IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN MENDOZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44036

FILED

FEB 16 2006

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, upon jury verdict, of fifteen counts of sexual assault of a minor under sixteen years of age, and twenty-five counts of sexual assault. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

Appellant Juan Mendoza was charged with fifteen counts of sexual assault with a minor, and twenty-six counts of sexual assault. After a three-day trial, Mendoza was found guilty on all counts except one. He was sentenced to three consecutive life sentences with eligibility for parole after twenty years; four consecutive life sentences with eligibility for parole after ten years; twelve concurrent twenty-to-life sentences; and twenty-one concurrent ten-to-life sentences.

Mendoza now appeals, citing five assignments of error by the district court: improperly allowing testimony about prior bad acts, improperly excluding testimony of a prior false accusation by the victim, improperly allowing introduction of a photo of the victim, improperly allowing expert testimony by a lay witness, and cumulative error.

Although we find that the district court made several errors, we find those errors to be harmless, especially in light of the overwhelming evidence of guilt.

Evidence of prior bad acts

This court has held that "[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error."[1]

Although Mendoza contends that it was error for the district court judge to admit evidence of sexual assaults against the victim before the family moved to Nevada, we hold that such evidence was admissible under NRS 48.045,[2] and that the probative value of the evidence outweighed the risk of unfair prejudice.[3]

The prior bad acts introduced were the same crime, by the same perpetrator, against the same victim. The evidence of the origins or beginnings of Mendoza's sexual assaults against A.A. were important to establishing his motive, his intent, and the absence of any consent on the part of his victim. When A.A. was testifying about the abuse she suffered before the family moved to Nevada, she provided evidence of the threats Mendoza made, and how she was afraid to tell anyone about the abuse because of those threats of the family being broken up. We conclude,

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

[2]Under NRS 48.045(2), such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Under NRS 48.035(3), such evidence is admissible if the bad act "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[.]"

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

therefore, that the district court did not abuse its discretion in allowing the evidence.

The district court held a hearing outside the presence of the jury to rule on the admission of this evidence, as required by Petrocelli v. State.[4] However, the district court did not make or announce any specific findings as to relevance, the burden of proof, or the balancing of probative value against unfair prejudice.[5] The district court's failure to put the proper findings on the record is reversible unless: (1) this court can determine from the record that the evidence meets the test for admissibility of bad acts evidence from Tinch v. State;[6] or (2) "where the result would have been the same if the trial court had not admitted the evidence."[7]

Mendoza did not appeal the district court's failure to put any findings on the record. However, this court may address sua sponte the district court's failure to put its findings on the record.[8]

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[4]101 Nev. 46, 692 P.2d 503 (1985).

[5]Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994) (holding that after a Petrocelli hearing, a "district court must state on the record its findings of fact and conclusions of law.").

[6]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (holding that a trial court must determine that the bad act is relevant to the crime charged, that the act is proven by clear and convincing evidence, and that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice).

[7]Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998) (citation omitted).

[8]Coleman v. State, 111 Nev. 657, 662, 895 P.2d 653, 656 (1995).

This court's review of the record leads us to conclude that the evidence was admissible under the Tinch factors. We hold that the prior bad acts were relevant and proven by clear and convincing evidence, and that the evidence was more probative than prejudicial. Further, given the overwhelming evidence of guilt, we conclude that the result would have been the same even if the district court had not permitted introduction of the evidence.

Mendoza also argues that the district court erred in permitting testimony about him taking a nude photo of A.A. before the family moved to Nevada. We agree that it was error for the district court to permit evidence of the taking of the photo, since evidence of the taking of the photo was clearly evidence of a prior bad act of the defendant, and since the district court admitted the evidence without a hearing, and without making the required findings from Tinch. However, since the photo itself was not admitted, nor any evidence introduced that Mendoza was charged for exploitation of a minor, and in light of the overwhelming evidence of guilt, we conclude that the error was harmless.

Prior accusation of sexual assault

Mendoza argues that the district court erred in not allowing testimony into evidence about an alleged prior false accusation of sexual assault by A.A. We disagree.

In Miller v State, this court noted that in sexual assault cases, "the complaining witness' credibility is critical and thus an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges."[9] As a result, this court carved out an exception for

[9]105 Nev. at 500, 779 P.2d at 89.

sexual assault cases to the general rule of NRS 50.085(3) that extrinsic evidence is inadmissible to disprove a witness' denial of specific instances of past conduct.[10] Before permitting evidence of such an accusation and extrinsic evidence that the accusation was false, however, the district court must first have a hearing. The party wishing to introduce the evidence must prove by a preponderance of the evidence that the accusation was in fact made, that the accusation was false, and that the evidence is more probative than prejudicial.[11]

Mendoza contends that A.A. referred to a prior incident at school as a sexual assault both during his preliminary hearing and in her statement to detectives in Arizona. The district court properly held a hearing to permit Mendoza to make the threshold showing required by Miller. Mendoza was not able to prove either the fact of the accusation or the falsity of the accusation. Mendoza never made a showing that A.A. termed the incident a sexual assault at the time the incident happened; in fact, the lack of evidence from the school about the incident tends instead to show that she did not make a sexual assault allegation at that time. Having heard the details of the incident from both defense counsel and A.A., the district court properly noted that although the incident might be termed a sexual assault in the mind of A.A., it was not so in the law. Additionally, we note that even if the incident was a sexual assault in the mind of the victim, it was not proven false, since A.A.'s description of the incident was never disputed.

The district court did permit the defense to ask A.A. if she had asked a witness to lie for her at the peer trial after the incident at school.

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[10]Miller, 105 Nev. at 501, 779 P.2d at 90.

[11]Id. at 502, 779 P.2d at 90.

A.A. denied making such a request, and under NRS 50.085(3), no extrinsic evidence was permissible to disprove her denial. Therefore, we conclude that the district court did not abuse its discretion in refusing to permit introduction of the so-called false allegation of sexual assault.

Introduction of a photo of the victim

The State was permitted to introduce a photo of A.A. at age thirteen, despite defense objections as to relevancy and prejudice. Evidence is generally admissible under NRS 48.025 if it is relevant. However, even relevant evidence may be inadmissible under NRS 48.035(1) "if its probative value is substantially outweighed by the danger of unfair prejudice[.]"

A photo of the victim at thirteen may not be relevant to crimes committed when she was fifteen and older; however, Mendoza did not include a copy of the photo in the record on appeal, making it difficult for this court to determine its potential prejudicial value. While the decision to permit introduction of the photo may have been error by the district court, the other evidence of guilt here was substantial, and without being able to gauge the prejudicial value of the photo, we conclude that the error, if any, was harmless.

Testimony of lay witness

"The admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court."[12] We find no abuse of that discretion in the district court permitting Detective Dunn to testify as to his opinion about victims of sexual assault.

Since Detective Dunn was asked a general question about victims of sexual abuse, and since he stated that he had interviewed

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[12]Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978).

thousands of such victims, we find that it was proper for the district court to permit Dunn to answer the question about whether victims often delay reporting the crimes. Although he admittedly had no personal knowledge of A.A. and her specific decision to report the crimes, he was not asked a specific question about A.A. or the crimes at issue. His answer was based on his personal knowledge of the many similar situations he dealt with,[13] and his rational perceptions of those situations.[14]

We further find that since the reasons for A.A.'s reluctance to report was arguably an important part of the prosecution, Dunn's testimony was "helpful to a clear understanding of his testimony or the determination of a fact in issue."[15] We conclude, therefore, that it was within the discretion of the district court to permit the testimony.

Cumulative error

Mendoza contends that the cumulative effect of errors by the district court deprived him of a fair trial. We disagree.

This court will reverse a conviction where the cumulative effect of errors at trial deny the appellant his right to a fair trial.[16] In distinguishing harmless error from prejudicial error, this court should

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[13]NRS 50.025 prohibits a witness from testifying to a matter unless that witness has personal knowledge of the matter, or states his opinion as an expert.

[14]NRS 50.265 limits a lay witness' opinion or inference testimony to those which are "[r]ationally based on the perception of the witness; and [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."

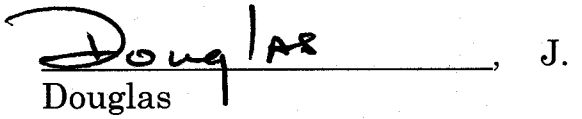
[15]Id.

[16]DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000); Homick v. State, 112 Nev. 304, 913 P.2d 1280 (1996).

consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[17]

The district court erred in permitting testimony about Mendoza having taken a nude photo of A.A., and failing to put findings on the record regarding the Petrocelli hearing. However, neither of these errors was overtly prejudicial, and the evidence of guilt here was overwhelming. We conclude that Mendoza was not deprived of a fair trial, and this court will not reverse his conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

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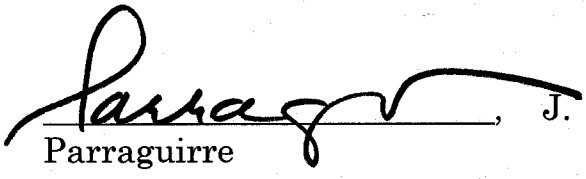
Becker



_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 16, District Judge
Sciscento & Montgomery
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[17]Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); see also Garner v. State, 78 Nev. 366, 374-75, 374 P.2d 525, 530 (1962).