IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERRI LYNNE LOVE A/K/A SHERRI LOVE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52403

FILED

MAY 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and child abuse and neglect with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Sherri Love killed her seven-year-old daughter by stabbing her multiple times, then stabbed her eight-year-old son twice, leaving him with minor injuries. Love maintained at trial that she was not guilty by reason of insanity. Specially, she asserted that her "state of mind was the product of the interaction of mental disease or defect, prescription medication, and alcohol abuse" and that, when she attacked her children, she was "suffer[ing] from an amnesiatic-type process that left her incapable of apprehending the nature of her conduct." On appeal, Love maintains that the trial court committed evidentiary and instructional error that compromised her insanity defense and led to her conviction. We disagree and affirm.

1. Expert testimony reporting Love's out-of-court statements

Love had diagnoses of bipolar and post-traumatic stress disorders and a long history of alcohol abuse. Less than a week before the filicide, she was in an in-patient drug and alcohol detoxification program,

where she was prescribed Librium. She left the program and proceeded to drink. Dr. Melvin Pohl—a medical director of a drug and alcohol treatment program who did not treat or examine Love—testified that Librium and alcohol together can trigger a known, rare side effect in a person with bipolar disorder, causing the person to become delusional, psychotic, or violent. Love's theory of defense required her to convince the jury that this rare side effect occurred with her.

Love opted not to testify at trial. She was interviewed before trial by a forensic psychologist, James Paglini. At trial, Love sought to introduce through Dr. Paglini an out-of-court statement she made to him that she had no recollection of stabbing her daughter. The district court excluded this statement as hearsay, a ruling Love appeals. The district court did not abuse its discretion in ruling as it did.

NRS 50.275 and NRS 50.285 address the admissibility of expert testimony, including testimony by experts concerning facts relied on by them as the basis for their opinions. Courts elsewhere are split on whether and to what extent an expert may testify as to otherwise inadmissible evidence that he or she relied on in order to formulate his or her opinion. See generally Annotation, Admissibility of Testimony of Expert, as to Basis of His Opinion, to Matters Otherwise Excludible as Hearsay—State Cases, 89 A.L.R. 4th 456 (1991). We do not need to decide the scope of the permission afforded by NRS 50.275 and NRS 50.285 here, however, because the statutes require, at a minimum, that the hearsay relied on by the expert be relevant to the opinion the expert offers.

Here, Dr. Paglini offered two expert opinions. First, he confirmed previous medical providers' diagnoses of Love's bipolar and post-traumatic stress disorders. Second, he opined that a "confluence of

numerous issues," including her bipolar disorder, depression, alcohol and opiate dependence, suicidal ideation, feeling overwhelmed in her life, and issues with her ex-boyfriend "likely to some respects contributed to that day." However, Dr. Paglini—a clinical psychologist, not a psychiatrist[1]—acknowledged he was not qualified to offer an opinion on whether Love had experienced the rare side effect of psychosis or delusions from taking Librium, let alone that she was experiencing those side effects at the time she killed her daughter.

Love's statement to Dr. Paglini that she did not remember killing her daughter was argued as relevant, not to the opinions Dr. Paglini was qualified to offer, but as confirming her Librium-induced psychotic or delusion state, on which Dr. Paglini declined to offer an opinion. Dr. Paglini could not be used as a Trojan horse to bring otherwise inadmissible substantive evidence into the case where he, himself, did not rely on that evidence for his opinions (and no argument was made that Dr. Pohl relied on Dr. Paglini's examination of Love for the opinion Dr. Pohl gave), Given this record, we conclude that the district court did not abuse its discretion in declining to admit Love's out-of-court statement to Dr. Paglini under NRS 50.275 and NRS 50.285.

2. Instructional errors

Love challenges the jury instructions on insanity, involuntary intoxication, and voluntary intoxication. Since she did not object to the challenged instructions at trial, plain error review obtains. Bonacci v.

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[1]Love's counsel on appeal erred in identifying Dr. Paglini as a psychiatrist during oral argument. The trial record shows that Dr. Paglini is a clinical psychologist.

State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980). Plain error is error "so unmistakable that it reveals itself by a casual inspection of the record," Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (citation and internal quotation marks omitted), that affected the appellant's substantial rights. McConnell v. State, 120 Nev. 1043, 1058, 102 P.3d 606, 617 (2004). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

Love first challenges the insanity instruction, Instruction 23.[2] In Finger v. State, we stated that "[t]he Legislature is free to decide what method to use in presenting the issue of legal insanity to a trier of fact, i.e., as an affirmative defense or rebuttable presumption of sanity." 117 Nev. 548, 575, 27 P.3d 66, 84 (2001). Citing Finger, Love argues that including language regarding a presumption of sanity and defendant's burden of proof on her affirmative defense of legal insanity altered adversely the proof burdens on each party. While Finger suggests that the Legislature could implement the insanity defense as a rebuttable presumption of sanity or an affirmative defense of insanity, nothing in the

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[2]Jury Instruction 23 read as follows:

> You are instructed that a defendant is presumed sane until the contrary is shown. Insanity is an affirmative defense, and the defendant has the burden of proving her legal insanity by a preponderance of evidence.
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> By a preponderance of evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.

instruction suggests that the trial court fully effectuated the legal construct of a rebuttable presumption of insanity by its use in Instruction 23 of the explanatory language that "a defendant is presumed sane until the contrary is shown." Nor, more importantly, has Love shown or even offered argument on how the language "skewed the proof burdens in favor of the prosecution." Thus, Love has not established error, let alone plain error, in Instruction 23 under the exacting standard in Patterson, 111 Nev. at 1530, 907 P.2d at 987.

Love next contends that the district court erred in its involuntary intoxication instruction[3] because, while it included language regarding the defendant's burden of proof on the affirmative defense of involuntary intoxication, it failed to also state that the State retained the ultimate burden of proof on each element of each crime and lacked "duty to acquit" language. The district court was not required to include specific language regarding the State's retaining the ultimate burden of proof on each element of each crime in the involuntary intoxication instruction, nor was it required to include "duty to acquit" language, because doing so would have been duplicative of Jury Instruction 32. Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002). Love's challenge to instruction 28 thus fails plain error review.

Last, Love challenges the instruction on voluntary intoxication as having "told jurors, in essence, that any voluntary intoxication on the

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[3]Jury Instruction 28 stated, in relevant part: "The defendant must prove by a preponderance of the evidence any claim of involuntary intoxication."

part of a criminal defendant precludes an insanity verdict." Love misreads Instruction 27, which said:

> In considering a defense of not guilty by reason of insanity, the jury may not consider a defendant's voluntary drug use or intoxication at the time of her crime in combination with any alleged mental disease or defect in determining whether the defendant was unable to appreciate the nature and quality or wrongfulness of her acts. Rather, in order to satisfy the requirements of legally insane, the defendant has to demonstrate that her mental disease or defect alone or in conjunction with involuntary intoxication prevented her from appreciating the nature and quality of her acts.

Although Love argues otherwise, Instruction 27 does not preclude all findings of insanity when the defendant was voluntarily intoxicated. Rather, it says that the effects of voluntary intoxication cannot be considered in evaluating an insanity or involuntary intoxication claim. The district court carefully reasoned through this issue at trial, reviewed the applicable law, and instructed the jury accordingly. Its conclusion that "voluntary intoxication combined with a mental disease will not support an insanity defense," United States v. Knott, 894 F.2d 1119, 1122 (9th Cir. 1990), was amply supported by caselaw. Even if it was error—a question we do not need to decide here—it did not qualify as plain error under Patterson, 111 Nev. at 1530, 907 P.2d at 987.[4]

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[4]Love's challenges to Instructions 8 and 11 fail because they are counter to settled questions of Nevada law and Love provides no argument for why this court should revisit that law. Love's contention with respect to Instruction 13 fails because it is based on a misreading of the instruction, which clearly states that the jury may consider second-degree murder if the jury has not already found, unanimously, the defendant

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3. Paglini impeachment with Moreno hearsay

The district court permitted the State to impeach Dr. Paglini with a statement by the children's father, Rick Moreno, that Love had threatened to harm the children four months before she stabbed them. Moreno's statement was in a police report Dr. Paglini reviewed in preparing to testify. Dr. Paglini opined that Love's stabbing of her children was best explained by a combination of the unique stressors she was under on February 3, 2007—in other words, that Love's stabbing of her children was completely unexpected and out of character for her.

Love contends that Moreno's statement in the police report was inadmissible under NRS 48.045(2) as a prior bad act. She also claims that the statements were barred under Walker v. State, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000), where this court held that threats dating back six and ten years were inadmissible as irrelevant and prejudicial.

Given his opinion on direct examination, the State was permitted to impeach Dr. Paglini with Moreno's statement in the police report by asking whether he had read and considered Moreno's statement to the police in formulating his opinion. See NRS 48.055(1). The statement impeached Dr. Paglini's testimony, and the district court

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. . . continued

guilty of first-degree murder. Last, Love contends that while Jury Instruction 10 is a correct statement of law, it may be confusing to jurors. Love did not object at trial, and has not provided this court a basis for holding that a correct statement of law that may be confusing to jurors is plain error.

properly gave a limiting instruction that the statement could only be considered for impeachment purposes.

4. Statement about patients leaving detoxification early

Dr. McKenzie was the medical director of the detoxification program attended by Love prior to the stabbing of her children. Dr. McKenzie testified without objection that in his experience the majority of patients who leave detox programs early do so to return to their substance of choice. The admission of this testimony, challenged by Love on appeal, did not amount to plain error. Given Love's theory of defense, it is not clear whether Love made a strategic decision not to object, precluding review altogether on direct review. Even putting this aside, the evidence was relevant, not otherwise inadmissible, and thus allowable under NRS 48.025. NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Why Love checked out of the program early, without finishing the program and against medical advice, was "of consequence to the determination of the action." NRS 48.015. Finally, there was ample corroborating evidence that Love in fact did return to drinking immediately after leaving the program early, making any error in admitting Dr. McKenzie's statement harmless and far from plain.

5. Child abuse conviction

Love contends that her conviction for child abuse and neglect with the use of a deadly weapon violates double jeopardy and redundancy principles. She argues that she cannot be convicted of child abuse with respect to her daughter since she has been convicted of first-degree murder for her daughter's death and that such a conviction would be a redundant conviction, which would "not comport with legislative intent."

Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (internal quotation omitted). She argues that the same rationale applies to her conviction for attempted murder with respect to her son. Though Love did not object at trial, this court may address constitutional or plain error claims sua sponte. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008).

Love's double jeopardy claim is of constitutional dimension, and thus this court reviews it for harmless error. Chapman v. California, 386 U.S. 18, 21-24 (1967). Love's redundancy claim is reviewed for plain error, and "[u]nder that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice." Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (internal quotation omitted).

Love's double jeopardy claim fails to demonstrate any error, harmless or otherwise, because it fails to meet this court's test for such a claim, which requires that a defendant not be convicted of both a greater and lesser included offense. McIntosh v. State, 113 Nev. 224, 225-26, 932 P.2d 1072, 1073 (1997). Here, neither of Love's other two convictions, first-degree murder with use of a deadly weapon, nor attempted murder with use of a deadly weapon, is a greater or lesser included offense of her conviction for child abuse or neglect with use of a deadly weapon.

Similarly, Love's contention that her convictions for child abuse or neglect with use of a deadly weapon and first-degree murder with use of a deadly weapon were redundant fails to meet this court's requirement that for a conviction to be redundant, "'[both] offenses that, as charged, [must] punish the exact same illegal act.'" Salazar, 119 Nev. at

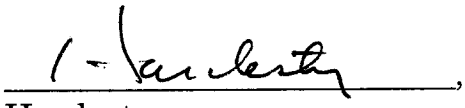
228, 70 P.3d at 751 (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)). Here, Love was convicted of first-degree murder for killing her daughter, and child abuse or neglect with use of a deadly weapon for stabbing her son.

6. Love's remaining contentions

Love raises a number of other issues, none of which we can credit as an appellate court. Her Batson v. Kentucky, 476 U.S. 79 (1986), claims fail because of the deference due the district court's factual finding that the juror's exclusion was not purposefully discriminatory. Hernandez v. New York, 500 U.S. 352, 364 (1991); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998). Her arguments respecting sentencing for deadly weapon enhancements under the version of NRS 193.165 in effect at the time of her sentencing were repelled in State v. Dist. Ct. (Pullin), 124 Nev. 564, 556-57, 188 P.3d 1079, 1080-81 (2008), and Hernandez v. State, 118 Nev. 513, 528, 50 P.3d 1100, 1110 (2002), forecloses her constitutional challenge to the deadly weapon enhancement. The evidence supports Love's conviction of the predicate felony of child abuse, defeating her challenge to the application of the felony murder statute. With respect to Love's contention that the district court should have sua sponte instructed the jury on the lesser offense of gross misdemeanor child abuse pursuant to NRS 200.508(2)(b)(1), she does not point to how her theory of the case at trial was in any way impaired by the failure of the trial court to do so. Finally, we have reviewed and reject Love's assertion that reversal is appropriate based on prosecutorial misconduct, insufficient evidence, or cumulative error.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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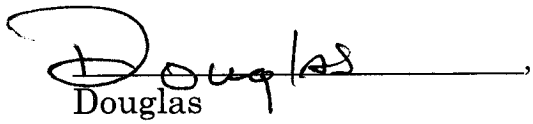

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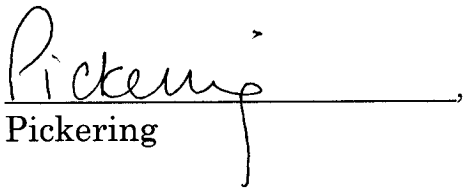

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk