IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE RAY LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47630

FILED

AUG 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a direct appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of lewdness with a minor under the age of 14, 41 counts of sexual assault of a minor under the age of 16, and one count of attempted sexual assault of a minor under the age of 16. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Willie Ray Lewis to serve concurrent and consecutive terms totaling life in prison with the possibility of parole in 20 years.

Lewis argues that the district court erred by allowing victim S.L. to testify about Lewis' uncharged acts of violence against S.L. and her family members without requiring the State to file a pre-trial motion in limine and conducting a pre-trial Petrocelli[1] hearing. He also argues that the district court erred by denying his request for a continuance to investigate the prior bad acts. We disagree. Nothing in Petrocelli requires the hearing to take place before trial; rather, the hearing should take place before the evidence of prior bad acts is admitted, as it did in this

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

case. While a pre-trial motion in limine by the State would have been the preferred procedure, there was no prejudice under the particular facts of this case. Lewis was aware of the substance of the prior bad acts, as S.L. testified at the preliminary hearing that Lewis was violent toward her. He does not contend that he had insufficient time between the preliminary hearing and trial to investigate the allegations. We therefore conclude the district court did not err in this regard.

Lewis also argues that the district court should not have allowed S.L. to testify about Lewis' violence because the testimony adduced at the Petrocelli hearing did not satisfy the Tinch[2] factors. We disagree. Under Tinch, a prior bad act is only admissible if the trial court determines that "(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 evidence is not substantially outweighed by the danger of unfair prejudice."[3] Here, S.L. testified that she was afraid of Lewis; the evidence of Lewis' violence toward her was relevant as to why she did not tell anyone about Lewis' sexual abuse. S.L.'s testimony at the Petrocelli hearing was sufficiently clear and convincing, and it was corroborated by victim M.L.'s testimony at the hearing that Lewis could be violent. The evidence was probative on why S.L. would conceal extensive sexual abuse, and this probative value was not substantially outweighed by the danger of unfair prejudice to Lewis. We therefore conclude the district court did not err in this regard.

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[2]See Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

[3]Id. at 1176, 946 P.2d at 1064-65.

Lewis also argues that the district court erred by denying his motion for a mistrial after the jury was read an incorrect information that contained an erroneous allegation that Lewis used a deadly weapon during one of the charged offenses. We conclude that the district court did not abuse its discretion in denying Lewis' motion.[4] The allegation was not solicited by the State, the district court admonished the jury that the allegation was a typographical error and they were not to consider it, the reference was brief and at the beginning of a two day trial, and the evidence of Lewis' guilt was convincing.[5]

Lewis next contends there was insufficient evidence to support 39 of his 41 convictions of sexual assault of S.L. because S.L. did not testify with sufficient particularity to those counts. The State concedes that there was insufficient evidence to support 17 of those convictions. Lewis also argues that the evidence was insufficient to support his conviction for lewdness with M.L. because M.L.'s testimony was inconsistent with her statements to police officers and her prior testimony.

Our review of the record indicates that S.L. testified with sufficient particularity to support five convictions of sexual assault (one incident of cunnilingus, one of digital penetration of S.L.'s vagina in Lewis' van, and one each of penetration of S.L.'s vagina with Lewis' penis in Lewis' van, Lewis' bedroom, and S.L.'s bedroom). As to the other 36 counts of sexual assault against S.L., S.L. only testified that Lewis digitally penetrated her vagina "a lot of times, like more than 20" over a

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[4]See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

[5]See id. at 942, 920 P.2d at 995-96.

two-year period. The State did not require her to give any specifics or even a further estimate of any other acts of penetration. We conclude this was not sufficiently particular to support the remaining 34 counts of sexual assault.[6]

As to M.L., we have held that it is for the jury to determine the degree of weight and credibility to give testimony, and their decision will not be disturbed on appeal where there is substantial evidence to support the verdict.[7] Our review of the record indicates that M.L. testified that when she was 11 years old, Lewis asked her if she was having sex. When she said no, he told her to take off her pants; she complied, and Lewis touched her vagina and "held it open" for a few minutes so he could "check." Along with the other evidence adduced at trial, this was sufficient to support the jury's verdict.

Finally, Lewis contends that cumulative error at trial requires reversal of his convictions.[8] Having found no prejudicial error, we disagree.

We note that Lewis' sentence on count three as reflected in the judgment of conviction is incorrect as a matter of law. The penalty for sexual assault of a child under the age of 16 where there is no substantial bodily harm to the child is life in prison with the possibility of parole after

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[6]See LaPierre v. State, 108 Nev. 528, 530-31, 836 P.2d 56, 57-58 (1992).

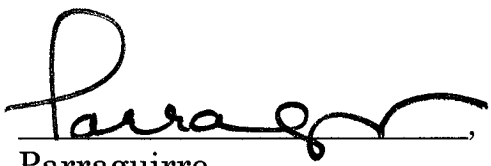
[7]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[8]See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

20 years, not after five years, as the judgment of conviction states.[9] We therefore direct the district court to correct this error in the judgment of conviction.[10]

Having reviewed Lewis' arguments and concluded he is entitled only to relief described above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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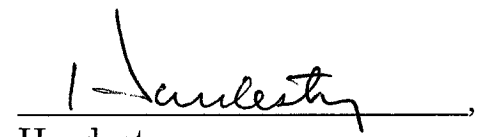

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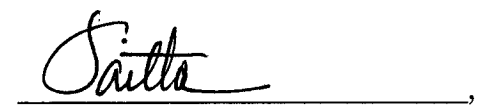

_____, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[9]NRS 200.366(3).

[10]See Ledbetter v. State, 122 Nev. 252, 266, 129 P.3d 671, 681 (2006).