IN THE SUPREME COURT OF THE STATE OF NEVADA

ANITA MARIE ROHR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84022

ORDER OF REVERSAL AND REMAND

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. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

In 2018, police found Melinda Tucker's body, which was badly beaten and stabbed.[1] Police questioned Gerardo Cortez, a homeless man who lived nearby who reported the body. Police also questioned appellant Anita Rohr, who was found near the scene, inside Cortez's tent. Both Cortez and Rohr voluntarily participated in interviews.

Rohr's first interview lasted approximately nine hours. Rohr was given frequent breaks, food and beverages, and cigarettes. She was told she was not in custody and that she could leave any time. *Miranda* warnings were not given. Rohr maintained her innocence throughout the first interview. The next day, detectives again spoke with her for

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

approximately 15 to 20 minutes after they received a tip that she had additional information. This time, Rohr told detectives that she had seen the victim on the night of the murder, standing up inside Cortez's tent with "blood everywhere."

Detectives took Rohr back to the police station for further questions and read her *Miranda* warnings. Rohr stated she understood her rights, agreed to voluntarily participate in the interrogation, and did not ask for a lawyer. The interrogation lasted five hours, and this time Rohr made numerous incriminating admissions detailing her involvement in the murder. Rohr was arrested and charged with the murder of Melinda Tucker, but detectives were ultimately unable to find forensic evidence linking Rohr to the murder.

Prior to trial, the defense moved to suppress Rohr's statements, arguing they were involuntary. Following a two-day hearing, the district court denied the motion to suppress. The State moved to preclude the testimony of defense expert Dr. Richard Leo, arguing that his testimony would invade the province of the jury by suggesting the confession in this case was false. Rohr filed an opposition to the motion, arguing that the court should allow Dr. Leo to address specific interrogation techniques used in this case as well as describe the impact of those techniques on Rohr. The district court granted the motion in part and allowed Dr. Leo to testify generally regarding the academic principles of false confessions, but precluded Dr. Leo from testifying about the application of those principles to the specific facts of this case.

Following a seven-day trial, the jury convicted Rohr of first-degree murder with the use of a deadly weapon and sentenced her to a term

of 20 years to life with a consecutive term of 60 to 150 months for the deadly weapon enhancement.

Jury instruction 45 prevented the jury from properly weighing the detective's coercive tactics and unduly restricted Rohr's defense

On appeal, we first address Rohr's argument that the district court invaded the province of the jury when, over Rohr's objection, it imparted instruction 45 regarding police deception.

The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). But we review de novo whether an instruction is an accurate statement of law. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). Erroneous jury instructions are reviewed for harmless error and will not warrant reversal "when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) (internal quotation marks omitted). However, a harmless improper instruction may still mandate reversal if it unduly restricts the defense. *See Barnier v. State*, 119 Nev. 129, 134, 67 P.3d 320, 323 (2003).

Instruction 45 regarded the voluntariness of confessions and the use of subterfuge by the police in obtaining confessions. The instruction states that such trickery is unlikely to produce an involuntary confession when it relates to a suspect's connection to the crime. In full, instruction 45 states,

> Police deception is a relevant factor in determining whether or not a confession is

> voluntary. However, an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary. Confessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement.
>
> Of the numerous varieties of police trickery, a lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary. Such misrepresentations, of course, may cause a suspect to confess, but causation alone does not constitute coercion. If it did, all confessions following interrogations would be involuntary because it can almost always be said that the interrogation caused the confession.
>
> Thus, the issue is not causation, but the degree of improper coercion. Inflating evidence of guilt interferes little, if at all, with a free and deliberate choice of whether to confess, for it does not lead a suspect to consider anything beyond her own beliefs regarding her actual guilt or innocence, her moral sense of right and wrong, and her judgment regarding the likelihood that the police had garnered enough valid evidence linking her to the crime.

The State argues that instruction 45 is a correct statement of Nevada law that directly quotes *Sheriff, Washoe Cty. v. Bessey,* 112 Nev. 322, 914 P.2d 618 (1996). In *Bessey*, we considered deceptive police tactics and recognized that "[c]ases throughout the country support the general rule that confessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement." *Bessey*, 112 Nev. at 325, 914 P.2d at 620. This language was inspired by *Holland v. McGinnis*, a Seventh Circuit case. 963

F.2d 1044, 1051 (7th Cir. 1992). We drew from *Holland* as illustrative in articulating our analysis of *Bessey*, but we did not adopt all the assertions in *Holland* as Nevada law. *See generally Bessey*, 112 Nev. at 327, 914 P.2d at 620-21. Ultimately, we declined to adopt a bright line rule on police deception, instead emphasizing that courts should focus on the specific police action and whether that action is likely to induce a false confession. *Id.* at 328, 914 P.2d at 622.

Here, we conclude that the language in the instruction's first paragraph was proper, as it pulls from law provided in *Bessey*. The first sentence of the second paragraph was also proper, as it pulls from *Silva v. State*, 113 Nev. 1365, 1369, 951 P.2d 591, 594 (1997) (("[A] lie that relates to a suspect's connection to the crime is the *least likely* to render a confession involuntary.") (quoting *Bessey*, 112 Nev. at 325, 914 P.2d at 620). However, the remainder of the language contained in the second paragraph, as well as the language in the third paragraph, does not accurately reflect Nevada law. *Id.* That language comes from a block quote of the analysis in *Holland* pertaining to that defendant's case. *Id.* Therefore, since the factual analysis from the Seventh Circuit was not adopted by Nevada, the district court erred by giving this instruction to the jury. Moreover, we conclude the error was reversible where it invaded the province of the jury and unduly restricted Rohr's defense by effectively instructing the jury to adopt the State's argument that Rohr's confession was voluntary. *See Barnier*, 119 Nev. at 134, 67 P.3d at 323 (explaining an erroneous instruction is reversible where it unduly restricts the defense and effectively directs the jury to find for the State).

The district court abused its discretion by limiting Dr. Leo's testimony

We turn next to Rohr's argument that the district court erred by restricting Dr. Leo from identifying and commenting on the interrogation techniques used by the police in this case. We review the decision of the district court to admit or exclude evidence for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or it exceeds the bounds of law or reason." *Crawford*, 121 Nev. at 748, 121 P.3d at 585.

NRS 50.275 permits an expert witness to testify if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *See also Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (holding expert testimony must meet the "qualification," "assistance," and "limited scope" requirements). Moreover, NRS 50.295 allows experts to express opinions or inferences regarding an ultimate issue so long as those opinions are not otherwise inadmissible.

We clarified the permissible scope of expert testimony regarding ultimate issues in *Pundyk v. State*, where an expert witness sought to testify to the defendant's ability to form the requisite intent at the time of the offenses. 136 Nev. 373, 377, 467 P.3d 605, 608 (2020). The district court determined that the expert could opine about Pundyk's ability to form intent at the time of the offense but could not provide conclusions about Pundyk's mental state nor his guilt or innocence. *Id.* at 374, 467 P.3d at 606. We held that the district court improperly limited the expert testimony by not allowing the expert to opine about Pundyk's mental state at the time of the offense. *Id.* However, we also held that a qualified expert

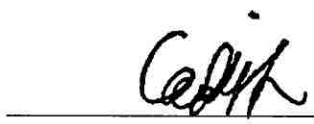
witness may not offer testimony that amounts to a legal conclusion, such as whether a defendant is not guilty by reason of insanity. *Id.* at 376, 467 P.3d at 608.

It is undisputed that Dr. Leo is qualified under *Hallmark*, and because NRS 50.295 expressly permits expert witnesses to proffer testimony that embraces an ultimate issue in the case, Dr. Leo's testimony should not have been limited on that basis so long as his testimony did not exceed the limitations set forth in *Pundyk*. And while he may not opine that the confession in this case was false, he should have been permitted to testify regarding specific instances of potentially coercive tactics and the impact of such tactics on Rohr. Accordingly, the district court also abused its discretion by limiting Dr. Leo's testimony. Again, we conclude this error is not harmless because there is a reasonable probability that precluding this testimony relevant to Rohr's defense affected the outcome of trial. *See Pundyk*, 136 Nev. at 378, 465 P.3d at 609 (reversing after finding that there was a "reasonable probability that [the expert's] testimony would have affected the outcome of trial" and that therefore the error was not harmless).

Finally, addressing Rohr's arguments regarding the admissibility of her confession, we note a confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. *Passama v. State*, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). Applying the totality of the circumstances test to the instant case, we conclude the district court did not err in admitting Rohr's confession. *See id.* at 213-14, 735 P.2d at 322-23 (applying that test to determine whether a confession is the product of a "rational intellect and a free will").

Accordingly, we

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



_____, J.
Cadish

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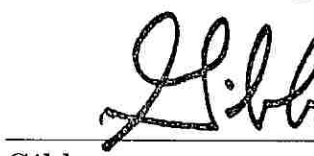

_____, Sr. J.[2]
Gibbons

cc: Hon. Scott N. Freeman, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[2]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.