IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ANDREW LYTLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49819

FILED

JAN 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under 14 years of age and one count of open or gross lewdness. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Appellant David Lytle appeals his conviction arising out of the molestation of his daughters, SL and ML. He argues that (1) the district court improperly admitted evidence of prior bad acts; (2) the district court erred in denying his motion for a mistrial because the Information was insufficient, (3) there was insufficient evidence for conviction, and (4) the State elicited improper vouching testimony. We agree that the district court improperly admitted bad act evidence, and therefore, reverse the district court's judgment of conviction.

The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.

The district court erred in admitting prior bad act evidence

Lytle argues that the district court improperly admitted prior bad act evidence that he lied during an interview with a detective and that he was involved in a companion case. We agree.

Evidence of prior crimes or wrongs is inadmissible to prove that the defendant acted in conformity with the alleged bad acts, but may

be admissible for other purposes. NRS 48.045(2). "A presumption of inadmissibility attaches to all prior bad act evidence." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) (quoting Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005)). To determine if bad acts are admissible, the court must hold a Petrocelli hearing. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998) (citing Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 507-08 (1985)). This court reviews the district court's decision whether to admit bad acts evidence for abuse of discretion. Id. "Failure to object to the admission of evidence generally precludes review by this court, although the court may address plain error." Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006). Any defect that does not affect substantial rights is harmless error. NRS 178.598.

Detective McGrath's testimony that Lytle was lying during the interview is bad act evidence

Detective McGrath testified that Lytle's answers and body language during the interview indicated he "was not being honest" and "was not truthful about specific instances." Lytle argues that this was inadmissible prior bad act evidence showing that Lytle was a liar. We agree. Because the defense did not object at trial, we review the admission of this evidence for plain error. Herman, 122 Nev. at 204, 128 P.3d at 472.

"An expert may not comment on a witness's veracity or render an opinion on the defendant's guilt or innocence." Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000). Although the detective did not testify as an expert witness, "jurors 'may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator.'" Id. (quoting Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct. App. 1998). For example, a police sergeant's testimony that the defendant had confessed to the crime and that the sergeant had never

heard an innocent person confess was tantamount to the sergeant's opinion that the defendant was guilty and required reversal. Id. at 670, 6 P.3d at 485 (citing Flynn v. State, 847 P.2d 1073, 1075-76 (Alaska Ct. App. 1993).

In this case, the State presented Detective McGrath as an experienced detective. The detective testified that he had training in interview techniques and had conducted over 100 investigative interviews. Therefore, Detective McGrath's testimony that Lytle was lying during his interview could have improperly swayed the jury.

The State asked Detective McGrath if he was able to confirm the truth of the statements Lytle made during the interview, but the district court admonished the State and it withdrew the question. Then the State asked the detective if he was able to form an opinion regarding Lytle's veracity. The court again admonished the State, and it withdrew the question. The State later reframed the question in terms of how Detective McGrath determines probable cause, and he testified that Lytle was not being honest and not being truthful during the interview. During the interview, Lytle only admitted to lusting for his daughters and touching SL's breast once. Detective McGrath's opinion that Lytle was lying suggests that Lytle committed all the other charged acts addressed at trial and that he lied by not admitting them to the detective during the interview. Thus, it is likely that this testimony improperly influenced the jury regarding Lytle's guilt and requires reversal.

Detective McGrath's testimony regarding Lytle's involvement in a "companion case" is bad act evidence

In response to the State's question regarding the nature of Detective McGrath's contact with Lytle, Detective McGrath explained that Lytle came to the sheriff's office regarding a "companion case." Lytle argues that this was prior bad act evidence. Because the defense did not

object, we review the admission of this statement for plain error. Herman, 122 Nev. at 204, 128 P.3d at 472.

"A witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005). Lytle's involvement in a companion case is bad act evidence because it suggests that he was under suspicion for other criminal conduct. Assuming the prosecutor did not intend to elicit the companion case statement from Detective McGrath, at a minimum, the district court should have admonished the jury to disregard any mention of other cases in which Lytle was involved. Because the court did not admonish the jury, it was free to infer that Lytle was under suspicion for other crimes.

Further, the Detective McGrath's describing the other case as a companion case suggests that it was somehow related to or similar to the case at bar. Therefore, the jury could have inferred that Lytle was under suspicion in another child molestation case and these inferences could have caused the jury to become convinced of Lytle's guilt. Thus, the district court committed plain error in admitting the companion case statement.

The district court did not err in admitting the other evidence Lytle challenges

Lytle argues that the district court admitted evidence of several other bad acts without "the necessary hearing or motions filed by the state." We disagree.

Lytle's admission of sexual feelings for SL was not bad act evidence

Lytle argues that the district court erred in allowing the State to mention in its opening statement that Lytle had admitted he lusted for his daughters. He also contends it was error to admit Detective McGrath's

testimony that Lytle had told him that Lytle lusted for SL and had touched her breast. Lytle alleges these are prior bad acts evidencing "aberrant sexual behavior." The defense did not object to either statement, so we review the admission of the evidence for plain error. Herman, 122 Nev. at 204, 128 P.3d at 472.

In Ledbetter v. State, this court held that "[e]vidence of separate acts of pedophilia or other forms of sexual aberration" is admissible as evidence of motive to commit the criminal act in question. 122 Nev. 252, 262, 129 P.3d 671, 678 (2006). The district court should hold a hearing to determine if such evidence is relevant, clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice. Id. at 259, 129 P.3d at 677. However, failure to hold such a hearing does not mandate reversal if this court can make the necessary admissibility determination from the record or if the result would have been the same absent the evidence in question. Id.

In this case, Lytle's statements that he lusted after SL and touched her breast indicate that he was sexually motivated to molest SL. Although the district court did not hold the proper evidentiary hearing, the jury would have convicted Lytle even if the district court had not admitted this testimony. The jury heard from Dr. Elizabeth Richitt, a psychologist who testified that in her opinion all three of the Lytle children had been abused. Both ML and SL testified to numerous acts of molestation by their father. Also, Susan Lytle testified to Lytle's inappropriate behavior. Therefore, we conclude that these statements are admissible under NRS 48.045(2) as evidence of Lytle's motive to molest SL. The district court did not err in admitting this evidence because given the substantial evidence against Lytle, the jury would have convicted him even if the district court had excluded these statements.

The State's closing argument slides mentioning "groping" and "sexual hugging" did not warrant a mistrial

Lytle argues that the State's showing a slide mentioning his "groping" of his daughters, and a slide mentioning "sexual hugging" regarding Lytle and his wife, Susan, were inadmissible prior bad acts. We disagree. Because the defense objected, we review the district court's admission of the evidence for abuse of discretion. Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998).

The evidence was inadvertent and not solicited by the prosecution, so a mistrial was only warranted if Lytle proved that the admission of the evidence was so prejudicial that it could not be cured by a limiting instruction to the jury. Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983).

Upon the defense's objection, the district court instructed the jury to disregard the mentioning of "groping." Lytle admits that the prosecution's presentation of the slide to the jury was inadvertent. Further, the judge immediately gave a curative instruction. Given the testimony by several witnesses describing how Lytle touched his daughters, the "groping" slide is not so prejudicial that the admonition from the judge could not cure it.

Similarly, the "sexual hugging" slide was not so prejudicial as to warrant a mistrial. In a Petrocelli hearing, the district court had ruled that any information pertaining to Lytle and Susan's sexual relationship was inadmissible. Although the State revealed the slide to the jury, it removed the slide from its closing argument outside the presence of the jury and never mentioned it to the jury. Therefore, neither the inadvertent mentioning of "sexual hugging" nor "groping" was so prejudicial that it warranted a mistrial. As such, the district court did not err in its handling of this evidence or in denying a mistrial.

Detective McGrath's testimony regarding Lytle's arrest was not bad act evidence

Lytle argues that Detective McGrath's statement regarding Lytle's arrest after the interview was a prior bad act that prejudiced Lytle because the jury could believe that the arrest suggests guilt. We disagree.

The criminal trial infers Lytle was arrested, and therefore the arrest is not a prior bad act. The defense neither objected to the arrest statement nor showed how it affected Lytle's substantial rights. See NRS 178.598. Thus, the district court did not err in admitting the arrest statement.

Susan's testimony that she was afraid of Lytle was not bad act evidence

Lytle argues that Susan's testimony, regarding her fear of Lytle and for SL's safety, was inadmissible bad act evidence. We disagree. The defense did not object to Susan's testimony on the basis of bad acts evidence, so this court reviews the admission for plain error. Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006).

Susan's testimony was not prior bad act evidence, but rather evidence of her state of mind, which is admissible under NRS 48.045(2). These statements helped explain why Susan never reported the suspected abuse or sought help. Thus, the district court did not err in admitting the statements.

The Information was sufficient

Lytle argues that this court should reverse his conviction and remand for a new trial because the Information violated NRS 173.075, and the district court erred when it denied Lytle's motion for a mistrial. We disagree. This court reviews the district court's denial of a mistrial for abuse of discretion. Evans v. State, 112 Nev. 1172, 1200, 926 P.2d 265, 283 (1996).

The Information must satisfy the defendant's Sixth Amendment right, which requires that the State "inform[ ] [the defendant] of the charges against him so that he [may] prepare an adequate defense." Viray v. State, 121 Nev. 159, 162-63, 111 P.3d 1079, 1081 (2005); Nevius v. Sumner, 852 F.2d 463, 471, (9th Cir. 1988). To satisfy this standard, the Information must include "'a statement of the acts constituting the offense in ordinary and concise language'" and put the defendant on notice of the State's theory of prosecution. Id. at 162, 111 P.3d at 1082 (quoting Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000)).

In this case, the defense objects to Counts, I, II, and III of the Information. Each of these counts specifies the statute Lytle allegedly violated, the approximate dates of the violation, against whom the acts were allegedly committed, and several examples of the acts constituting violation of the statute.

Given the statutory language and the details of the alleged acts, the Information put Lytle on notice of the State's theory of prosecution. Further, it did not prejudice Lytle's substantial rights because he had all the information he needed to prepare an adequate defense. As such, we conclude that the district court did not err in denying a mistrial.

Sufficient evidence supports the conviction

Lytle argues that because the Information was unclear, this court cannot determine whether the jury's verdict relied on sufficient evidence to satisfy his due process rights. He argues that because the Information was vague and ambiguous, it is unclear if the jury found the essential elements of the crimes charged. We disagree.

Lytle invokes Rose v. State, 123 Nev. ___, ___, 163 P.3d 408 (2007), to support his argument. Rose held that due process requires the

State to prove every element of every crime charged beyond a reasonable doubt. Id. at ___, 163 P.3d at 414 (2007). This court views the evidence in the light most favorable to the State and determines whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Id.

As discussed above, the Information was specific as to the statutes that Lytle allegedly violated, and therefore, it did not impede the jury's finding every element of each offense charged beyond a reasonable doubt. Further, sufficient evidence supports each conviction.

Count I: Lewdness with a child under 14 years of age

Count I alleges that Lytle committed lewd acts with ML in violation of NRS 201.230. NRS 201.230's essential elements are (1) willful commission of a lewd act, other than sexual assault; (2) upon any part of the body of a child under the age of 14 years; and (3) with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child.

This court held in Rose that in a sexual assault case, a "victim's testimony alone is sufficient to uphold a conviction." Id. A child's testimony, however, must be sufficiently specific so as not to be speculative. Id. It "need not 'specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred.'" Id. (quoting LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992)).

In this case, Dr. Elizabeth Richitt, a psychologist, testified that in her opinion all three of the Lytle children had been sexually abused. In addition, ML testified to numerous incidents with her father that made her uncomfortable. These included Lytle holding her hips tightly and not letting her up, touching her breasts when he hugged her,

grabbing her vaginal area in the pool, and ML feeling his erect penis while sitting on his lap.

Viewing the evidence in the light most favorable to the State, a rational juror could have decided beyond a reasonable doubt that Lytle willfully committed a lewd act, upon ML's body, to satisfy his own sexual desire. Therefore, the conviction of Count I relied on sufficient evidence.

Count II: Lewdness with a child under 14 years of age

Count II alleges that Lytle committed lewd acts with SL in violation of NRS 201.230. The essential elements are listed above.

SL testified about many incidents with her father that supported his conviction, such as forced sexual "therapy" lessons, during which she could feel his erection. In addition, SL testified that Lytle repeatedly grabbed her breasts and buttocks during wrestling sessions.

Viewing the evidence in the light most favorable to the State, a reasonable juror could find that SL's testimony was sufficient to convict Lytle of lewdness with a minor under fourteen years of age. Therefore, sufficient evidence supports the conviction on Count II.

Count III: Open or gross lewdness

Count III alleges defendant committed acts of open or gross lewdness with SL in violation of NRS 201.210. Open or gross lewdness is (1) intentional sexual conduct, either (2) in public or in private, in an open manner, (3) with the intent that the acts be offensive to the victim. Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993).

Detective McGrath testified that during the interview, Lytle told him that he had touched SL's breast, about three years ago, when she was 16 years old. SL's testimony, detailed above, also supports the conviction. The "therapy" sessions, wrestling incidents, and cuddling-in-

bed incidents were all intentional and done openly in the Lytle family home.

Viewing the evidence in the light most favorable to the State, a rational juror could have found beyond a reasonable doubt that Lytle committed acts of open or gross lewdness upon SL. The testimony of Dr. Richitt, Detective McGrath, and SL all support the conviction. As such, sufficient evidence supports the conviction of Count III.

The State did not elicit improper vouching

Lytle argues that the prosecutor solicited improper vouching testimony from Detective McGrath and Dr. Richitt by asking questions that influenced the jurors' minds. He further argues that the evidence in this case was "close," making the alleged vouching prejudicial. We disagree. Since the defense did not object, we review the questioning for plain error. Mejia v. State, 122 Nev. 487, 490, 134 P.3d 722, 724 (2006).

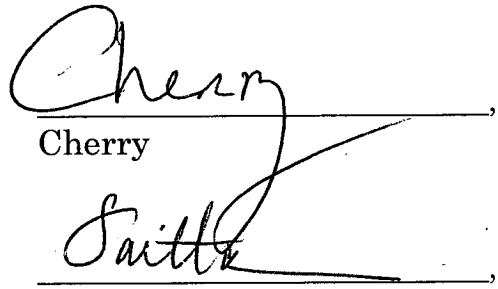
"The prosecution may not vouch for a witness; such vouching occurs when the prosecution places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.' Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992). Also, a witness cannot vouch for the testimony of another witness. Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 1114-17, 13 P.3d 451, 454-55 (2000).

The State asked Dr. Richitt about her training in determining whether a child was coached or lying. Before she answered, the court interjected and the prosecutor withdrew his question. Later, the State asked Detective McGrath if he was able to verify whether the statements Lytle made in the interview were true. Again, the court interjected and the prosecutor withdrew the question.

The evidence in this case was not "close," as discussed above regarding the sufficiency of the evidence. Further, the witnesses did not answer the questions. Thus, the jurors did not hear a witness or the prosecutor vouch for Lytle or his children's testimony. Therefore, there was no vouching.

The district court committed plain error by admitting Detective McGrath's statements regarding Lytle's veracity and his involvement in a companion case. Accordingly, we

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



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. John P. Davis, District Judge
Sanft Law, P.C.
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County Clerk

GIBBONS, J., dissenting:

I would affirm the judgment of conviction because I disagree with the majority's conclusion that the testimony mentioning that Lytle was "not being honest" and was involved in a "companion case" was plain error.

Detective McGrath's testimony regarding Lytle's truthfulness

The district court erred by admitting Detective McGrath's statements that Lytle was not being honest and truthful about specific instances during the interview. However, admission of these statements was not plain error. Substantial evidence supports Lytle's conviction. The jury heard from Dr. Elizabeth Richitt, who opined that all the Lytle children had been abused. SL and ML testified to numerous acts of molestation by their father, and Susan Lytle testified regarding his inappropriate behavior with the children. Therefore, the jury would have convicted Lytle regardless of whether the district court excluded the detective's statements or had admonished the jury.

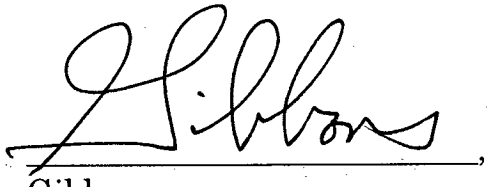
Further, this case is distinguishable from Flynn v. State, 847 P.2d 1073 (Alaska Ct. App. 1993), upon which Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000), and the majority relies. In Flynn, the defendant had confessed, and the sergeant testified that he had never seen an innocent person confess. 847 P.2d at 1075. But in Flynn, the defendant's confession was central to the State's case and the defendant presented a plausible coerced-confession theory. Id. at 1076. Therefore, the sergeant's testimony was tantamount to his opinion that the confession was true, and this could have had a "tremendous effect on the jury's verdict" by improperly influencing the jury's guilty verdict. Id.

Here, Lytle's partial confession was not central to the State's case. Rather, the State's case relied on the testimony of Dr. Richitt, SL, ML, and Susan Lytle. As such, it is unlikely that the jury would have acquitted Lytle if the district court had excluded the detective's statements. Therefore, the statements did not affect Lytle's substantial rights and their admission was not plain error.

Detective McGrath's testimony regarding Lytle's involvement in a "companion case"

The district court's admission of Detective McGrath's statement mentioning Lytle's involvement in a companion case was erroneous, but it was not plain error. The jury may have inferred that Lytle was a suspect in another similar case, but it also may have inferred that he was a witness or a complainant. Regardless of the inferences the jury may have drawn, given the substantial evidence in this case, the statement did not affect Lytle's substantial rights and was not plain error.

I find no plain error requiring reversal in this case. As such, I dissent and would affirm the judgment of conviction.



_____, J.
Gibbons