IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
CHERYL BOTZET, AKA CHERYL LYNN MUSSO,
Respondent.

No. 46511

FILED

SEP 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY U. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting respondent's motion for a new trial. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The State contends that the district court abused its discretion in granting respondent Cheryl Botzet's motion for a new trial. Specifically, the State takes issue with the district court's determination that it previously erred by allowing the admission of prior bad act evidence at trial. We disagree with the State's contention.

On June 17, 2004, Botzet was charged by way of a criminal information with one count of murder of her daughter; the State alleged three alternative theories. Prior to the trial, the State filed a motion to admit evidence of other bad acts.[1] Specifically, the State sought to present the testimony of three health care professionals from Colorado who came into contact with Botzet and the victim while the two lived there from May to December of 2002. The district court conducted a hearing pursuant to

[1]See NRS 48.045(2).

Petrocelli[2] and granted the State's motion, finding that the evidence was relevant, not "overly prejudicial," and "all [about] a course of conduct leading up to what ultimately happened to this child." The district court also found that the evidence was admissible "for all of the reasons that [the prosecutor] argues to the court," including, to show motive, intent, knowledge, and absence of mistake or accident. Nevertheless, at trial, the district court, after further discussions with both parties, excluded one of the Colorado witnesses, finding her testimony "unnecessary." And prior to the testimony of the other two Colorado witnesses, the district court gave the following limiting instruction, narrowing its previous ruling on the admissibility of the prior bad act evidence:

> [A]s a precautionary instruction, I need to tell you that evidence of prior instances of high blood sugar and a prior high A1C test results have been and will be introduced.
>
> Such evidence, if believed, has not been received and will not be received, and you may not consider it by you to prove either that the defendant is a person of bad character or that she has a disposition to commit crimes.
>
> Such evidence was and will be introduced and may be considered by you only for the limited purpose of showing you the defendant had been educated about the care and maintenance of the diabetic child and the importance of an A1C test.
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998).

> case, and you're not to consider such evidence for any other purpose.

(Emphasis added.) Defense counsel repeated his objection to the testimony of the Colorado witnesses, arguing that it was "irrelevant and immaterial."

On October 25, 2005, the jury returned a verdict, finding Botzet guilty of second-degree murder. Botzet subsequently filed a motion to set aside the verdict and to enter a judgment of acquittal and a motion for a new trial. The State opposed both motions. The district court conducted a hearing and denied Botzet's motion to set aside the verdict and enter a judgment of acquittal. After hearing extensive arguments from counsel, however, the district court granted Botzet's motion for a new trial, stating that "the court erred in allowing the testimony from Colorado at all," and finding, among other things, that the evidence was "far more prejudicial than probative." The district court further found that "the State ran all over that limiting instruction in their closing argument to show . . . how neglectful Miss Botzet was while the child lived in Colorado with her." The district court also precluded the Colorado witnesses from testifying at the next trial. The State now timely appeals.

NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence."[3] (Emphasis added.) The district court has broad discretion to grant or deny a timely motion for a new trial, and the district

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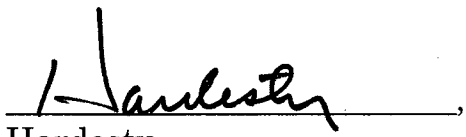
[3]See also NRS 176.515(4) ("[a] motion for a new trial based on any other grounds [than newly discovered evidence] must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period").

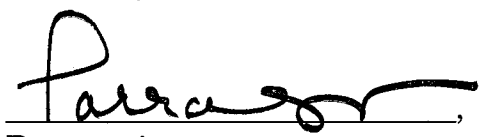
court's determination will not be reversed on appeal absent a clear abuse of its discretion.[4] In this case, the district court determined that it had erred in allowing the admission of the prior bad act evidence from Colorado, and the State has not provided any legal authority for its argument that "[i]t is not the province of the trial court to rule after the trial that the probative value [of the prior bad act evidence] was substantially out weighed [sic] by the prejudicial effect." Therefore, we conclude that the district court acted within its discretion in granting Botzet's motion for a new trial.[5]

Having considered the State's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Hardesty



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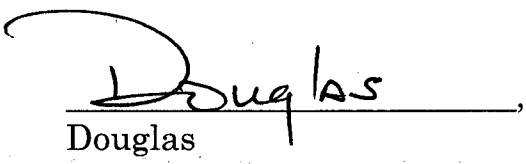

_____, J.
Douglas

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[4]See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001); State v. Carroll, 109 Nev. 975, 860 P.2d 179 (1993).

[5]See generally Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001) ("[w]e have often held that the use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system") (citing Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000)).

cc: Hon. Sally L. Loehrer, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Herbert Sachs
Eighth District Court Clerk