IN THE SUPREME COURT OF THE STATE OF NEVADA

JUANITA OCHOA FUENTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46304

FILED

MAY 08 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of assault with a deadly weapon. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge. The district court sentenced appellant Juanita Ochoa Fuentes to serve a prison term of 19 to 48 months. The district court further ordered the sentence suspended and placed Fuentes on probation for a period of 36 months. Fuentes presents two issues for our review.

First, Fuentes contends that the district court erred by permitting the State to present testimony concerning two uncharged prior bad acts: (1) Fuentes's threats to get even with the victim, to ensure that he goes to jail, and to kill him and his alleged paramour; and (2) a barroom incident involving Fuentes and the victim. We disagree.

"The 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."[1] Such determinations will not be reversed

[1]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002); Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

absent manifest error.[2] A trial court deciding whether to admit evidence of prior bad acts must conduct a hearing outside the presence of the jury,[3] 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 other act is not substantially outweighed by the danger of unfair prejudice."[4]

Here, the district court conducted a Petrocelli hearing. It found that the evidence regarding Fuentes's threats was relevant to her motive, intent, and absence of mistake or accident because it indicated that she acted out of jealousy or anger; the witness was credible and therefore the act was proven by clear and convincing evidence; and the probative value of the evidence substantially outweighed the danger of unfair prejudice.[5] The district court further found that the evidence regarding the barroom incident was relevant as rebuttal evidence to show absence of self-defense and that Fuentes created a physical confrontation which she then blamed on the victim. We note that the district court instructed the jury regarding the use of the prior bad acts evidence each time such evidence was admitted,[6] and we conclude that district court's decision to admit this evidence did not constitute manifest error.

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[2]Braunstein, 118 Nev. at 72, 40 P.3d at 416.

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

[4]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[5]See NRS 48.045(2).

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

Second, Fuentes contends that the district court erred by permitting the State to present opinion evidence regarding her propensity for truthfulness or untruthfulness.[7] Fuentes specifically claims that a witness who offered opinion evidence about her truthfulness had moved away and had not had been in touch with her, or the community in which she resides, for two years. She argues, therefore, that because the witness's opinion was not formed near the time of trial it should not have admitted into evidence. Fuentes presented this argument to the district court prior to the admission of the witness's opinion testimony. After noting McCormick's practical solution to this issue and observing that Fuentes had several times delayed the trial, the district court ruled that the witness's opinion evidence was formed near the time of trial.[8] We conclude that the district court did not abuse its discretion.[9]

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[7]See NRS 50.085(1) (providing, in part, that opinion evidence as to a witness's truthfulness or untruthfulness is admissible to attack or support the witness's credibility).

[8]See 1 John W. Strong, McCormick on Evidence § 43 at 173-74 (5th ed., 1999) ("The crucial time when the witness's character influences his truth-telling is the time he testifies. But obviously reputation takes time to form and is the result of earlier conduct and demeanor. Hence, the reputation does not reflect character exactly at the trial date. The practical solution is to do what most courts do, that is, (1) to permit the reputation-witness to testify about the impeachee's "present" reputation as of the time of trial, if he knows it, and (2) to accept testimony about reputation as of any time before trial which the judge in his discretion finds not too remote. This practice should be followed under Federal Rule of Evidence 608(a). A witness's opinion permitted by the federal rule ought to have a similar temporal relation to the trial." (internal citations omitted)).

[9]See Greene v. State, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997) ("The decision to admit evidence is within the sound discretion of the court."),

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Having considered Fuentes's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

. . . *continued*
overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).