IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES JAY HARMER A/K/A CHARLIE HARMER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43744

FILED

JAN 0 7 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of statutory sexual seduction. Fourth Judicial District Court, Elko County; Dan L. Papez, Judge. The district court sentenced appellant Charles Jay Harmer to serve a prison term of 24-60 months. The jury found Harmer not guilty of lewdness with a child under the age of 14 years.

First, Harmer contends that the district court erred by admitting evidence of uncharged bad acts at trial, specifically, prior sexual contact between himself and the victim. A Petrocelli hearing[1] was not held prior to the victim's challenged testimony, defense counsel did not ask for and the jury did not receive a limiting instruction prior to its admission,[2] and defense counsel never objected. Harmer argues that the evidence of uncharged misconduct was not admissible under the complete

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), holding modified on other grounds by Sonner v. State, 114 Nev. 321, 955 P.2d 677 (1998).

[2]Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).

story of the crime doctrine because it was unfairly prejudicial. We disagree with Harmer's contention.

This court has stated that "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[3] Nevertheless, the admission of uncharged bad acts evidence is heavily disfavored.[4] In the instant case, the district court admitted the evidence under the res gestae doctrine – the complete story of the crime – under NRS 48.035(3).[5] We have explained that the doctrine allows the State to present a complete picture of the facts surrounding the commission of a crime:

> [T]he State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime, and such evidence is admissible even if it implicates the accused in the commission of other crimes for which he has not been charged.[6]

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[3]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

[4]Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

[5]NRS 48.035(3) states:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

[6]Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59, 63 (1988).

For the evidence to be admitted, "the crime must be so interconnected to the act in question that a witness cannot describe the act in controversy without referring to the other crime."[7]

In this case, we conclude that the district court did not commit manifest error in admitting the evidence as part of the complete story of the crime. After the victim's testimony and prior to the second day of trial, the district court made the following statement outside the presence of the jury:

> COURT: The Supreme Court has instructed the district courts . . . that the district court has the obligation to raise the issue sui [sic] sponte in the event counsel doesn't.
>
> But we should place on the record that we have discussed this previously, it was obvious yesterday from the testimony of [the victim] that there were uncharged bad acts as parts of that testimony. . . .
>
> Having discussed this matter previously with counsel in chambers, it is the Court's opinion that all of that testimony is admissible without having to do any kind of Petrocelli hearing under NRS 48.035, paragraph 3, which is basically the complete story of the incident doctrine.
>
> The Court believes from the testimony that it heard yesterday, and also what was represented to the Court before the trial started and by counsel, that it would be impossible for the witness to testify about the charged conduct without also talking about the uncharged conduct.
>
> And I believe those are the findings that are necessary to permit that testimony to go forward without a Petrocelli hearing . . . .

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[7]Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995); State v. Shade, 111 Nev. 887, 895, 900 P.2d 327, 331 (1995).

> DEFENSE COUNSEL: Your Honor, we did discuss that in chambers yesterday and it is unfortunately my view that that is a correct ruling.
>
> That is based on a review of all the discovery in this case and points and authorities that the State submitted to the Court, also. I agree that it is not necessary to have a Petrocelli hearing.

We conclude that the victim's testimony was admissible under the complete story of the crime doctrine. We also conclude that in light of the substantial evidence against Harmer, the failure to give a limiting instruction did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[8]

Second, Harmer contends that he received ineffective assistance of counsel during the trial. Specifically, Harmer argues that counsel's performance was deficient because he failed to: (1) object to the admission of prior bad acts, and (2) cross-examine the victim and her mother. This court has repeatedly stated that, generally, claims of ineffective assistance of counsel will not be considered on direct appeal; such claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing.[9] We conclude that Harmer has failed to provide this court with any reason to depart from this policy in his case.[10]

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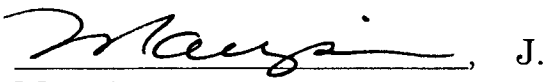
[8]Tavares, 117 Nev. at 732, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[9]See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001).

[10]See id. at 160-61, 17 P.3d at 1013-14.

Accordingly, having considered Harmer's contentions and concluded that they are either without merit or not properly raised on direct appeal, we

ORDER the judgment of conviction AFFIRMED.[11]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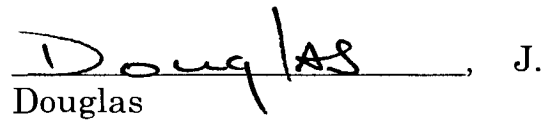
Maupin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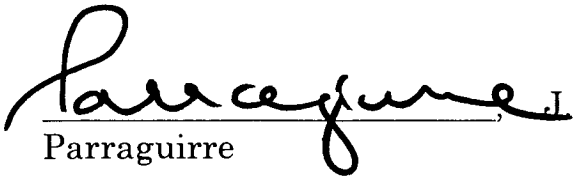
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Parraguirre

[11]In light of our disposition of Harmer's appeal, we deny his motion for a stay of sentence and bail pending appeal as moot. Further, although this court has elected to file the appendix submitted by Harmer, we note that it does not comply with the arrangement and form requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(c); NRAP 32(a). Specifically, the appendix is not prefaced by "an alphabetical index identifying each document with reasonable definiteness, and indicating the volume and page of the appendix where the document is located." See NRAP 30(c)(2). Counsel for Harmer is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n).

cc: Hon. Dan L. Papez, District Judge
Paul E. Quade
Thomas L. Qualls
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk