IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WAYNE PAUL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33970

FILED

OCT 15 2002

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

ORDER OF REVERSAL AND REMAND

Joseph Wayne Paul appeals from a judgment of conviction, entered pursuant to a jury verdict, of two counts of sexual assault and one count of open or gross lewdness. We conclude that the district court improperly admitted evidence of other bad acts at Paul's trial. Because we cannot say without reservation that the verdict would have been the same in the absence of these errors, we reverse Paul's conviction and remand this matter for further proceedings.[1]

The fifteen-year old victim in this case, TG, testified at trial that in December of 1997, Paul drove her and her boyfriend to a private residence one night, where she drank beer, played drinking games and eventually became ill and vomited. It was cold outside and her boyfriend had fallen asleep, so when Paul offered her a ride home, she accepted. Paul drove her past her house, and down a dirt road approximately one-half mile from her home. After parking the car, Paul pulled TG over to

[1]See Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

02-17865

him and attempted to kiss her. TG testified that despite her protests and repeated requests for him to stop and to take her home, Paul unzipped her pants, digitally penetrating her vagina twice, and unhooked her bra. He then dragged her out of the car and onto the ground, pulled her pants down around her ankles, held her down, and raped her.

The next day, TG told a friend of her mother's that Paul had kissed her and put his hand down her pants, but she did not mention the rape. Later that day, TG reported the same accusations, absent the rape, to the police. She claimed initially that on the morning after the alleged assault, she had washed the clothes she had been wearing. Several months later, TG informed police officers for the first time that Paul had raped her. She explained that she had not been forthcoming earlier because she was scared and embarrassed. She again told them that she had washed her clothes. Later in her testimony at trial, however, she stated for the first time that she had also burned her clothes.

At trial, Paul admitted that he offered TG a ride home, that he felt she had been flirting with him all night, and that he did not drive her straight home. He claimed that when they reached the dirt road, he unhooked TG's bra, then unbuttoned her pants, and placed his hand in her underwear. He further claimed that he stopped when he touched her pubic hair and removed his hand from her pants. Paul testified that he then reached for TG's breast, but she asked him to stop. According to Paul, he complied with TG's request and drove toward TG's home, dropping her off a few houses away so that she could sneak back into the

house. Paul denied digitally penetrating or raping TG, but admitted that his finger might have touched the lip of TG's vagina when he put his hand down her pants. Paul also admitted telling TG that the incident would be their secret and that he did not want the police banging on his door, but explained that he was only concerned because he believed that he had done something morally wrong that could threaten his marriage and his status as a volunteer deputy with the sheriff's department.

The State offered testimony from several witnesses (DG, LP, and KS) regarding uncharged bad acts committed by Paul. Following a Petrocelli[2] hearing, the district court ruled that the evidence was admissible under NRS 48.045(2) to show opportunity, preparation, intent, plan, knowledge, or absence of mistake or accident.

The defense offered the testimony of several character witnesses. At least two of those witnesses testified to Paul's general good behavior around women. In response, the State called a witness to rebut the character evidence presented by the defense.

At the conclusion of the trial, the jury found Paul guilty of two counts of sexual assault and one count of open or gross lewdness. The district court sentenced Paul to serve concurrent terms of life in prison with the possibility of parole after ten years for the two sexual assault counts and a concurrent term of one year in jail for the open or gross lewdness count. This appeal followed.

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

Prior bad act testimony.

Paul contends that the district court abused its discretion in admitting the prior bad act testimony of DG, LP, and KS. We conclude that under NRS 48.045(2), the district court properly admitted the testimony of KS, but abused its discretion in admitting the testimony of DG and LP.

Without specifying a particular "other" purpose permitting admission of the other bad act evidence, the district court found that the testimony regarding Paul's prior bad acts with DG, LP and KS was relevant and admissible under NRS 48.045(2).[3] The district court also conducted the requisite hearing outside the presence of the jury and found that the evidence of Paul's other acts was relevant to the charged offenses, that the other acts were proven by clear and convincing evidence, and that the probative value of the other acts was not substantially outweighed by

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[3]NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

the danger of unfair prejudice.[4] Paul challenges these findings as to each of the other acts.

We conclude that the two incidents involving KS were sufficiently similar to the conduct alleged so as to be probative of whether Paul possessed the intent or state of mind required for the charged offenses.[5] KS testified that in the first incident, Paul offered her a ride home, took a longer route to her home, and made unwanted sexual advances toward her that included fondling her breasts. KS testified that in the second incident, she was giving Paul a ride home when he suggested that they go to a remote area and that he made unwanted sexual advances toward her that included rubbing her crotch. According to the victim in this case, Paul engaged in similar conduct with her. Although the two incidents involving KS are somewhat remote, occurring eleven and seven years before the charged offenses, given the similarity in the conduct, we conclude that the district court properly admitted this evidence.

In balancing the probative value of the incidents against the danger of unfair prejudice, we note that the district court could have appropriately taken into account the absence of any direct evidence, other

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[4]See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985).

[5]See 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.22[1][a], at 404-79 (Joseph M. McLaughlin ed., 2d ed. 2001).

than the victim's testimony, supporting the State's case. In assessing the probative value of prior bad act evidence, the trial court may consider "not only relevance but also the necessity and reliability of the evidence."[6] Additionally, according to KS, Paul terminated the contact with her upon her request in both prior instances. Consequently, the other act evidence was not particularly egregious or prejudicial with respect to the sexual assault charges. In fact, it actually tended to support Paul's testimony that although he touched the victim in this case, he stopped when she rejected his advances. Thus, the district court did not abuse its broad discretion in determining that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

Paul argues, however, that the prior acts involving KS were not proven by clear and convincing evidence because KS failed to contemporaneously report the incidents to anyone. Paul acknowledges KS's testimony that she told her sister immediately, but points out that her sister denied receiving any such information. We conclude that Paul's contention lacks merit.

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[6]See United States v. DiZenzo, 500 F.2d 263, 266 (4th Cir. 1974); see also United States v. Bailleaux, 685 F.2d 1105, 1112 (9th Cir. 1982) (in balancing probative value against unfair prejudice, the trial court should consider the need for evidence of prior criminal conduct to prove a particular point) (citing United States v. Lawrance, 480 F.2d 688, 691-92 n.6 (5th Cir. 1973), and C. McCormick, McCormick's Handbook of The Law of Evidence § 190 at 453 (2d ed. 1972)).

The State offered KS's testimony as the only evidence to establish the prior bad acts. We have consistently held that a victim's testimony alone is sufficient to support a jury's finding of guilt beyond a reasonable doubt so long as the victim testifies with some specificity.[7] The burden of proof is even less in a Petrocelli hearing, and we conclude that testimony of a victim of a prior bad act may itself be sufficient to prove the act by clear and convincing evidence.[8] We perceive no indication that, in discharging its obligation to make credibility determinations, the district court abused its discretion in finding that KS's testimony was sufficient to establish the other acts by clear and convincing evidence.

The testimony of DG and LP, on the other hand, was not relevant to any fact of consequence in the trial other than to show that Paul committed the charged crime because of a trait of character.[9] As a general rule, other act evidence may be relevant and admissible as proof of intent where the other act is sufficiently similar to and not too remote in

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[7]See, e.g., Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

[8]See Meek, 112 Nev. at 1295, 930 P.2d at 1108; Keeney v. State, 109 Nev. 220, 227-29, 850 P.2d 311, 316-17 (1993), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

[9]Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 696 (1979); accord Huddleston v. United States, 485 U.S. 681 (1988) (discussing Fed. R. Evid. 404(b), which is similar to NRS 48.045(2)).

time to the charged offense.[10] The other acts involving DG and LP, however, were not sufficiently similar or proximate in time to the charged conduct as to be probative of Paul's intent or state of mind.

Except for the descriptions of social drinking and accusations of general sexual misconduct, neither of the incidents described by DG and LP was similar to any of the specific conduct alleged by TG. As we explained in Meek v. State,[11] such general similarities are not sufficient to make the other acts relevant to the charged offenses. Moreover, given the dissimilarity between the conduct described by DG and LP and the conduct alleged by TG, the eight-year and seven-year lapses in time between these other acts and the charged offenses makes the other acts even less probative. Thus, we conclude the prior bad act testimony of DG and LP was not sufficiently probative of Paul's intent or motive to commit the charged offenses to warrant its admission under NRS 48.045(2).

We further conclude that DG's and LP's testimony was not relevant to show any of the other factors listed in NRS 48.045(2). It was undisputed that Paul was alone in the vehicle with TG. Thus, Paul's identity as the alleged attacker and whether he had the opportunity to commit the charged offenses were not materially at issue. Nor were these prior bad acts probative of preparation because they had little tendency to

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[10]See Williams, 95 Nev. at 833, 603 P.2d at 697. See generally 2 Weinstein & Berger, supra note 5, § 404.22[1][c], at 404–86-88.

[11]112 Nev. 1288, 1294, 930 P.2d 1104, 1108 (1996).

establish that Paul devised or arranged the means or measures necessary to commit the charged offenses. Additionally, Paul did not offer a defense based on mistake or accident.[12]

DG's and LP's testimony was also not probative of a common plan or scheme. Evidence evincing a common scheme or plan must "tend to prove the defendant's commission of the charged crime by showing that the defendant planned to commit it."[13] Given the lack of similarity between the other acts and the charged offenses and the passage of time separating the events, we conclude that these other acts do not tend to establish a preconceived or common plan, design, or scheme.

For similar reasons, the evidence was also not admissible as proof of knowledge. Both counts of sexual assault alleged that Paul committed the acts against the victim's will or under conditions in which Paul knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of his conduct. Although Paul's knowledge of whether the victim was mentally or physically incapable of resisting or understanding the nature of his conduct was a fact of consequence at trial, the evidence presented by DG and LP had little if any tendency to make it more probable that Paul had

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[12]See Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846-47 (1993) (the State cannot claim that other act evidence is relevant to rebut a claim of accident or mistake where the defendant did not present a defense based on accident or mistake).

[13]Cirillo v. State, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980).

such knowledge. As noted, the alleged incidents involving DG and LP are not similar to the charged offenses. They involved women who were older than TG, and the factual scenarios differed significantly from the facts alleged in the charged offenses. Additionally, although the alleged conduct with DG and LP occurred on mornings following parties where alcohol was consumed, there is no indication that DG or LP were intoxicated or otherwise physically or mentally incapable of resisting or understanding the nature of Paul's conduct.

NRS 178.598 sets forth the harmless error rule: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Because the admission of other act evidence is not constitutional error,[14] the relevant inquiry is whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'"[15] The State must show that the error "more probably than not was harmless."[16]

As we concluded in Big Pond v. State, although the evidence presented here was "substantial enough to convict in an otherwise fair

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[14]See U.S. v. Vgeri, 51 F.3d 876, 882 (9th Cir. 1995).

[15]Tavares v. State, 117 Nev. ___, ___, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[16]Vgeri, 51 F.3d at 882.

trial, [it] was not overwhelming."[17] There was no physical evidence presented at trial. Paul disputed the victim's version of events and the jury was presented with a close question. Under the circumstances, we cannot conclude that it is more probable than not that the erroneous admission of the prior acts involving DG and LP had no influence on the jury's verdict. We therefore conclude that the district court's error in admitting evidence of the other acts involving DG and LP was not harmless and that the judgment of conviction must be reversed and remanded for further proceedings.

Although this conclusion renders it unnecessary to consider Paul's other claims of error, we nonetheless address the merits of two of his other evidentiary claims because the same situations may again arise in a retrial of this case.

Rebuttal character witness.

First, the district court allowed the State to call one of Paul's former girlfriends, PJ, as a rebuttal character witness. During direct examination by the State, PJ testified about a specific instance of sexual misconduct by Paul.[18] Paul argues that the district court abused its discretion by permitting PJ to testify.

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[17]101 Nev. at 3, 692 P.2d at 1289. We thus reject Paul's contention that the evidence was insufficient to support the jury's verdict.

[18]Paul did not object to that testimony in the proceedings below. As a general rule, the failure to make a contemporaneous objection precludes appellate review. Because we have already determined that reversal is

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NRS 48.045(1)(a) permits the admission of character evidence offered by the accused, and when the accused opens the door to character evidence by calling character witnesses, it permits the State to cross-examine the defense's character witnesses and call witnesses in rebuttal. Here, the defense opened the door to rebuttal character evidence by presenting witnesses who testified to Paul's character for good behavior around women. Therefore, the district court did not abuse its discretion by allowing the State to present rebuttal character evidence.

NRS 48.055(1) provides, however, that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion." NRS 48.055(1) further provides that "[o]n cross-examination, inquiry may be made into specific instances of conduct." Thus, pursuant to NRS 48.055(1), rebuttal character witnesses may testify only to reputation and to opinion, not to specific acts by a criminal defendant; however, the State may cross-examine a defendant's character witnesses regarding specific acts committed by the defendant.[19] But here, the State attempted to rebut

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warranted on other grounds, however, we have addressed the merits of this issue to avoid a recurrence of the error in any retrial.

[19]2 Weinstein & Berger, supra note 5, § 405.03[2][a], at 405–11 (discussing Fed. R. Evid. 405(a), which is identical to NRS 48.055(1)); see also United States v. Herman, 589 F.2d 1191, 1197 (3d Cir. 1978) (explaining that government may not call witnesses to testify to specific evidence of conduct to rebut testimony of character witnesses).

testimony of Paul's good character by introducing specific instances of conduct on direct examination of a rebuttal witness. Under NRS 48.055(1), this is not permitted.[20]

Evidence of the victim's prior sexual experience

Paul also contends that the district court abused its discretion by admitting evidence of the victim's prior sexual experience. Paul relies on our decision in Owens v. State[21] as support for the proposition that evidence of a victim's prior sexual experience is not relevant. In Owens, the prosecution presented evidence in a murder and rape trial that the victim was a virgin prior to the rape. The prosecutor later mentioned on three occasions before the jury that the victim was a virgin. This court held that the evidence of the victim's virginity was not relevant, and that the district court erred by admitting the evidence, but that the error was harmless given the overwhelming evidence against the defendant.[22]

Unlike Owens, in the instant case, the State did not present explicit evidence that the victim had been a virgin, just that she had never had sex with her boyfriend. Additionally, the State did not mention the victim's virginity or prior sexual experience at any time after the brief

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[20]NRS 48.055(2) only permits proof of specific instances of conduct on direct or cross-examination "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim or defense."

[21]90 Nev. 359, 526 P.2d 1181 (1974).

[22]Id. at 360-61, 526 P.2d at 1182.

questions during direct examination of the victim. However, the State fails to explain the relevance of the victim's sexual relationship, or lack thereof, with her boyfriend, and we do not perceive any such relevance. We caution the State to avoid such questions at any new trial unless it can demonstrate that the evidence is relevant.

CONCLUSION

The district court abused its discretion by admitting evidence of other acts described by DG and LP. Because we cannot conclude beyond a reasonable doubt that the verdict would have been the same in the absence of this error, we

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

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. John P. Davis, District Judge
Robert E. Glennen III
Attorney General/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk