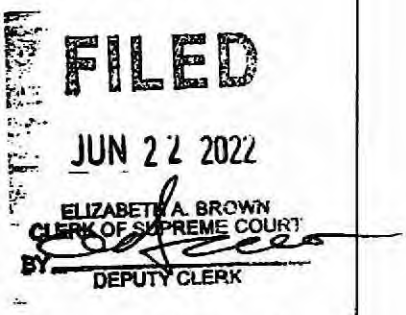
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARENCE EDWARD CUNNINGHAM, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83483-COA



ORDER OF AFFIRMANCE

Clarence Edward Cunningham, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of battery which constitutes domestic violence by a probationer, prisoner, or parolee. Second Judicial District Court, Washoe County; Tammy Riggs, Judge.[1]

On February 19, 2021, Andrew Atkinson planned to stay overnight with his grandmother, Donna Atkinson, and her boyfriend, Cunningham, in their trailer.[2] Andrew often stayed overnight at their trailer and would sleep in an area near the front entrance. Donna and Cunningham would sleep in a bedroom at the other end of the trailer.

When Andrew entered the trailer on the night of February 19, he heard Cunningham and Donna arguing in their bedroom. From where he planned to sleep, Andrew was able to see partial reflections of Donna and Cunningham in the front window of the trailer. Andrew attempted to ignore the fighting, but when he thought he heard Cunningham slap Donna, he dialed 9-1-1. While Andrew was speaking to the 9-1-1 operator and while

[1]The Honorable Kathleen Drakulich, District Judge, decided both pretrial motions addressed below and the Honorable Tammy Riggs, District Judge, presided over the trial and sentencing.

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

looking at their reflections in the window, he observed Cunningham get on top of Donna, who was lying on the bed. It appeared to Andrew that Cunningham was strangling Donna by the positioning of Cunningham's wrists; however, Andrew could not see Cunningham's hands on Donna's neck as a curtain was partially obstructing his view of their reflections in the window. Andrew witnessed Donna push Cunningham away and get out of the bed. As Donna was walking toward the front of the trailer, it appeared to Andrew that simultaneously she tripped over something on the floor while Cunningham was pushing her, causing her to fall and injure her thumb.

Andrew and Donna left the trailer together, but Cunningham remained inside. Deputy Robert Medina, one of the officers who responded to Andrew's 9-1-1 call, observed that Donna "appeared to be very upset, quiet and standoffish" when he arrived on the scene. Deputy Medina noticed Donna was holding her right hand, so he asked her why she was holding it. According to Deputy Medina, Donna "stated that she was wrapped in a blanket and pushed out of the trailer, and as she was falling, she tried to break her fall and injured her thumb." Afterwards, law enforcement officers entered the trailer, removed Cunningham, arrested him, and placed him in the back of a patrol car. Another officer returned to the trailer to speak with Donna, and the officer testified that she told him that "[Cunningham] may have hit or grabbed her hair, pinned her down on the bed, and then wrapped her up in a blanket and threw her out of the trailer."

Cunningham was charged with one category B felony count of battery which constitutes domestic violence by a probationer, prisoner, or

parolee," a violation of NRS 200.481(2)(f) and NRS 200.485.[3] At the preliminary hearing, Donna recanted the statements she previously made to law enforcement, and testified that while she initially thought Cunningham pushed her, she actually just tripped. Prior to trial, Cunningham filed a motion in limine requesting that the district court bifurcate his status as a parolee from the battery charge and to have the charge of "simple battery" tried first. Cunningham specifically argued that his prior felony conviction was presumptively prejudicial and, therefore, bifurcation of his status as a parolee was required, consistent with the reasoning set forth in Nevada Supreme Court cases dealing with bifurcation in multi-charge, ex-felon firearm possession cases. The district court denied Cunningham's motion, noting, inter alia, that Cunningham failed to cite to any persuasive authority regarding bifurcation of a single charge, which in this case was a battery resulting from domestic violence committed by a parolee. The district court denied Cunningham's request for bifurcation concluding that the single charge could not be bifurcated because Cunningham's status as a parolee was a necessary element of the single charge.

The State also filed a motion in limine to admit evidence involving a prior domestic battery conviction where Cunningham physically abused Donna. The district court held a hearing on the motion and ultimately entered an order granting it, reasoning that the State had met the factors for admitting prior bad act evidence as outlined in *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244 (2012).

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[3]"NRS 200.485 states the penalties for convictions for the crime of battery constituting domestic violence . . . ." *State v. Second Judicial Dist. Court (Kephart)*, 134 Nev. 384, 387, 421 P.3d 803, 806 (2018).

The case proceeded to trial and during her testimony Donna explained that she and Cunningham were in love and planned to get married. Donna testified that the argument on the night in question "did not become physical at all." Although Donna admitted that Cunningham had tried to pick her up at some point, Donna denied that Cunningham pushed her or committed any wrongdoing. Throughout the State's direct examination of Donna, she was argumentative, recanted her prior statements, and refused to answer several questions regarding the incident. Based on her testimony, the State requested that the district court give the jury a limiting instruction, as previously agreed to, before Donna was questioned about the prior domestic incident between herself and Cunningham. Specifically, the court instructed the jurors as follows:

> [Y]ou are about to hear evidence concerning a prior incident involving [Cunningham] and [Donna]. This evidence is only to aid you in determining the context of the relationship between them and to assist you in determining the credibility of [Donna's] testimony. You're not to consider it for any other purpose, including but not limited to [Cunningham's] character or action in conformity therewith. The weight of the evidence, if any, is solely up to you.

Donna eventually admitted that the prior incident of domestic violence occurred.

At the conclusion of trial, the jury returned a guilty verdict. Cunningham was sentenced to 28 to 72 months in prison and ordered to serve the sentence consecutively to a sentence imposed in an unrelated case. This appeal followed.

On appeal, Cunningham presents this court with two issues: (1) whether the district court abused its discretion in denying Cunningham's

motion to bifurcate, and (2) whether the district court abused its discretion in admitting Cunningham's prior bad act.

The district court did not abuse its discretion in denying Cunningham's motion to bifurcate

Cunningham argues that the district court abused its discretion when it denied his motion to bifurcate the trial, as bifurcation would have allowed the jury to consider Cunningham's guilt as to the elements of the crime of battery separate from his status as a parolee.[4] To support his contention, Cunningham cites to cases where courts have bifurcated an ex-felon in possession of a firearm charge from other substantive charges.[5] Cunningham asserts that, similar to the ex-felon firearm possession cases, the district court should have bifurcated his status as parolee because the jurors' knowledge of his status as a parolee was unfairly prejudicial. Conversely, the State contends that the district court did not abuse its discretion and distinguishes this case from the ex-felon firearm possession

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[4]On appeal, Cunningham does not challenge the State's decision to charge Cunningham with a single charge under both NRS 200.481(2)(f) and NRS 200.485. Based on the record, Cunningham's relationship with Donna was uncontroverted and Cunningham does not now contend that the State erred in charging him under NRS 200.485, which provides for battery constituting domestic violence. To be clear, Cunningham contends that his status as a parolee should have been bifurcated from the elements of simple battery pursuant to NRS 200.481(2)(f) and does not substantively address NRS 200.485 on appeal.

[5]*See Morales v. State*, 122 Nev. 966, 969-70, 143 P.3d 463, 465 (2006) (concluding that bifurcation of the "ex-felon firearm possession charge" was proper in a case involving multiple substantive charges); *Brown v. State*, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998) (clarifying that severance of an ex-felon firearm possession charge is required "to ensure fairness in those future cases where the State seeks convictions on multiple counts, including a count of possession of a firearm by an ex-felon").

cases because only one offense was charged here, and notes that Cunningham "failed to cite a single case approving of or requiring bifurcation of an element of an offense." We agree with the State.

This court reviews a district court's order denying a defendant's motion to bifurcate offenses for an abuse of discretion. *Morales*, 122 Nev. at 969, 143 P.3d at 465; *Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Under NRS 200.481(1)(a), "[b]attery" refers to "any willful and unlawful use of force or violence upon the person of another." If the battery is committed by a probationer, parolee, or prisoner who is in lawful custody at the time of the crime, such a battery constitutes a category B felony. NRS 200.481(2)(f). Cunningham was charged with battery pursuant to NRS 200.481(2)(f), which subsumes the definition of "simple battery" as defined in NRS 200.481(1)(a) but includes an additional element requiring the State to prove that the defendant was a probationer, prisoner, or parolee at the time of the battery, thus increasing the offense to a category B felony.

Cunningham points to no authority discussing bifurcation of the single charge of battery by a probationer, parolee, or prisoner in lawful custody pursuant to NRS 200.481(2)(f), but rather asks this court to apply the logic underlying ex-felon firearm possession cases dealing with bifurcation to the instant case. While not specifically addressed by the Nevada Supreme Court, the overwhelming majority of circuit courts agree that bifurcation of a single ex-felon firearm possession charge is generally error because a defendant's status as an ex-felon is an element of the crime charged, requiring the jury's consideration. *See United States v. Higdon*, 638 F.3d 233, 241-42 (3d Cir. 2011) (concluding that the district court abused

its discretion when it completely excluded the defendant's prior felony conviction, which the defendant stipulated to, from the jury's consideration because the prior felony constituted an "element of the charged offense"), *abrogated on other grounds by United States v. Adams*, Nos. 19-1811 & 19-2574, 2022 WL 1672141, at *4 (3d Cir. May 26, 2022); *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993) (holding that bifurcation of a single ex-felon firearm possession charge was improper because "[t]he government would be precluded from proving an essential element of the charged offense, and the district court would breach its duty to instruct the jury on all the essential elements of the crime charged"), *opinion amended on denial of reh'g*, 20 F.3d 365 (9th Cir. 1994); *United States v. Gilliam*, 994 F.2d 97, 100 (2d Cir. 1993) (holding that it was not an abuse of discretion for the district court to reject defendant's proposed stipulation to the fact of his prior felony conviction in an ex-felon firearm possession case because "the prior conviction is essential to proving the crime" and admission of the prior felony was "by definition not prejudicial").

In this case, the district court properly denied Cunningham's motion for bifurcation because his status as a parolee was an element of the single crime charged, battery which constitutes domestic violence by a probationer, prisoner, or parolee, a violation of NRS 200.481(2)(f) and NRS 200.485, and the jury was required to consider each element of the charged offense, including Cunningham's status as a parolee. To the extent that Cunningham argues that his status as a parolee was not an element of the crime charged, but was rather a sentencing enhancement, this argument ignores Nevada precedent acknowledging that a defendant's status as a parolee is a required element of the charge of battery pursuant to NRS 200.481(2)(f). *See State v. Javier C.*, 128 Nev. 536, 540-41, 289 P.3d 1194, 1197 (2012) (holding that juveniles in custodial confinement are not

prisoners and therefore not "subject to prosecution for felony battery by a prisoner under NRS 200.481(2)(f)").

Thus, Cunningham points to no persuasive authority showing that a defendant's status as a probationer, parolee, or prisoner is not an element of battery by a probationer, parolee, or prisoner pursuant to NRS 200.481(2)(f).[6] *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). The Nevada Supreme Court and this court have treated probation, parole, or prison custody status as an essential element of the crime of battery charged pursuant to NRS 200.481(2)(f), and Cunningham's argument, that his single charge of battery by a parolee should have been bifurcated, is unpersuasive and controverted by existing law. *See, e.g., Hooper v. State*, No. 63027, 2015 WL 1441832, at *1 (Nev. Mar. 26, 2015) (Order of Reversal and Remand) (holding that defendant's "prior judgment of conviction and NDOC offender sheet to prove that [defendant] was in lawful custody" was "an essential element of battery by a prisoner" pursuant to NRS 200.481(2)(f)); *Campos v. State*, No. 72687-COA, 2017 WL 6811843, at *3 (Nev. Ct. App. Dec. 29, 2017) (Order of Affirmance) (holding that sufficient evidence supported that defendant "was in lawful custody to sustain a conviction for the crime of

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[6]Cunningham cites to *Hobbs v. State*, where the Nevada Supreme Court clarified that substantial bodily harm is not an element of simple battery, stating that "NRS 200.481 might appear to include physical harm or pain as an element of the offense," but while "substantial bodily harm does affect punishment (NRS 200.481(2)(a)-(g))[,] . . . it is not included as an element of simple battery." 127 Nev. 234, 238, 251 P.3d 177, 179 (2011) (internal quotation marks omitted). However, *Hobbs* does not address a battery charged pursuant to NRS 200.481(2)(f) and Cunningham ignores Nevada authority acknowledging a defendant's status as a parolee being an element of a battery charged under NRS 200.481(2)(f).

battery by a prisoner" pursuant to NRS 200.481(2)(f)). Therefore, we conclude that the district court did not abuse its discretion by denying Cunningham's motion to bifurcate.

The district court did not abuse its discretion in admitting evidence of Cunningham's prior act of domestic violence against Donna

Cunningham argues that the district court abused its discretion when it granted the State's motion and admitted evidence of Cunningham's prior act of domestic violence against Donna because such evidence "served only to establish Mr. Cunningham's propensity for violence, which may have rouse[d] the jury to overmastering hostility." (Alteration in original.) (Internal quotation marks omitted.) Specifically, Cunningham contends that the district court's ruling was erroneous, and this case is distinguishable from the facts of *Bigpond*, 128 Nev. 108, 270 P.3d 1244, because (1) there was other evidence which the State could have used to attack Donna's credibility aside from the prior conviction, (2) Donna was not the only witness in this case, and (3) the prior domestic violence happened too remote in time to be relevant as it occurred nearly three years before the incident in question. In response, the State contends that this case is analogous to the facts of *Bigpond*, and the district court correctly considered the factors therein in reaching its decision. Specifically, the State asserts that although Donna was not the only witness at trial, Andrew was not able to see everything, and Donna's credibility was still a critical part of the State's case. The State also notes that Cunningham points to no authority to support his assertion that a nearly three-year-old domestic violence conviction is irrelevant because it is too remote in time. Moreover, the State asserts that even if admission of the prior bad act evidence was prejudicial to Cunningham, any such prejudice was harmless as there was overwhelming evidence to support Cunningham's guilt as demonstrated by

Donna's, Andrew's, and law enforcement officers' testimonies. We agree with the State.

"A district court's decision to admit or exclude evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). "A presumption of inadmissibility attaches to all prior bad act evidence." *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005). However, "[e]vidence of other crimes, wrongs or acts" is inadmissible to prove propensity, but it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Moreover, evidence of "other crimes, wrongs or acts may" also "be admitted under NRS 48.045(2) for a relevant non-propensity purpose other than those listed in the statute." *Bigpond*, 128 Nev. at 116, 270 P.3d at 1249 (internal quotation marks omitted).

In *Bigpond*, the Nevada Supreme Court dealt with a similar set of facts to the case at hand. In that case, the defendant was charged with battery constituting domestic violence "for striking his wife in the jaw with a closed fist, causing her to fall to the ground and lose consciousness." *Id.* at 111, 270 P.3d at 1246. Before trial, the State anticipated that the wife would recant her pretrial statements implicating the defendant and filed a motion to admit evidence of prior incidents of domestic violence involving the defendant and his wife. *Id.* Following a *Petrocelli* hearing,[7] the district

[7]"[B]efore admitting evidence of a prior bad act or collateral offense, the district court must conduct a hearing outside the presence of the jury." *Armstrong v. State*, 110 Nev. 1322, 1323, 885 P.2d 600, 600 (1994) (citing *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by*

court admitted the evidence of the prior domestic violence. *Id.* at 117, 270 P.3d at 1250.

The Nevada Supreme Court affirmed the district court's ruling granting the State's motion to admit the evidence and applied a three-part test, concluding that (1) "the victim's prior accusations of domestic violence were relevant because they provide insight into the relationship and the victim's possible reason for recanting her prior accusations, which would assist the jury in adequately assessing the victim's credibility"; (2) the alleged prior bad acts were shown to have occurred by clear and convincing evidence, as the defendant had "previously pleaded guilty to punching the victim with a closed fist"; and (3) "the district court carefully weighed the probative value of the evidence against the danger of unfair prejudice" and concluded "that the probative value was not substantially outweighed by the danger of unfair prejudice," and provided the jury with a limiting instruction explaining the limited purpose for which the evidence was to be used. *Id.* at 118, 119, 270 P.3d at 1250, 1251.

In this case, like in *Bigpond*, the State, prior to trial, moved to introduce Donna's previous allegations of domestic violence in anticipation of Donna recanting her previous accusation on the stand, as she did at the preliminary hearing. The district court properly held a *Petrocelli* hearing and entered an order granting the State's motion in which it addressed the three prongs of *Bigpond*. As to the first prong, the district court found that the prior bad act evidence was relevant because Donna had recanted her pretrial accusations against Cunningham, and the prior bad act would

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statute as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823-24 (2004)).

provide context for the relationship between Donna and Cunningham and provide a possible explanation as to why Donna recanted. Further, the district court noted that Donna's credibility was a central issue to the case.

As to the second prong, the court found that Cunningham's prior act of domestic violence was proved by clear and convincing evidence as he "pleaded guilty to grabbing and pulling Ms. Atkinson by the hair, forcing her head into a pond, pushing her, and grabbing her with both hands by the throat on August 6, 2018." Finally, as to the third prong, the district court found that the probative value of Cunningham's prior act of domestic violence against Donna was not substantially outweighed by the danger of unfair prejudice. However, the district court restricted this evidence to testimony regarding Cunningham's actions which gave rise to the conviction but ruled that the prior conviction itself would not be admitted. Further, before any evidence of Cunningham's prior domestic violence was introduced, the district court gave a limiting instruction to the jury in accordance with *Bigpond*, so that the jury would understand that the evidence was not being admitted for propensity purposes but rather for the permissible purpose of showing the relationship between Cunningham and Donna.

We conclude that the district court did not abuse its discretion in admitting the prior bad act evidence.[8] The district court properly followed

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[8]The district court's findings are supported by the record as Donna did in fact recant on the stand, which further demonstrates the court's nonpropensity reasoning for admitting the prior bad act evidence. We have considered Cunningham's additional arguments attempting to distinguish this case from *Bigpond* and find them unpersuasive. In this case, as in *Bigpond*, Donna's testimony was critical to supporting the elements of the charge, and the nature of the relationship between Donna and Cunningham was a central issue in the case.

the three-prong test set forth in *Bigpond*. Moreover, the district court properly provided the jury with a limiting instruction *before* the evidence was introduced to the jury.[9] Cunningham fails to show how the district court abused its discretion in admitting the prior domestic violence evidence as permitted by NRS 48.045(2) and *Bigpond*.[10]

Nevertheless, the State argues that even if the district court's admission of Cunningham's prior act of domestic violence was an error, it amounted to harmless error. "Errors in the admission of evidence under NRS 48.045(2) are subject to a harmless error review." *Rosky*, 121 Nev. at 198, 111 P.3d at 699. "An error is harmless and not reversible if it did not have a substantial and injurious effect or influence in determining the jury's verdict." *Hubbard v. State*, 134 Nev. 450, 459, 422 P.3d 1260, 1267 (2018). Here, the State argues that there was overwhelming evidence showing that Cunningham committed battery upon Donna, which was evidenced by Andrew's eyewitness testimony, law enforcement officers' testimony regarding Donna's statements, and even Donna's own statements at trial that Cunningham was in fact trying to pick her up but she did not want to

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[9]We presume that the jury followed the court's limiting instruction and did not consider the prior bad act evidence for propensity purposes. *Summers v. State*, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006) (recognizing "that jurors are intellectually capable of properly following instructions regarding the limited use of prior bad act evidence").

[10]To the extent that Cunningham suggests his prior domestic battery conviction is too remote in time to be relevant, this argument is unpersuasive. Cunningham's alleged prior domestic battery occurred on August 6, 2018, whereas the domestic incident in question occurred on February 19, 2021. Cunningham provides no authority to support the contention that a prior bad act occurring two and a half years before the instant offense is too remote in time to be relevant. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

be picked up. In his reply brief, Cunningham fails to address the State's harmless error contentions, and therefore concedes that any such alleged error was harmless. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").[11] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Tammy Riggs, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[11]Insofar as appellant raises arguments that are not specifically addressed herein, we have considered the same and conclude that they do not provide a basis for relief.