IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWIN VON SEVRENCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55004

FILED

APR 27 2011

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a child and lewdness with a child under 14 years of age. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Edwin Von Sevrence was convicted of sexual assault and lewdness with a child, S.S., when she was between the ages of 7 and 9. Sevrence raises the following issues on appeal: (1) whether the district court abused its discretion in admitting prior bad act evidence, including evidence of prior conduct that indicates Sevrence groomed the victim to be sexually abused, on the basis that it established a common scheme or plan; (2) whether the State presented sufficient evidence to support the convictions for sexual assault and lewdness; (3) whether the prosecutor engaged in misconduct throughout the trial that warrants reversal of the judgment of conviction, including whether the State improperly withheld evidence until the morning of trial; (4) whether the State violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by referencing allegations of penile penetration when Sevrence was acquitted of that charge at his previous trial; and (5) whether the district court abused its discretion in denying certain defense

motions for mistrial. We conclude that Sevrence's arguments lack merit, and we affirm the judgment of conviction.

The parties are familiar with the facts, and we do not recount them further except as pertinent to our disposition.

Prior bad act evidence

Sevrence was convicted of sexual assault and lewdness with a child under the age of 14 years old in a previous trial ("first trial"), but this court reversed the convictions on direct appeal. See Docket No. 45857. Prior to Sevrence's second trial, the district court held a hearing on pretrial motions and deemed prior bad act evidence admissible. The same judge presided over both proceedings.

Sevrence argues that the district court erred by ruling that evidence of prior bad acts was admissible. Sevrence takes issue with the district court's failure to hold a hearing pursuant to Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), regarding the admission of evidence of prior bad acts. Sevrence argues that information regarding the following amounted to prior bad act evidence that was admitted without a Tinch hearing or cautionary instruction: (1) evidence that Sevrence showed S.S.'s privates to her brothers, evidence that Sevrence showed S.S. naked pictures, and evidence that Sevrence told S.S. not to tell anyone about his actions; (2) evidence that Sevrence sexually penetrated S.S.; (3) evidence that Sevrence took S.S. to his bed; and (4) evidence that Sevrence slapped Delores, his wife, after a fight about S.S. being "too young."

Standard of review

Evidence of prior bad acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. NRS 48.045(2). However, prior bad act evidence may be

admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id. "A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

There is a presumption that all prior bad act evidence is inadmissible. Rosky v. State, 121 Nev. 184, 194, 111 P.3d 690, 697 (2005). This presumption can be rebutted if the prosecutor, in a Tinch hearing held outside the presence of the jury, establishes that "(1) the [prior bad act] 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." Id.; Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65. If evidence of a prior bad act is admitted, the prosecutor has a duty to request a limiting instruction on the issue or, if the prosecutor fails to do so, the district court should give the instruction sua sponte. Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

Nevada caselaw has also addressed the motive exception in NRS 48.045(2) for prior bad act evidence in child sexual assault cases. In Braunstein v. State, this court overruled a line of cases setting forth that evidence of a defendant's propensity for sexual aberration is always relevant to the defendant's intent in a child sexual assault case and outweighs the danger of unfair prejudice as a matter of law. 118 Nev. 68, 75, 40 P.3d 413, 418 (2002). Instead, the court explained, district courts must analyze prior bad act evidence in child sexual assault cases under the parameters of NRS 48.045(2) and the three-factor test in Tinch. Id. at

72-75, 40 P.3d at 416-18. This court reiterated the Braunstein holding in Ledbetter, 122 Nev. 252, 129 P.3d 671, and applied it to conclude that evidence of prior bad acts that establish a defendant's motivation for committing the crime charged is admissible to prove motive pursuant to NRS 48.045(2). Id. at 261-62, 129 P.3d at 678.

