IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NATHALIE NADINE REINOSO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74412

ORDER OF AFFIRMANCE

Nathalie Nadine Reinoso appeals from a judgment of conviction pursuant to a jury verdict of battery constituting domestic violence. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

After a physical altercation with her mother Maria in their shared home, Reinoso was arrested and charged with battery constituting domestic violence for "pulling [Maria] down, pulling her hair, scratching and hitting her."[1] At trial, before the second day of jury selection, the State moved, over Reinoso's objection, to amend the information to add in the alternative, "biting" and to remove "hitting." The district court allowed the amendment. The jury convicted Reinoso on the amended charge, and the court sentenced her to 19-48 months in prison.

On appeal, Reinoso asserts that (1) statements by the district court to the prospective jury panel constituted reversible error, (2) the district court abused its discretion by permitting the State to amend its information during jury selection, (3) the district court abused its discretion by excluding evidence of Reinoso's previous brain injury and the

[1]We do not recount the facts except as necessary to our disposition.

victim's testimony regarding Reinoso's intent, and (4) cumulative error warrants reversal.

First, we consider whether the district court's statement to the prospective panel constituted reversible plain error.[2] Reinoso did not object below but argues on appeal that the district court's comment created a chilling effect on the venire that likely affected the impartiality of the jury. "[A] judge is presumed to be impartial." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). We review unpreserved allegations of judicial misconduct for plain error. *Oade v. State*, 114 Nev. 619, 622, 960 P.2d 336, 339 (1998). "[R]eversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." *Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015).

Here, error, if any, is not readily apparent. The record shows that the district court emphasized the importance of an impartial jury from the start of and throughout jury selection. And considering the context surrounding the statement, the record seems clear that it served merely to warn prospective jurors against attempting to use pretext to

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[2]At the beginning of jury selection, the district court made the following statement, to which Reinoso did not object:

> So basically I don't think that would be possible for you to serve on a jury and be done with your service in less time than what I'm telling you about today. So this, as I say, is a very good opportunity for you because otherwise, you know, if I have to excuse you, you maybe [sic] re-cycled into a different pool where you might have to serve for a couple of weeks or more. So just to let you know.

avoid jury duty. Additionally, Reinoso fails to demonstrate that error, if any, prejudiced her substantial rights as the district court's subsequent actions cured any effect the challenged statement may have had. Notably, the district court emphasized the importance of candor during the venire canvass and questioned the venire extensively as to any bias regarding domestic violence and excused those whom it determined could not be fair and impartial. Consequently, reversal is not warranted here.

Next, we consider whether the district court abused its discretion by permitting the State to amend the information during jury selection. Reinoso argues that the amendment deprived her of "adequate actual notice" of the charges and of the opportunity to mount a defense against them. "The court may permit an indictment or information to be amended at any time before verdict or finding if [1] no additional or different offense is charged and if [2] substantial rights of the defendant are not prejudiced." NRS 173.095(1). And we review that determination for an abuse of discretion. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

As to the first prong of NRS 173.095(1), the district court relied on *Shannon v. State*, 105 Nev. 782, 783 P.2d 942 (1989), where the supreme court upheld an amendment to an information because no additional or different offense was charged despite a change to the facts alleged. A similar factual difference is at play here, leading to the same result. A fact, biting, was added in the alternative to other actions already alleged in the information via the amendment. No additional or different offense was charged by adding an alternative action to the amended information.

Regarding the second prong, the record reflects that under these facts, the amendment did not prejudice Reinoso's substantial rights. Here, Reinoso was provided adequate notice to mount a defense against the factual addition. The State provided Reinoso with a photo of the alleged bite mark in discovery and she had access to the police report of the incident and officers' body camera footage before trial, both of which refer to biting. But the district court ultimately erred in allowing the amendment because doing so prevented Reinoso from availing herself of the opportunity to seek expert testimony on the alleged bite mark.

But here, any error was harmless. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (noting that nonconstitutional error is harmless unless there was a "substantial and injurious effect or influence in determining the jury's verdict." *(quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The district court allowed the amendment before the jury was empaneled and before any testimony was heard, blunting the risk of prejudice to Reinoso's substantial rights. *See, e.g., Viray*, 121 Nev. at 162-63, 111 P.3d at 1081-82 (holding that an information amended on the first day of trial to conform to the victim's preliminary hearing testimony did not prejudice the defendant's substantial rights, and noting that the State is required to give "adequate notice" of the theories of prosecution); *State v. Eighth Judicial Dist. Court (Taylor)*, 116 Nev. 374, 378, 997 P.2d 126, 129 (2000) (finding that a defendant's "substantial rights were effectively prejudiced by the State's delay in amending the information to include [aiding and abetting]" because "there is no indication from the documents . . . [that] Taylor received adequate actual notice of [aiding and

abetting]").[3] Moreover, the State presented evidence unrelated to the bite to support the other charged actions even without the amendment, namely through Maria's and her neighbor's testimony and through photographs of Maria's injuries.

Accordingly, because the amendment charged no additional offense and the record shows that it did not prejudice Reinoso's substantial rights, the district court did not abuse its discretion in allowing the State to amend the information.

Finally, we consider whether the district court abused its discretion by excluding evidence of Reinoso's previous brain injury that she argues was relevant and should have been admitted because it explained her conduct and appearance at the time of the incident and refuted evidence that she was intoxicated.[4] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to

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[3]Reinoso argues that the photograph of the bite provided constructive, but not actual notice that biting might be at issue in this case. But she provides no authority showing there is any difference in this context. Thus, we need not address this argument. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating that issues not supported by relevant authority and cogent argument need not be addressed by this court).

[4]Reinoso also argues that excluded testimony regarding her intent was relevant to determine whether the touching was intentional or accidental. The district court correctly concluded that Reinoso's intent to hurt Maria was irrelevant as battery constituting domestic violence is a general intent crime. NRS 200.481 (defining battery); *Byars v. State*, 130 Nev. 848, 863, 336 P.3d 939, 949 (2014). Thus, the district court did not abuse its discretion because it applied correct legal principles in sustaining the State's objection and excluding Maria's testimony regarding Reinoso's intent.

the determination of the action more or less probable than it would be without the evidence" and is generally admissible. NRS 48.015; NRS 48.025. But even "relevant . . . evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

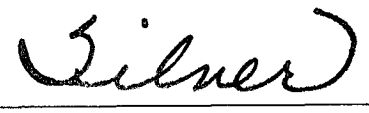
Here, the district court presented appropriate rationales for excluding the brain-injury evidence. It noted that allowing for the admission of the evidence risked introducing bad-act evidence—namely, evidence of Reinoso's prior violent conduct. *See Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001) ("The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person."), *holding modified on other grounds by Mclellan*, 124 Nev. 263, 182 P.3d 106. The district court also excluded the evidence because it would serve impermissibly to induce sympathy in the jury. *See* NRS 48.035(1); *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (noting that "unfair prejudice" under NRS 48.035 is "an appeal to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence" (internal quotation marks omitted)). Thus, the district did not abuse its discretion in excluding that evidence.

But even if the court abused its discretion, any error was harmless. Reinoso's substantial rights were not affected because the record shows the jury heard about her brain injury through Reinoso's own

testimony. And although the jury heard evidence that Reinoso had been drinking, intoxication has no legal relevance here because battery is a general intent crime to which voluntary intoxication is not a defense, and Reinoso herself testified that she was not drunk at the time of the incident, thus curing any inference that she was intoxicated. NRS 193.220; *Byars*, 130 Nev. at 863, 336 P.3d at 949. Therefore, we conclude that because the evidence had no permissible purpose, error in excluding it, if any, was harmless.[5]

Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring:

I concur in the judgment but disagree that the amendment of the Information constituted legal error under NRS 173.095. Reinoso

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[5]Reinoso also argues cumulative error warrants reversal. In reviewing a claim of cumulative error, this court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (internal quotation marks omitted). Here, we conclude that the *Valdez* factors weigh against Reinoso because any error was harmless. Additionally, although the crime charged was a felony, it carried a relatively light penalty; and the issue of Reinoso's guilt was not close in light of the testimony at trial.

argues that the late amendment deprived her of the opportunity to investigate and present expert "bite mark" evidence in her defense that she might have pursued had the bite been charged initially.

"The court may permit an indictment or information to be amended at any time before verdict or finding if [1] no additional or different offense is charged and if [2] substantial rights of the defendant are not prejudiced." NRS 173.095(1). Here, everyone seems to agree that the amendment, which modified the factual predicate of one charged count from "hitting" to "and/or biting," did not charge an additional or different offense. The question is whether the amendment resulted in "prejudice" to Reinoso rising to the level of legal error.

I would conclude that it did not. Though not originally charged, the accusation of a bite was clearly part of the case from the beginning. The police took photos of the bite mark at the scene, the police report described it, and police body camera footage captured a conversation at the scene about the victim having been bitten. Thus, Reinoso had clear notice throughout the case that an alleged bite was part of the story of the crime whether separately charged or not. She therefore had every opportunity, and exactly the same incentive, to investigate any available mitigating expert "bite mark" evidence because disproving the bite mark would seriously damage the victim's credibility whether the bite was actually charged or not. Merely adding to the formal charge an incriminating fact that was always going to be presented at trial as part of the victim's story of the crime doesn't strike me as the kind of prejudice that should bar the kind of amendment proposed and made here.

Quite to the contrary, in *Shannon v. State*, 105 Nev. 782, 783 P.2d 942 (1989), the Nevada Supreme Court permitted a much more

radical amendment that entirely changed the underlying facts recited in the Information: in a sexual assault case, the original Information charged that the defendant placed his penis into the mouth of the victim, and the proposed amendment recited instead that the victim's penis was inserted into the defendant's mouth. Surely, that change severely affected the defendant's trial strategy, including the kind of medical evidence he could have investigated and presented (the victim's DNA in the defendant's mouth versus the defendant's DNA in the victim's mouth). But the amendment was nonetheless permitted.

Consequently, I would conclude that no error occurred, and therefore concur in the result.

_____, J.
Tao

cc: Hon. Carolyn Ellsworth, District Judge
Law Offices of Andrea L. Luem
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk