merit and that Johnson received a fair trial.[21]

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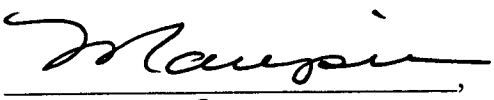
[19]Johnson raised claims of prosecutorial misconduct in his first and second motions for a new trial, which were considered and rejected by the district court.

[20]NRS 48.035(3). Additionally, we note that there was no testimony presented that Johnson used marijuana. To the contrary, the victim testified that Johnson was neither smoking marijuana nor drinking alcohol at the time the battery occurred.

[21]See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").

Having considered Johnson's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



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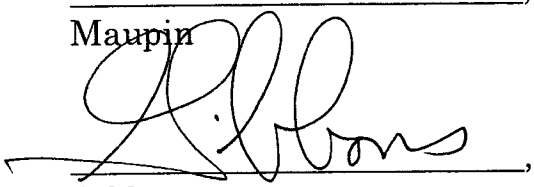

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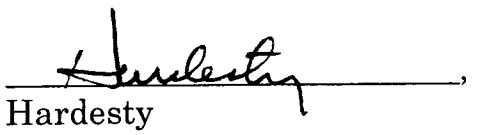

_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 3, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk