IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 31596

FILED

DEC 04 2000

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction of first-degree murder. Appellant was sentenced to life in prison with the possibility of parole.

A jury convicted appellant John Tole Moxley of first-degree murder by child abuse. The case was tried as a capital case, but the jury returned a sentence of life imprisonment with the possibility of parole.

Jonathan Donald Moxley was born to appellant and Susan Reyes on December 12, 1996. By February 1, 1997, he was dead. Appellant testified that on the night of January 29, 1997, he was alone with Jonathan at their apartment. He bathed and fed Jonathan, then he lay down on the couch with Jonathan and they both fell asleep. Appellant awoke some time later to find Jonathan an odd color and having trouble breathing. He began to shake and smack Jonathan in an effort to revive him. It is unclear from the evidence how long appellant engaged in his own resuscitation efforts; initially appellant indicated he had been doing it for about an hour, at trial he claimed it was really only five to ten minutes. Paramedics responded to appellant's call and took Jonathan to the hospital.

The evidence is undisputed that Jonathan died of shaken baby syndrome; his whole body was covered with recent

bruises, he had a black eye, blood on his penis, subdural hematomas, retinal hemorrhages, intracranial bleeding, swelling of the brain, and progressive brain contusions. Appellant admits he shook and hit Jonathan; he claims, however, that Jonathan's injuries were the result of his well-intentioned, though misguided, efforts to resuscitate him rather than of malicious child abuse.

On appeal, appellant raises five issues: the admission of prior bad acts, the admission of a statement appellant made to a witness from the jail, the use of a videotape of appellant's trial testimony, an erroneous jury instruction, and the insufficiency of the evidence. Because of our determination that appellant's conviction must be reversed and this case remanded for a new trial based on the erroneous jury instruction, we will only address three of the five issues.[1]

Evidence of Prior Bad Acts

First, appellant contends that four prior bad acts were erroneously admitted at trial: (1) appellant's beating of Reyes occurring seven years prior to Jonathan's death; (2) one instance in which he beat Reyes's son Anthony with a belt five years prior to Jonathan's death; (3) one instance in which he tripped Reyes's two-year-old, Zachary, a few months prior to Jonathan's death; and finally, (4) appellant's abuse of Jonathan himself when he placed his hand over the baby's mouth to stop him from crying. The district court held a

[1]Because the issue should not arise again on retrial, we decline to address the use of the videotape of appellant's testimony. Further, there is sufficient evidence in the record to support a properly instructed jury's finding of first-degree murder. Nonetheless, as discussed below, we are unable to conclude beyond a reasonable doubt that, in the absence of the erroneous jury instruction, the jury would have found appellant guilty of first degree murder. See, e.g., Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993).

hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), and concluded that the evidence was admissible.

Evidence of a defendant's prior bad acts is not admissible to prove that the accused acted in a similar manner for purposes of the charge at issue. See Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). Evidence of prior uncharged misconduct may improperly influence the jury and result in a conviction simply because the jury believes the accused is predisposed to crime or is a bad person. See Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991). However, evidence of prior wrongs may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). The decision to admit evidence of a prior bad act is within the trial court's sound discretion and that decision will not be disturbed on appeal unless it is manifestly wrong. Crawford, 107 Nev. at 348, 811 P.2d at 69.

> To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, 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.

Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Appellant complains that none of the three requirements was met in this case. We disagree. With the exception of the evidence regarding appellant's abuse of Reyes, we conclude that all prior acts were properly admitted.

Witnesses testified to seeing bruises on seven-year-old Anthony's legs and buttocks; one witness testified she saw appellant beat Anthony with the belt. One of the witnesses also testified to watching appellant trip two-year-old Zachary when he would run in the house, make him fall down and then yell at him. The witnesses also testified that Zachary's

personality changed from a fun easy-going child to a frightened little boy after three months of living with appellant. Finally, witnesses testified to appellant's abuse of Jonathan by placing a pillow completely over the baby's face to prevent him from crying. Thus, the acts were proved by clear and convincing evidence.

Moreover, the acts were relevant to and probative of the crime charged. The prior abuse of Jonathan is admissible to show the child was battered and that the fatal injuries were non-accidental and part of a continuing course of conduct. See, e.g., Bludsworth v. State, 98 Nev. 289, 291, 646 P.2d 558, 559 (1982) (holding that evidence of prior child abuse was properly admitted, even where the State could not prove which appellant inflicted the injuries, as "circumstantial evidence tending to show that the child was intentionally, rather than accidentally, injured on the day in question").

Although this court has not specifically ruled that evidence of domestic violence against children other than the victim is admissible against a defendant accused of murder by child abuse, we conclude that such evidence is admissible to show intent and the absence of mistake or accident.

Other jurisdictions have recognized that the environment of domestic violence and abuse of children generally is relevant in a death-by-child-abuse case. See, e.g., State v. Anderson, 513 S.E.2d 296, 310 (N.C. 1999) (approving the admission of evidence that defendant had previously punished her other children through her use of a belt and biting, which tended to establish, first, the identity of the person who committed the crime; second, a plan; and finally, absence of accident), cert. denied, ___ U.S. ___, 120 S.Ct. 417, 145 L.Ed.2d 326 (1999); see also State v. Teuscher, 883 P.2d 922, 926-28 (Utah 1994) (providing

summary of decisions in other jurisdictions approving admission of evidence of abuse of children other than the victim); People v. Evers, 12 Cal. Rptr. 2d 637, 643-44 (Cal. 1992) (approving admission of evidence of abuse of other children in defendant's care to show intent and absence of accident); and Com. v. Donahue, 549 A.2d 121, 127 (Pa. 1988) (concluding that evidence of abuse of other children may be admissible to show intent because, "although two different children may, at different times, be seriously injured or killed while in a person's care, and . . . this may happen without his intentional conduct, as the number of such incidents grows, the likelihood that his conduct was unintentional decreases. It is merely a matter of probabilities.") We conclude that the district court did not err in admitting the evidence that appellant had abused Anthony and Zachary as relevant to the questions of intent and lack of accident or mistake.

Appellant placed his intent at issue by pleading "not guilty" in a first-degree murder case. See, e.g., McMichael v. State, 94 Nev. 184, 189, 577 P.2d 398, 400 (1978), overruled on other grounds by Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985). Further, absence of accident and mistake are also at issue because appellant's defense was that the death was an accident or mistake. See NRS 48.045(2). Finally, we conclude that the probative value of the evidence is not outweighed by the danger of unfair prejudice. See Tinch, 113 Nev. at 1176, 926 P.2d at 1064-65. Appellant has not demonstrated that the district court was manifestly wrong in admitting the evidence of abuse of Anthony and Zachary or of Jonathan himself. See Crawford, 107 Nev. at 348, 811 P.2d at 69.

However, the evidence regarding appellant's abuse of Reyes was largely irrelevant and therefore error; she is not a

child, the incident occurred seven years prior to Jonathan's death, and the implication of the evidence is primarily that appellant has a propensity to be violent. The district court erred by admitting evidence of appellant's abuse of Reyes.

Admission of Maria Jensen's testimony

Appellant also complains that a statement he made from the jail to a witness, Maria Jensen, should not have been admitted into evidence. Specifically, during her testimony at trial, Jensen stated that she felt appellant had tried to get her to say something she knew was not true: "He mentioned to me that we had a discussion that I knew for a fact that we did not have. I felt at that point like he was trying to train me to say something I wasn't going to say because I knew we never had that discussion." Appellant complains that the testimony revealed a prior bad act which had never been subject to a Petrocelli hearing. The State responds that the statement is simply evidence of consciousness of guilt. After careful review of the record, we agree with the State, and we conclude that the district court did not err. See Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) (holding that "[d]eclarations made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence, or tend to establish intent may be admissible"); Reese v. State, 95 Nev. 419, 422, 596 P.2d 212, 214 (1979) (an attempt to bribe or procure or fabricate false testimony is admissible as evidence of consciousness of guilt).

Erroneous jury instruction

Appellant challenges Jury Instruction number 11:

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed by means of child abuse. Therefore, a killing which is committed by child abuse is deemed to be murder of the first degree whether the killing was intentional or unintentional.

In the recent decision in Collman v. State, 116 Nev. ___, 7 P.3d 426 (2000), this court held that the above instruction is erroneous because it improperly permits the jury to presume the element of malice aforethought. However, Collman also concluded that such an instruction is subject to a harmless error analysis. Further, we held that the erroneous instruction in Collman was harmless beyond a reasonable doubt because the jury's unanimous, affirmative finding that the killing involved torture established that the jury had actually found that Collman killed the victim with malice. In the instant case, however, we are unable to conclude that the error was harmless beyond a reasonable doubt.

The jury's questions, submitted to the district court during deliberations, indicate the jury may have had difficulty in reconciling the erroneous instruction with the other instructions on the intent required for murder:

> 1. In determining whether child abuse was committed, is "willfully" considered to be intent of the defendant? (Instruction 7.)[2]
>
> 2(a). If the child is found to have died as a result of "shaking [sic] baby syndrome," is that the "child abuse" that the defendant must be found to have committed?
>
> 2(b). In other words, does "causation" need be [sic] considered?
>
> 3. Can the verdict of involuntary manslaughter apply in this case, even though it is a child abuse case resulting in death?

The district court simply instructed the jurors to read the

[2]Instruction 7 stated: "The word 'willfully,' when used in the criminal statutes with respect to proscribed conducts [sic], relates to an act or omission which is done intentionally, deliberately, or designedly as distinguished from an act or omission done accidentally, inadvertently, or innocently."

instructions again and did not provide any further guidance. The jury's questions go directly to the heart of the problem with the instruction.

Moreover, in Collman, the jury found torture as an aggravating circumstance. As noted, that finding permitted this court to conclude beyond a reasonable doubt that the jury had affirmatively found facts establishing the element of malice, independently of the erroneous instruction. The jury made no similar finding in this case. Rather, the record in this case is insufficient for this court to determine beyond a reasonable doubt that, absent the erroneous instruction, the jury would have found malice as required. See Collman, 116 Nev. at ___, 7 P.3d at 449-50 (citing Neder v. United States, 527 U.S. 1, 18 (1999) (holding that harmless error analysis requires the reviewing court to ask, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"), and Yates v. Evatt, 500 U.S. 391, 405 (1991)).

We reverse appellant's conviction and remand this case for further proceedings.

It is so ORDERED.[3]

Rose, C.J.

Young, J. Maupin, J.

Shearing, J. Agosti, J.

Leavitt, J. Becker, J.

[3]In light of our decision today, we deny as moot appellant's April 17, 2000, motion to expedite this appeal.

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Arnold Weinstock
Clark County Clerk
Lamond R. Mills & Associates