IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY MCKINLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49300

FILED

JUL 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of sexual assault. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant Gary McKinley argues on appeal that the district court abused its discretion when it admitted highly prejudicial evidence of McKinley's alleged prior bad acts and sexual proclivities as evidence of his bad character. Additionally, McKinley argues that the district court abused its discretion when it refused to instruct the jury as to his theory of the case. We conclude that these arguments lack merit.

It is within the district court's sound discretion to admit or exclude evidence, and we review that decision for an abuse of discretion or manifest error.[1] Further, a district court's decision to admit or exclude evidence under NRS 48.045, which governs the admission of evidence of other crimes, wrongs, or acts, rests within the sound discretion of the district court, and that decision will not be reversed on appeal absent

[1]Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

manifest error.[2] Additionally, district courts enjoy broad discretion to settle jury instructions, and this court will not overturn a district court's decision concerning a particular instruction absent an abuse of discretion or judicial error.[3]

Prior bad acts

McKinley argues that the district court abused its discretion by allowing evidence of his alleged prior bad acts into evidence. He contends that under Ledbetter v. State,[4] the district court should have: (1) precluded the State from referring to his fetish for bondage, and (2) excluded evidence of pornographic videos depicting bondage.

The State's references to McKinley's fetish for bondage

McKinley contends that under NRS 48.045, the State's references to his fetish for bondage amounted to improper character evidence because they invited the jury to conclude that he was a bad person and that he acted in conformity with his bad character during the criminal incident. Further, McKinley argues that while he had a preference for consensual sexual bondage, it did not make him more likely

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[2]Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

[3]Nelson v. State, 123 Nev. ___, ___, 170 P.3d 517, 527 (2007).

[4]122 Nev. at 259, 129 P.3d at 677 (holding that the presumption of inadmissibility for prior bad acts may be rebutted when prior to the admission of this evidence the district court conducts a hearing while outside the presence of the jury and finds that the following three facts are satisfied: the evidence is relevant, it is clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997))).

to commit sexual assault. Consequently, McKinley contends that the State's references to his fetish for bondage impermissibly allowed the State to promote the logical leap from a fetish involving consensual bondage to a fetish involving sexual assault.

We conclude that the district court did not abuse its discretion.[5] Under NRS 48.045(2), McKinley's fetish for bondage was relevant to McKinley's motive for sexual gratification with bondage, which may have caused McKinley to tie up and gag the victim without her consent. Therefore, McKinley's argument relating to the State's references to McKinley's fetish for bondage lacks merit.

The pornographic videos depicting bondage

McKinley further argues that the district court abused its discretion when it allowed the State to introduce evidence of his collection of bondage and sadomasochistic pornography because the evidence impermissibly allowed the State to show that he had the propensity to tie women up and then rape them and that he acted in conformity with that propensity in this case.

Because defense counsel did not object to this evidence on these grounds, we review McKinley's assignment of error, as argued under NRS 48.045, for plain error.[6] As such, we conclude that the district court did not commit plain error in admitting pornographic videos into evidence

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[5]See Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008) (holding that this court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion).

[6]See Calvin v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006).

and that McKinley's substantial rights were not affected.[7] As argued by the State, McKinley has not demonstrated that the pornographic videos were introduced as character evidence for the purpose of showing that he had the propensity to tie women up and then rape them, and he has not demonstrated that the probative value of the pornographic videos was substantially outweighed by the danger of unfair prejudice. The pornographic videos were relevant in tending to show that McKinley had the motive and desire to engage in bondage as the actors did in the pornographic videos, which may have also caused McKinley to tie up and gag the victim without her consent.[8] Therefore, McKinley's argument relating to the pornographic videos depicting bondage lacks merit.[9]

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[7]See id.

[8]See NRS 48.045; Braunstein v. State, 118 Nev. 68, 75, 40 P.3d 413, 418 (2002).

[9]We additionally conclude that the district court did not abuse its discretion in allowing the State to introduce evidence that McKinley had sexually assaulted his former girlfriend in the past, as the district court in its sound discretion made a Tinch determination during a Petrocelli hearing. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1334, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004); NRS 48.045(2). Further, the district court did not abuse its discretion in admitting this evidence because it was relevant in tending to show that McKinley was motivated in acquiring a victim's trust and then forcing the victim into bondage, and in tending to show that McKinley was mistaken in thinking that the victim had consented to his acts of bondage.

The jury instruction at issue

McKinley additionally argues that the district court abused its discretion when it refused to instruct the jury as to his theory of the case. McKinley argues that because the victim had been on a methamphetamine binge when the alleged attack occurred and because the State's evidence against him was based on the victim's recollection of the events, the district court should have given his proposed jury instruction regarding the victim's credibility given her drug use.[10] McKinley contends that the district court was required to give this proposed jury instruction under NRS 175.161(3)[11] because it was appropriate and supported under Nevada law. Additionally, McKinley argues that the district court erred in distinguishing this court's decision in Champion v. State[12] to the facts in this case.

We conclude that the district court did not abuse its discretion in refusing to provide the jury instruction at issue.[13] The proposed jury instruction, as revealed in McKinley's appellate briefs, is an instruction as to the victim's credibility. As the record reveals that the jury had been instructed as to the credibility of witnesses in general, the proposed jury

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[10]The proposed jury instruction at issue is not contained within the record on appeal.

[11]NRS 175.161(3) provides: "Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused."

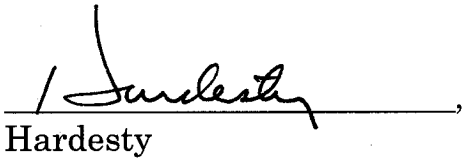
[12]87 Nev. 542, 543, 490 P.2d 1056, 1057 (1971).

[13]See Nelson v. State, 123 Nev. ___, ___, 170 P.3d 517, 527 (2007).

instruction was duplicitous and unnecessary.[14] We further conclude that the district court did not err in distinguishing Champion to the facts in this case; the victim in this case was never classified as an addict-informer.[15] As a result, the district court did not abuse its discretion in refusing to provide the proposed jury instruction. Therefore, McKinley's argument as to the jury instruction lacks merit.

Consequently, we conclude that McKinley's arguments on appeal do not warrant the reversal of McKinley's conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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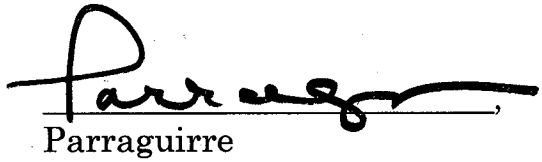

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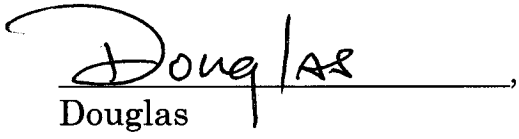

_____, J.
Douglas

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[14]See Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (stating that district courts do not have to accept misleading, inaccurate, or duplicitous jury instructions).

[15]See 87 Nev. at 543, 490 P.2d at 1057.

cc: Hon. Jackie Glass, District Judge
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Eighth District Court Clerk