

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS HUMBERTO TRIGILIO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52972

**FILED**

NOV 02 2009

ORDER OF REVERSAL AND REMAND

THACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of extortion and misdemeanor assault. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. On November 20, 2008, the district court sentenced appellant Carlos Trigilio to serve a prison term of four years for extortion and a jail term of six months for assault; the district court ordered both sentences suspended and placed Trigilio on probation.

Trigilio's convictions stem from an incident in which he parked outside Benjamin Madera's home with a gun and waited for Madera to return home from work. When Madera arrived, Trigilio threatened him and demanded a sum of money that Madera owed to Trigilio's girlfriend.

Trigilio claims that the district court erred by admitting prior bad act evidence and by failing to give the jury a limiting instruction on the admitted evidence. Specifically, he refers to (1) his cross-examination regarding two prior suspensions of his concealed weapons permit and (2) the rebuttal testimony of Albert Sollini about the facts of a prior arrest for assault with a deadly weapon. We conclude that Trigilio was properly

cross-examined but that the district court erred in admitting Sollini's testimony as rebuttal evidence.

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error." Somee v. State, 124 Nev. \_\_\_, \_\_\_, 187 P.3d 152, 160 (2008). Before evidence of prior bad acts can be admitted, the district court must determine, in a hearing "outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). "If evidence of the prior bad act is admitted, the district court must then issue a limiting instruction to the jury about the limited use of bad act evidence, unless waived by the defendant." Chavez v. State, 125 Nev. \_\_\_, \_\_\_, 213 P.3d 476, 488 (2009). This requirement includes a verbal instruction to the jury at the time the evidence is admitted. Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001), modified by Mclellan v. State, 124 Nev. \_\_\_, \_\_\_, 182 P.3d 106, 111 (2008).

At trial, Trigilio testified on his own behalf. He denied threatening Madera or brandishing his gun. In addition to testifying about his version of the events, Trigilio testified that he had possessed a concealed weapons permit for ten years. On cross-examination, over defense counsel's objection, Trigilio admitted that his concealed weapons permit had been suspended or revoked on three occasions: (1) after his arrest for the current charges, (2) in July 2006 pursuant to an extended protective order issued against him during divorce proceedings, and (3) in

2002 following an arrest for assault with a deadly weapon. He conceded that he should have said that he had held a concealed weapons permit "off and on" for ten years but pointed out that the charges in the prior case had been dismissed.

After the defense rested, the State asked for a Petrocelli hearing to present the testimony of Albert Sollini as a potential rebuttal witness. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004); Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65. During the hearing, Sollini testified about the specific facts of the 2002 incident that had resulted in the suspension of Trigilio's concealed weapons permit. On cross-examination, Sollini testified that he gave a written statement to the police regarding the incident and did not recall retracting his statement but admitted that he could have recanted at some point.

After the hearing, the district court ruled that Trigilio's prior attack on Sollini had been proven by clear and convincing evidence and was admissible prior bad act evidence because of the similarities between the prior incident and the present case. Defense counsel objected on the grounds that the evidence should have been presented in the State's case-in-chief and he had not received notice of it. The district court rejected defense counsel's argument and ruled that the evidence was not case-in-chief evidence but was being admitted as rebuttal to Trigilio's testimony. Sollini's testimony was admitted without a limiting instruction.

With respect to the cross-examination, we conclude the prosecutor's questioning of Trigilio regarding the prior suspensions of his concealed weapons permit was effective and proper cross-examination intended to impeach his testimony that he had possessed a valid concealed weapons permit for ten years. "[A] party can impeach a witness on collateral matters during cross-examination 'with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used.'" Jezdik v. State, 121 Nev. 129, 137, 110 P.3d 1058, 1063 (2005) (quoting Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000)). See also NRS 50.085(3) ("Specific instances of the conduct of a witness . . . may not be proved by extrinsic evidence," but may be "inquired into on cross-examination.").

On the other hand, although the district court held a proper Petrocelli hearing to consider Sollini's testimony, we conclude that the district court erred in permitting Sollini to testify in the State's rebuttal case.

First, Sollini's testimony was not admissible rebuttal evidence. Sollini's testimony regarding the facts behind Trigilio's prior arrest for assault with a deadly weapon was extrinsic evidence of a collateral matter. Pursuant to the collateral fact rule, "[i]t is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter." Jezdik, 121 Nev. at 137, 110 P.3d at 1063 (alteration in original) (quoting McKee v. State, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996)). See also Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) ("Impeachment by use of extrinsic evidence is prohibited when collateral to the proceedings."). "Facts are collateral if they are 'outside

the controversy, or are not directly connected with the principal matter or issue in dispute.” Jezdik, 121 Nev. at 137, 110 P.3d at 1063 (quoting Lobato, 120 Nev. at 518, 96 P.3d at 770). While the collateral fact “rule does not limit the scope of cross-examination,” it applies when a defendant is impeached “using extrinsic prior bad acts not resulting in a conviction.” Jezdik, 121 Nev. at 137-38, 110 P.3d at 1063-64. This court has recognized “an exception . . . when the State ‘seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused’s direct examination.” Id. at 138, 110 P.3d at 1064 (quoting 1 John W. Strong, et al., McCormick on Evidence § 49, at 202 (5th ed. 1999)).

Not only was Sollini’s testimony evidence of a prior bad act that did not result in a conviction, but it did not fit into the recognized exception to the collateral fact rule because it did not directly contradict any of Trigilio’s specific factual assertions. Trigilio admitted on cross-examination that his concealed weapons permit had been suspended in 2002 due to an arrest for assault with a deadly weapon, and he further admitted that the prior incident involved the same gun he had with him on the night he was arrested at Madera’s apartment. He also testified that the charges from the prior incident had been dismissed by the district attorney’s office. None of his statements in this regard were untruthful. Accordingly, Sollini’s testimony did not impeach Trigilio because their testimony was in accord.

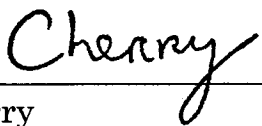
Second, to the extent that Sollini’s testimony was admitted as prior bad act evidence, the State failed to provide notice of Sollini’s testimony and the district court failed to give a Tavares instruction to the


jury. If the evidence was appropriate prior bad act evidence it should have been presented in the State's case-in-chief, and the defense should have been given notice of Sollini's potential testimony—including any of Sollini's statements obtained by the district attorney during the previous prosecution of Trigilio. See NRS 174.234(1)(a)(2); NRS 174.235(1)(a). As we stated recently in a different context, "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." Grey v. State, 124 Nev. \_\_\_, \_\_\_, 178 P.3d 154, 160 (2008) (quoting Wardius v. Oregon, 412 U.S. 470, 475-76 (1973)). We conclude that Trigilio was prejudiced by the district court's decision to admit, without notice to the defense, the prior bad act testimony of a witness who admitted that he might have previously recanted his uncorroborated testimony. The district court's ruling allowed the State to bypass its obligations to disclose evidence and effectively precluded Trigilio from challenging Sollini's version of events with specific evidence that Sollini had previously recanted his testimony. The prejudice to the defendant was exacerbated when the district court failed to instruct the jury as required by Tavares.

In this case, where the trial turned mainly on the conflicting testimony of the defendant and the victim, we cannot conclude that the district court's improper admission was harmless. Not only was Sollini's testimony wrongly admitted as rebuttal evidence, but its admission without notice to the defense and without a proper limiting instruction compounded the error. Accordingly, we conclude that Trigilio's convictions must be reversed.

Having considered Trigilio's claims<sup>1</sup> and concluded that relief is warranted, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 J.  
Cherry

 J.  
Saitta

 J.  
Gibbons

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<sup>1</sup>Trigilio also claims that: (1) the prosecution withheld evidence; (2) the jury was improperly instructed on the type of threat required to sustain a conviction for extortion; (3) the prosecutor committed several instances of misconduct; (4) the district court erred in permitting the State to reopen its case; (5) the district court erred in failing to instruct the jury that it was required to determine whether his statements were voluntary before considering them as evidence; (6) the district court erred in denying two motions for mistrial; and (7) he was prejudiced by cumulative error. In light of our decision to reverse Trigilio's convictions, we decline to consider these claims.

cc: Hon. Robert H. Perry, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk