IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK OWEN MADSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51270

FILED

DEC 14 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 each of sexual assault of a child under 14 years of age and lewdness with a child under 14 years of age and from an order denying a motion for a new trial. Seventh Judicial District Court, Lincoln County; Dan L. Papez, Judge.

Appellant Patrick Madsen was temporarily staying with A.A., the victim, and her family and sleeping on the couch in their living room. A.A. was 13 years old at the time. Around the end of May 2006, Madsen sexually assaulted A.A. on two separate occasions. The State charged Madsen with two of counts sexual assault with a minor under age 14 and two counts of lewdness with a minor under age 14. After a two-day trial, a jury convicted Madsen of all four counts and the district court sentenced him to two consecutive life terms with parole eligibility after 20 years and two concurrent life terms with parole eligibility after 10 years.

Madsen now appeals, arguing that: (1) the district court erred by admitting hearsay statements, (2) the district court erred by admitting testimony over the defense's objections, and (3) cumulative error warrants

reversal.[1] We conclude error because the district court admitted hearsay and double hearsay, the district court admitted bad act evidence, and cumulative error warrants a new trial. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

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

DISCUSSION

I. The district court erred by admitting hearsay and double hearsay through Deputy Cowley

Madsen argues that the district court improperly admitted Deputy Cowley's recitations of what the victim told her about the two incidents and Deputy Cowley's statements about what Madsen told the victim. We conclude that the district court committed reversible error by

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[1]Madsen also argues that: (1) the district court erred by trying him on two counts of lewdness when he was only bound over on one and by admitting evidence of the improperly charged second lewdness count, (2) the district court erred when it prevented Madsen from questioning the jury during voir dire regarding the believability of child witnesses, (3) prosecutorial misconduct warrants a new trial, (4) the district court erred in denying Madsen's motion to dismiss the lewdness counts, (5) the district court erred in handling jury questions off the record, (6) the district court erred in improperly admonishing the jury, and (7) the district court erred in denying Madsen's motion to set aside the verdict and for a new trial. We conclude these arguments lack merit.

admitting A.A.'s hearsay statements and committed harmless error by admitting A.A.'s statements repeating what Madsen said to her.[2]

Madsen did not object to any of these statements, and therefore, this court reviews for plain error. Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). In conducting plain error review, we determine whether there was clear error that affected the defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

A. The district court committed reversible error by admitting Deputy Cowley's testimony repeating A.A.'s statements

Deputy Cowley repeated what A.A. told her during her interview of A.A., and the testimony echoed A.A.'s testimony. Madsen argues that Deputy Cowley's repeating A.A.'s statements was inadmissible hearsay. Madsen contends that the incidents never occurred and that A.A. fabricated the events. We conclude that the district court's admission of A.A.'s hearsay statements through Deputy Cowley was plain error because, as discussed below, they were not made prior to when A.A. would have had a motive to fabricate, and the State's case relied almost exclusively on A.A.'s testimony.

Under NRS 51.035(2)(b), a statement is not hearsay if the declarant testifies at trial, she is subject to cross-examination, and the prior consistent statement is "offered to rebut an express or implied charge

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[2]Madsen also argues that the district court improperly admitted his confession about having sex with A.A. because he did not have sufficient knowledge to make that statement and it was inadmissible speculation. We conclude the district court properly admitted his statement as an admission and it was not plain error.

against [the declarant] of recent fabrication." The State has the burden of showing that "the prior consistent statements occurred prior to the alleged fabrication." Patterson v. State, 111 Nev. 1525, 1532, 907 P.2d 984, 989 (1995). If the State does not make this showing, and the defense does not object at trial, this court then reviews for plain error. Id. at 1533, 907 P.2d at 989. Admission of such statements is harmless when the evidence of the crime is more than minimal and does not solely rest on the testimony at issue. Id. at 1533-34, 907 P.2d at 989-90. However, where the State's case rests completely on the victim and such statements corroborate the victim's testimony, the error is plain error. Gibbons v. State, 97 Nev. 299, 302, 629 P.2d 1196, 1197 (1981).

In this case, Madsen's theory was that the assaults and lewd acts never occurred. In essence, Madsen was alleging that A.A. fabricated the incidents. However, when the State called Deputy Cowley to testify, it never established that A.A. made her statements to Deputy Cowley before the alleged motive to fabricate arose. A.A. only spoke to Deputy Cowley after she told her mother, who called the police. Therefore, if A.A. was fabricating the attacks, then she had already lied about them to her mother. Thus, the statements A.A. made to Deputy Cowley were made after A.A.'s motive to fabricate arose. Therefore, the State did not meet its burden and this court reviews for harmless error.

Here, the evidence supporting the charges was almost entirely A.A.'s testimony. Other evidence included A.A.'s mother finding strange items in A.A.'s room and then questioning A.A. until she admitted what happened. Also, A.A.'s grandmother noticed a change in A.A.'s behavior sometime around May 2006, but could not remember if the changes had begun in April. Thus, she could not remember if the change occurred

before or after Madsen began living with the family. Also, Deputy Cowley testified that Madsen said he had sex with A.A. but did not remember it. The testimonies of A.A.'s mother and grandmother were circumstantial and vague in that they do not necessarily point to a sexual assault or to Madsen's involvement. Therefore, the State's case rests almost solely on A.A.'s testimony. As such, we conclude that Deputy Cowley's repeating all of A.A.'s testimony was plain error in this case.

B. The district court's admission of Deputy Cowley's testimony repeating what A.A. said Madsen told her was not plain error

Madsen argues that Deputy Cowley's testimony repeating what A.A. said Madsen told her is inadmissible double hearsay. Here, Deputy Cowley said that A.A. told her that before the first incident, Madsen told A.A. about his girlfriend and said that he trusted A.A. and could tell her anything. We conclude that Madsen's argument has merit because A.A.'s statement is inadmissible hearsay, but it is not plain error.[3]

Under NRS 51.067, hearsay within hearsay is admissible if both statements are admissible under an exception to the hearsay rule. Because we conclude that A.A.'s statement is inadmissible hearsay, Madsen's otherwise admissible statements to A.A. are inadmissible as double hearsay.

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[3] Madsen's statements are admissible because he is a party and the State is offering the statements against him. However, A.A.'s statement is inadmissible, and thus, the entire testimony is inadmissible as double hearsay. We conclude that the improper admission of Madsen's statements alone does not constitute plain error, but the admission does contribute to the cumulative error committed by the district court.

II. The district court abused its discretion in admitting testimony regarding Madsen's minor girlfriend

Madsen argues that the district court committed reversible error in admitting statements regarding Madsen's girlfriend into evidence. We conclude that the district court abused its discretion in admitting evidence regarding Madsen's girlfriend.[4]

A. The district court abused its discretion by admitting bad act evidence regarding Madsen's girlfriend

Evidence of the defendant's prior bad acts are not admissible to prove the defendant's character to show that he acted in conformity therewith, but may be used for other purposes. NRS 48.045(2). To determine if bad acts are admissible, the district court must hold a Petrocelli hearing unless the evidence is admissible under Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), or the result would have been the same had the district court not admitted the evidence. King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000). Under Tinch, the prior bad acts are admissible if "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the

[4]Madsen argues that the district court abused its discretion in allowing the prosecutor's leading question regarding Madsen's kissing A.A.'s breasts. The prosecutor asked a leading question about whether Madsen kissed A.A.'s breasts, and the defense objected. The district court overruled the objection and A.A. testified that Madsen fondled her breast with his hand, which was consistent with the complaint. This alone is sufficient for a lewdness conviction, therefore any testimony by A.A. regarding Madsen kissing her breasts would not have affected the verdict. We conclude that the district court acted within its discretion in overruling the defense's objection.

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." 113 Nev. at 1176, 946 P.2d at 1064-65.

A.A.'s mother testified that Madsen had told her that his girlfriend was 17 years old and they had been together for four years. The defense objected, and the district court overruled the objection, stating that A.A.'s mother had already testified to it. This evidence appears to have been used by the State to show that because Madsen had a 17-year-old girlfriend of four years, who was 13 years old when they began dating, it is more likely that he would be attracted to A.A. This evidence suggests that because he dated a 13-year-old before, he would do so again. The admission of such bad act evidence is impermissible under NRS 48.045. The State offers no alternative purpose for the evidence. However, the act was not proven by clear and convincing evidence. A.A.'s mother stated it and the State offered no corroborating proof. Further, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice because the jury likely used this evidence as proof that Madsen was previously attracted to and dating a 13-year-old and, therefore, he assaulted A.A. This is especially true because the State offered no alternative purpose for the evidence and the district court gave no limiting instruction. Therefore, we conclude that the district court's admission of A.A.'s mother's statement is reversible error.[5]

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[5]Although this testimony may have been a surprise to the State, the district court should still have recessed the trial to conduct a Petrocelli hearing outside the presence of the jury before ruling upon the admissibility of the testimony.

III. Cumulative error warrants a new trial

Madsen argues that cumulative error denied his right to a fair trial. We agree.

Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008). "When evaluating a claim of cumulative error, we consider the following factors: '(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Here, the following errors occurred: (1) the district court admitted hearsay and double hearsay statements through Deputy Cowley who repeated what A.A. told her and what A.A. told her Madsen said, and (2) the district court admitted bad act evidence regarding Madsen's minor girlfriend without conducting a Petrocelli hearing. In this case, the evidence of guilt, absent the errors, would have been sufficient to support Madsen's conviction. However, considering the district court's admission of inadmissible hearsay and double hearsay, as well as bad act evidence regarding Madsen's minor girlfriend, the evidence "does not overcome the unfairness of the cumulative error." Valdez, 124 Nev. at ___, 196 P.3d at 481.

A. The evidence of guilt is sufficient to uphold the convictions, but is not overwhelming

Madsen was convicted of two counts of sexual assault under NRS 200.366(3)(c) and two counts of lewdness under NRS 201.230.

1. Sexual assaults

Under NRS 200.366(1), a person is guilty of sexual assault if he subjects another person to penetration, against the person's will,

"under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct."

In this case, the evidence of sexual assault included: (1) A.A.'s testimony that Madsen penetrated her with his penis on two separate occasions; (2) testimony by A.A.'s mother that she found strange items in A.A.'s room and that A.A. told her about the alleged attacks; (3) A.A.'s grandmother's testimony that she noticed a change in A.A.'s behavior, but could not remember if it began before or after Madsen began living with the family; and (4) Deputy Cowley's testimony that Madsen said he had sex with A.A. but did not remember it.

We conclude that this evidence is sufficient to support a sexual assault conviction, absent the errors committed below. However, the evidence of guilt is not overwhelming. The evidence presented by the State includes the testimony of A.A.'s mother and grandmother, noting A.A.'s changed behavior and what A.A. told her mother about the alleged attack, and Deputy Cowley's testimony that Madsen confessed to having sex with A.A. but could not remember it. Because the evidence relies heavily on A.A.'s testimony alone, it is not overwhelming and therefore cannot overcome the prejudice of the errors committed by the district court.

2. Lewdness

Under NRS 201.230(1), a person is guilty of lewdness if he "willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault" on any part of the body of a child under age 14, "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child."

Here, the evidence of lewdness consisted of A.A.'s testimony that Madsen licked her vagina on one occasion and fondled and kissed her breasts on another occasion, as well as the other evidence discussed above regarding the sexual assaults. We conclude that absent the errors committed below this evidence is sufficient to support Madsen's lewdness convictions, but is not overwhelming.

B. The quantity and character of the error is significant

We conclude that the quantity and character of the error in this case is significant.

First, the district court's admission of hearsay through Deputy Cowley who repeated what A.A. told her is reversible error standing alone. This testimony repeated all of A.A.'s testimony, which likely caused the jury to place undue weight on A.A.'s version of the events. Also, the district court's admission of Deputy Cowley's testimony repeating what A.A. told her Madsen said, although harmless error when considered alone, contributes to the cumulative error in this case.

Second, the testimony of A.A.'s mother that Madsen had a 17-year-old girlfriend and that they had been together for four years was inadmissible bad act evidence. The district court did not strike the testimony or admonish the jury, thus leaving the error uncorrected. Admission of this evidence alone requires reversal because it is bad act evidence and the evidence of guilt is not overwhelming.

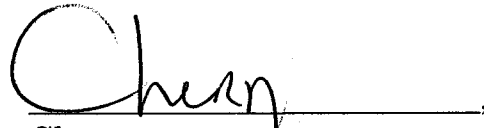
C. Gravity of the crimes charged

The crimes charged, lewdness and sexual assault with a minor under age 14, are grave crimes that carry severe penalties. In this case, the evidence of guilt is not overwhelming, and the errors emphasized A.A.'s testimony, portrayed Madsen as having bad character, and overall denied Madsen a fair trial. Therefore, "'[w]e cannot say without

reservation that the verdict would have been the same in the absence of error.'" Valdez, 124 Nev. at ___, 196 P.3d at 482 (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

Although the evidence is sufficient to support Madsen's convictions, it is not overwhelming and does not overcome the cumulative effect of the errors in this case. Therefore, we conclude that the cumulative error denied Madsen a fair trial and that this court should reverse.

Accordingly, we ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.



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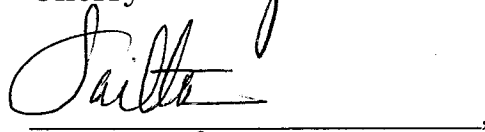

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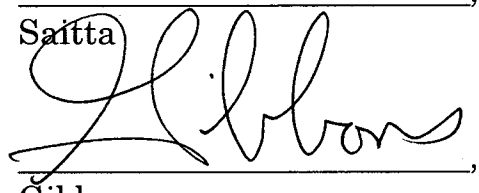

_____, J.
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