IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. FRIEDMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43260

FILED

NOV 16 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubade
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of one count of aggravated stalking, four counts of indecent exposure, and seven counts of open and gross lewdness. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Kenneth Friedman contacted various businesses in Las Vegas pretending to be a woman named Paula who represented the local neighborhood watch. "Paula" indicated that a sexual predator, wearing a certain type of clothing, was active in the neighborhood. Friedman would present himself at these businesses wearing the described clothing and engaging in lewd behavior. On several occasions, he engaged in lewd behavior and made threatening remarks to employees at a Subway restaurant. One evening, Friedman followed a female Subway employee home from work and made threatening comments. The woman was unharmed, but testified she feared that Friedman was going to rape or kill her.

At trial, testimony was presented that, three months prior to the conduct leading to the instant charges, Friedman had called to a crisis center for help to prevent himself from committing an unrelated sexual offense. An officer investigated the incident and testified regarding his investigation.

Friedman argues that the admission of this testimony, combined with admission of certain evidence seized from his car was error. He also claims that Nevada's open and gross lewdness statute is void for vagueness under the United States and Nevada constitutions, that sufficient evidence did not support the aggravated stalking verdict and that the sentence of life without parole for a habitual offender constitutes cruel and unusual punishment under the United States and Nevada constitutions. We conclude that admission of the testimony and some of the seized items amounted to harmless error and that Friedman's remaining claims lack merit.

Admission of prior bad acts and seized items

The decision to admit evidence is within the sound discretion of the district court and will not be overturned absent a showing of manifest error.[1] Admission of evidence of a person's character to prove that he acted in conformity therewith is generally prohibited; however other acts are admissible to prove motive, opportunity, intent, or other relevant issues.[2]

> In determining whether such acts are admissible, the district court must conduct a hearing and determine whether "(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."[3]

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[1]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[2]NRS 48.045(1), (2).

[3]Braunstein, 118 Nev. at 72-73, 40 P.3d at 416-17 (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

In general, use of this evidence is disfavored "'because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges.'"[4]

Friedman argues that, before the prosecution can offer evidence of any bad acts, the defendant must have put his own character at issue and the evidence must be relevant to the character issue raised.[5] Friedman asserts that he never testified; thus, his character was never placed at issue. Even if the evidence was relevant, Friedman argues that any probative value was substantially outweighed by the prejudicial nature.[6]

In Braunstein v. State, we held that evidence of a prior bad act was inadmissible to prove an emotional propensity for sexual aberration,[7] expressly rejecting the proposition that evidence showing an accused possesses a propensity for sexual aberration is relevant to the accused's intent.[8] In Richmond v. State, we reiterated the rule expressed in Braunstein, and cautioned district courts to analyze such evidence under NRS 48.045(2).[9] Moreover, prior acts that are remote in time and involve

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[4]Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1255 (2002) (quoting Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001)).

[5]See Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998); see also NRS 48.045(1).

[6]NRS 48.035(1).

[7]Braunstein, 118 Nev. at 75, 40 P.3d at 418.

[8]Id. at 75, 40 P.3d at 417.

[9]See Richmond, 118 Nev. at 928, 59 P.3d at 1252.

conduct distinguishable from the crime charged are generally inadmissible.[10] Failure to exclude such evidence is harmless error where overwhelming evidence supports the conviction.[11]

We conclude that the district court abused its discretion in permitting Detective Moniot to testify, but that the error was harmless. A hearing should have been conducted to establish the admissibility of this evidence. The district court erred in not conducting such a hearing.[12] The relevance of the testimony is questionable because it concerns an act that occurred several months prior to the incidents at issue, and did not result in a criminal charge or arrest. Moreover, the only reason the State put forth the testimony was to establish to the jury that Friedman was a sexual offender. However, based on the overwhelming evidence of Friedman's guilt, the error appears to be harmless. The testimony of several witnesses, in addition to physical evidence gathered, supports that conclusion.

Similarly, the district court abused its discretion in allowing some of the seized items into evidence. Some of the items directly link Friedman to the crime. For example the pornographic magazines seized from his car were relevant because several victims saw Friedman with pornographic magazines when he appeared at the businesses. Additionally, the wig seized is relevant to his created female persona, and

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[10]Braunstein, 118 Nev. at 73, 40 P.3d at 417.

[11]Richmond, 118 Nev. at 934, 59 P.3d at 1252.

[12]Rhymes v. State, 121 Nev. ____, ____, 107 P.3d 1278, 1281 (2005) (holding that the State bears the burden of establishing through a Petrocelli hearing that prior bad act evidence is admissible).

maps of the area are relevant to the various locations where Friedman appeared. However, items such as the used condom and dildo only appear to prejudice Friedman without substantive probative value. While it was error to allow these items into evidence because of their minimal relevance and prejudicial nature, it was harmless error based on the overwhelming evidence of guilt against Friedman. Finally, we conclude that no cumulative error arises from introduction of the testimony and seized items.

Open and gross lewdness statute

"A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that [his] conduct is forbidden by statute."[13] "The test for vagueness is whether the terms of the statute are 'so vague that people of common intelligence must necessarily guess as to [their] meaning.'"[14] The United States Supreme Court has set forth two clarifying points in evaluating vagueness questions.[15] First, the "fair notice" requirement enables an ordinary citizen to conform his conduct to the law.[16] Second, the statute must provide clear standards for law enforcement.[17]

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[13]Williams v. State, 118 Nev. 536, 545-46, 50 P.3d 1116, 1122 (2002).

[14]Sereika v. State, 114 Nev. 142, 145, 955 P.2d 175, 177 (1998) (quoting Cunningham v. State, 109 Nev. 569, 570, 855 P.2d 125, 125 (1993)).

[15]Chicago v. Morales, 527 U.S. 41, 58 (1999).

[16]Id.

[17]Id. at 60.

Friedman argues that NRS 201.210 is unconstitutionally vague because it provides no guidelines to which either the ordinary citizen or law enforcement can conform their conduct or investigation. NRS 201.210 states in its entirety:

> 1. A person who commits any act of open or gross lewdness is guilty:
>
> (a) For the first offense, of a gross misdemeanor.
>
> (b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130.
>
> 2. For the purposes of this section, the breast feeding of a child by the mother of the child does not constitute an act of open or gross lewdness.

Friedman asserts a reading of the statute only leads one to further questions of what constitutes "open or gross lewdness," and there is no specification of what standards are used to judge conduct. The State acknowledges that the crime of open and gross lewdness has not been defined by the legislature.

When an offense is either not defined or incompletely defined, the legislature mandates that common law definitions apply.[18] In Young v. State, this court recognized the common law definition of open and gross lewdness to mean "unlawful indulgence of lust involving gross indecency with respect to sexual conduct committed in a public place and observed by persons lawfully present."[19] This court provided a clear definition of

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[18]NRS 193.050(3).

[19]109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (quoting 3 Wharton's Criminal Law, § 315 (14th ed.1980)).

the prohibited conduct. NRS 201.210 provides the penalty for such an offense. NRS 193.050(3) provides that the common law, as defined in Young, applies. Therefore, we conclude that Friedman's argument lacks merit.

Conclusion

We have reviewed Friedman's remaining claims and conclude they lack merit. Additionally, sufficient evidence supports the conclusion that a rational jury would have found the elements for aggravated stalking beyond a reasonable doubt.[20] We have previously held that regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[21] The sentence did not exceed the statutory limit and does not rise to the level of cruel and unusual punishment. Accordingly, we

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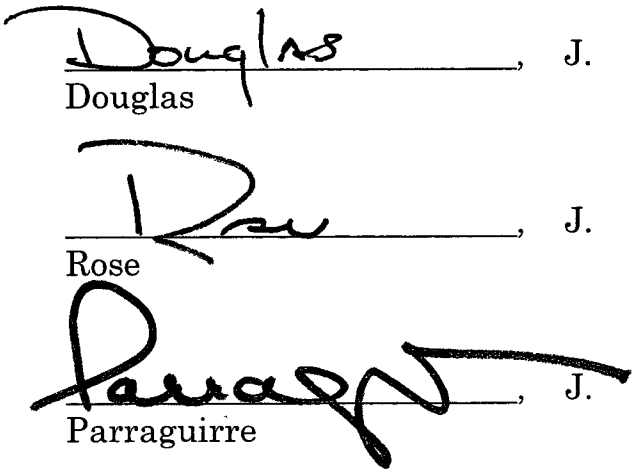
[20]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[21]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk