IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN LEE FRASER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53675

FILED

JUN 23 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a child under the age of 14 years. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Appellant Ryan Fraser appeals his conviction for the sexual assault of E.G., a child under the age of 14 years. Fraser's arguments include that the district court abused its discretion by: (1) allowing the prosecutor to testify at trial, (2) finding that E.G. was competent to testify at trial, and (3) admitting evidence of a prior bad act. For the reasons set forth below, we conclude that Fraser's arguments fail and we affirm the judgment of conviction. Because the parties are familiar with the facts and procedural history in this case, we do not recount them further except as necessary for our disposition.

The district court did not abuse its discretion by allowing the prosecutor to testify

Fraser argues that the district court abused its discretion by allowing District Attorney Robert Auer to testify at trial. We disagree.

District courts have discretion to permit prosecutors to testify at trial. Tomlin v. State, 81 Nev. 620, 624, 407 P.2d 1020, 1022 (1965). This court will not reverse a district court's admission of evidence unless

there is an abuse of discretion. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

In this case, Fraser's counsel asked E.G. leading questions on cross-examination regarding whether Auer told her how to testify at trial. E.G. responded affirmatively to these questions, thereby confirming that Auer spoke to her about how she should testify. After E.G. completed her testimony, the district court allowed Auer to take the stand to respond to the witness-tampering allegations. On the stand, Auer stated that that he did not influence E.G.'s testimony in any way. After his testimony, Auer withdrew and an assistant district attorney tried the remainder of the case.

Fraser now argues that the district court erred by allowing Auer to testify because Nevada Rule of Professional Conduct (RPC) 3.7 supersedes Tomlin, 81 Nev. 620, 407 P.2d 1020. According to this court, "[t]he law is clear that a prosecutor is competent to testify and he may even be compelled to do so." Tomlin, 81 Nev. at 623, 407 P.2d at 1022. Prosecutors should not testify unless: (1) the possibility of the prosecutor becoming a witness was unforeseeable, and (2) there was a compelling need for the prosecutor's testimony given the case's unusual circumstances. Id. Additionally, if the prosecutor's testimony becomes necessary after trial begins, the prosecutor should withdraw after testifying. Id.

We conclude that RPC 3.7[1] does not supersede Tomlin for two reasons. First, this court did not cite to ethical rules in Tomlin, but based its ruling upon caselaw. Tomlin, 81 Nev. at 623, 407 P.2d at 1022 (citing Robertson v. Commonwealth, 107 S.W.2d 292 (Ky. 1937), superseded by statute on other grounds as stated in Brock v. Commonwealth, 430 S.W.2d 333, 334-35 (Ky. 1968); Robinson v. United States, 32 F.2d 505 (8th Cir. 1928); United States v. Alu, 246 F.2d 29 (2d Cir. 1957)). Courts do not rely upon ethical rules to determine if evidence is admissible. United States v. Birdman, 602 F.2d 547, 556 (3d Cir. 1979). Second, even if RPC 3.7 is applicable to this analysis, interpreting the rule to permit a counsel's "total disqualification would invite the rule's misuse as a tactical ploy." DiMartino v. Dist. Ct., 119 Nev. 119, 122-23, 66 P.3d 945, 947 (2003) (interpreting former Supreme Court Rule 178, which was adopted in RPC 3.7).

We further conclude that Auer's testimony was admissible because he met the Tomlin requirements. 81 Nev. at 623-24, 407 P.2d at 1022. First, Auer could not have known prior to trial that E.G. would testify about witness tampering. According to Auer, he only discussed the case with E.G. on one occasion during the month before trial. It was Fraser's counsel that opened the door to this issue by asking E.G. about witness tampering.

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[1]RPC 3.7(a) states that a lawyer shall not be an advocate at trial if he or she is likely to be a necessary witness, unless the testimony relates to an uncontested issue or to the nature of the legal services provided, or the lawyer's disqualification would create substantial hardship for the client.

Second, there was a compelling need for Auer's testimony, as he was the only person who could verify whether he told E.G. how to testify at trial. Although Fraser argues that a waitress from the place where Auer allegedly ate lunch with E.G. could have testified as opposed to Auer, this unidentified person would be unable to testify with regard to Auer's exact statements to E.G.

Third, Auer met the final Tomlin requirement because he withdrew from the case after testifying. Because Auer met all three Tomlin requirements, we conclude that the district court did not abuse its discretion by allowing him to testify.

The district court did not abuse its discretion by ruling that E.G. was competent to testify

Fraser argues that the district court abused its discretion by ruling that E.G. was competent to testify at trial. We disagree.

A child witness is competent to testify at trial if he or she "has the capacity to receive just impressions and possesses the ability to relate them truthfully." Koerschner v. State, 116 Nev. 1111, 1118, 13 P.3d 451, 456 (2000). This court will not disturb a district court's finding of competency unless it clearly abused its discretion. Id.

In this case, E.G.'s allegations about Fraser's sexual abuse varied. Because E.G.'s statements varied, Fraser argues that she did not understand the difference between truth and a lie. He also argues that E.G. was incompetent like the victims in Felix v. State, 109 Nev. 151, 849 P.2d 220 (1993), superseded by rule as stated in Evans v. State, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001). In Felix, the district court erred by ruling that two child-victims were competent to testify. Id. at 203, 849 P.2d at 255. The first victim testified to events that were clearly based on

fantasy. Id. at 174, 849 P.2d at 236. The second victim did not offer incriminating evidence until officials subjected her to coercive interviews and coaching. Id. at 174-75, 849 P.2d at 236.

This case is distinguishable from Felix. Unlike the victims in Felix, E.G. did not make allegations that were clearly based on fantasy, nor does the evidence suggest that someone coached her. We further note that the district court did not abuse its discretion by finding E.G. competent to testify because she understood the need to testify truthfully. Wilson v. State, 96 Nev. 422, 423, 610 P.2d 184, 185 (1980). Here, the district court held a competency hearing prior to trial. At the hearing, the district court judge asked six-year-old E.G. if she understood the need to testify truthfully, and E.G. testified that she understood. Auer also displayed pictures and asked E.G. a series of questions to show that E.G. understood the difference between truth and a lie. We therefore conclude that the district court did not abuse its discretion by finding E.G. competent to testify.

The district court did not abuse its discretion by admitting evidence of Fraser's prior bad act

Fraser argues that the district court abused its discretion by admitting evidence of a prior bad act under NRS 48.045(2). According to Fraser, the testimony of a witness, referred to as S.M., about his prior bad act of digital penetration did not show his motive. We disagree.

District courts have discretion to admit or exclude evidence of a defendant's prior bad acts. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). NRS 48.045(2) states that prior bad acts are admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This court gives deference to

a district court's decision regarding the admissibility of prior bad acts. Braunstein, 118 Nev. at 72, 40 P.3d at 416.

In this case, 19-year-old S.M. testified that Fraser was her sister's ex-husband. According to S.M., Fraser digitally penetrated her vagina in a forceful manner when she was 11 or 12 years old. S.M. also testified that this act occurred while she was alone with Fraser in her sister's house. At the time, S.M. lived a few houses away from Fraser.

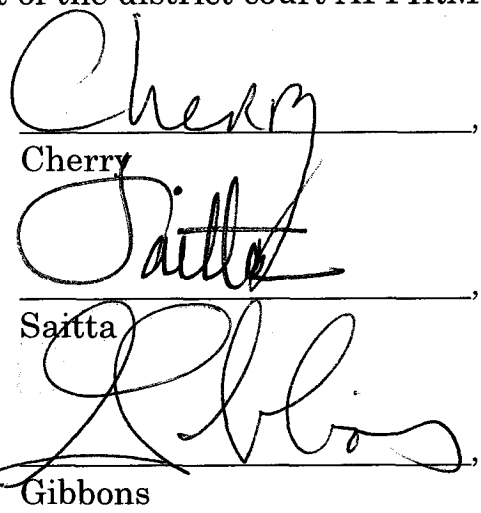
We conclude that the district court properly admitted this evidence because it shows Fraser's motive for harming E.G. Ledbetter v. State, 122 Nev. 252, 261-62, 129 P.3d 671, 678 (2006). Evidence showing a defendant's motivation to commit a crime is admissible under NRS 48.045(2) to prove motive, so long as the three-factor test in Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), is met. This test sets forth that a bad act is admissible if the district court determines that: (1) the act is relevant to the charged crime, (2) there is clear and convincing evidence proving the act, and (3) the danger of unfair prejudice does not substantially outweigh the evidence's probative value. Id.

The first requirement in Tinch is met because S.M.'s testimony was relevant to Fraser's motive for sexually assaulting E.G. Id. Through S.M.'s testimony, the State showed that Fraser is sexually attracted to children with whom he has domestic relations. Fraser's digital penetration of S.M. reveals a motive for the similar sexual assault of E.G. See Ledbetter, 122 Nev. at 262, 129 P.3d at 679 (evidence of a defendant's uncharged sexual abuse of two children established the defendant's motive for sexually abusing the victim).

The second and third requirements in Tinch are also met because S.M.'s credible testimony proved the act by clear and convincing

evidence, and the probative value of the evidence did not substantially outweigh the danger of unfair prejudice. 113 Nev. at 1176, 946 P.2d at 1064-65. Since S.M.'s testimony met the Tinch requirements, we conclude that the district court did not abuse its discretion by admitting the prior bad act evidence.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. David A. Huff, District Judge
Richard F. Cornell
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk

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[2]Fraser also argues that the district court erred by admitting testimony about E.G.'s out-of-court statements. Since E.G. was available for cross-examination at trial, the admission of this testimony did not violate the Confrontation Clause, nor were such statements inadmissible under NRS 51.385. Crawford v. Washington, 541 U.S. 36 (2004); Pantano v. State, 122 Nev. 782, 138 P.3d 477 (2006).