IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34751

FILED

NOV 15 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault and lewdness with a minor under the age of fourteen. The district court sentenced appellant on the sexual assault count to life in prison with the possibility of parole after ten years and on the lewdness count to a consecutive term of seven years in prison.

Appellant makes a threefold argument that the district court improperly admitted testimony of the victim's sister regarding appellant's alleged prior misconduct. Appellant asserts that: (1) the prior bad act evidence was improper character evidence to show that appellant acted in conformity therewith; (2) the probative value of the evidence was substantially outweighed by the danger of unfair prejudice; and (3) the prior incident of misconduct was not proven by clear and convincing evidence. Although the district court, after a hearing outside the presence of the jury, admitted testimony regarding appellant's prior misconduct with both the victim and her sister, appellant only challenges on appeal the district court's decision to allow the testimony of the victim's sister. After considering appellant's argument, we conclude that it lacks merit for the reasons outlined below.

First, the district court properly admitted the evidence to show appellant's intent. See NRS 48.045(2); see also Keeney v. State, 109 Nev. 220, 228, 850 P.2d 311, 316 (1993) (stating that "evidence was properly admitted to prove intent since [appellant] placed his intentions at issue by pleading not guilty").

Second, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). As in Keeney, the prior sexual misconduct in this case was committed against a minor and therefore the evidence of the misconduct was relevant as sexual aberration and its probative value was not substantially outweighed by the danger of unfair prejudice. See Keeney, 109 Nev. at 229, 850 P.2d at 317.

Third, the evidence was proven by clear and convincing evidence. The victim's sister testified in sufficient detail that appellant created an opportunity to be alone with her, that appellant partially penetrated her vagina with his penis, that she felt pain, and that she was scared and pushed appellant away so she could get up and leave. Despite the witness's prior inconsistent statements and failure to mention the incident until a week before trial, we conclude that the incident was proven by clear and convincing evidence.

Accordingly, the district court did not manifestly abuse its discretion in admitting the prior bad act evidence because the evidence was relevant to the crimes charged, the incident was proven by clear and convincing evidence, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65; see also Petrocelli v.

State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), (stating that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong) modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

In addition to the foregoing, appellant raises a separate issue regarding the jury's substitution of the verdict form on count I, arguing that thereby the jury illegally impeached and changed its verdict after dismissal. We agree. "As a general rule, jurors may not impeach their own verdict." Tinch 113 Nev. at 1174, 946 P.2d at 1064 (citing Pinana v. State, 76 Nev. 274, 288, 352 P.2d 824, 832 (1960)). Here, after the court clerk read the original verdict, the district court asked the jury: "Ladies and gentlemen of the jury, is this your true verdict as read, so say you one, so say you all, on these two counts?" The record indicates that the jurors responded affirmatively. Neither party asked for the jury to be polled and the jury was discharged. The jury having thus indicated in open court that appellant was guilty of statutory sexual seduction, the district court erred in reconvening the jury and allowing it to replace the original verdict with a sexual assault verdict. By so doing, the district court allowed the entire jury to impeach its own verdict. We therefore hold that appellant's conviction for statutory sexual seduction should be reinstated.

Having considered all of appellant's arguments, we remand this case and direct the district court to vacate appellant's conviction and sentence under count I for sexual assault, reinstate the conviction for statutory sexual seduction pursuant to the original jury verdict, and sentence

appellant accordingly. Appellant's conviction and sentence under count II, lewdness with a minor under the age of fourteen, is affirmed.

It is so ORDERED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: John P. Davis, District Judge
Attorney General
Nye County District Attorney
James D. Leavitt
Nye County Clerk