The district court properly admitted evidence of the prior bad acts

Sevrence's argument regarding evidence of the prior bad acts of showing S.S.'s privates to her brothers, showing S.S. naked photos, and warning S.S. not to tell anyone about his conduct is without merit because the evidence was admissible to prove Sevrence's motive, intent, and common-plan-or-scheme. Sevrence's attorneys made their arguments at the pretrial hearing as to why the information should be kept out, and the district court rejected them. In the first trial, the district court determined that these acts were admissible pursuant to a Tinch hearing, and there is no indication of manifest error in the district court allowing the same information in this trial. The district court stated, "So all those three items I will adopt again without having to go over it anew with the new evidence outside the presence of the jury, because we already went through this. And, again, the defense doesn't have anything new on this." The district court in this case properly followed the holding in Ledbetter because the evidence showed Sevrence's motivation for sexually abusing S.S. by explaining his attraction to or obsession with the victim and his grooming of S.S. for sexual conduct, and was admissible to prove motive pursuant to NRS 48.045 and the three-factor test in Tinch. Ledbetter, 122 Nev. at 262, 129 P.3d at 678. Although testimony regarding additional incidents of sexual abuse was presented by witnesses at this trial, Sevrence had appropriate notice because he was aware of the incidents from his first trial. The prior bad act evidence was relevant to the crimes

charged, proven by clear and convincing evidence, and the probative value was not substantially outweighed by the danger of unfair prejudice. Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

Further, NRS 48.045(2) allows evidence of a prior bad act if the evidence offered tends to prove a common plan or scheme. Ledbetter, 122 Nev. at 260-61, 129 P.3d at 677-78. The district court did not abuse its discretion by allowing the disputed evidence under the common-plan-or-scheme exception because the prior bad acts and the crime charged formed an "'integral part of an overarching plan explicitly conceived and executed by the defendant.'" Rosky, 121 Nev. at 196, 111 P.3d at 698 (quoting Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002)). The test for whether or not evidence of prior bad acts is admissible under the common-plan-or-scheme exception "'is not whether the [prior bad act] has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime.'" Richmond, 118 Nev. at 933, 59 P.3d at 1255 (quoting Nester v. State of Nevada, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959)). The evidence of Sevrence's prior bad acts tended to establish his preconceived plan to groom S.S. for sexual abuse because showing S.S.'s privates to her brothers, showing her naked photos, and threatening her not to tell anyone supports an overarching plan to desensitize the victim to sexual abuse and the district court did not abuse its discretion; Sevrence is not entitled to a new trial.

Sevrence's argument that the district court improperly allowed testimony regarding the penile penetration of S.S. is similarly without merit because Sevrence stated that he planned on attacking S.S. based on her testimony. During a pretrial hearing, Sevrence described

attacking S.S.'s credibility as "part and parcel of the overall case." Sevrence accepted that S.S. could testify about the penile penetration incident, and he would attack any inconsistencies in her testimony during cross-examination. The district court properly allowed S.S. to testify to Sevrence's penile penetration, and he was not prejudiced as it was his defense strategy to highlight her inconsistent statements based on this information. The district court made its finding pursuant to Tinch and did not abuse its discretion in allowing S.S.'s testimony regarding penile penetration.

Sevrence also argues that the State's questioning of Delores about seeing S.S. in bed with him and S.S. testifying that she witnessed him slap Delores during a fight allowed prior bad act evidence to be admitted. These arguments are without merit. The district court struck Delores' testimony regarding whether she had seen S.S. in bed with Sevrence and S.S.'s testimony regarding a fight between Delores and Sevrence. We conclude that the district court did not abuse its discretion by admitting evidence of Sevrence's prior bad acts. The district court properly allowed this evidence pursuant to NRS 48.045(2) and gave the required limiting instructions to the jury. Sevrence's arguments are without merit and do not warrant reversal.

In addition, since Sevrence's arguments regarding prior bad act evidence are without merit, we conclude that the district court did not abuse its discretion in denying his motions for mistrial based on the various prior bad acts evidence.

Sufficiency of the evidence

Sevrence argues that the jury found him guilty based upon insufficient evidence because his expert witness, Dr. William O'Donohue, placed S.S.'s credibility in doubt. Sevrence contends that it is doubtful

that the jury could have relied upon S.S.'s testimony alone to reach its verdict since the charges were weak and the State relied upon evidence of prior bad acts for its conviction. Sevrence argues that Dr. O'Donohue's testimony regarding factors of bias concerning S.S.'s statements must be considered, particularly the inconsistencies in her statements. The State contends that Sevrence's argument lacks merit, and that Sevrence asks this court to improperly accept Dr. O'Donohue's testimony and ignore the testimony from the other witnesses who supported the sexual abuse claims. We agree with the State.

Standard of review

This court will not reverse a jury's verdict on appeal if that verdict is supported by sufficient evidence. Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998). Additionally, it is the jury's task to weigh the evidence and evaluate the credibility of witnesses. See Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). "[C]ircumstantial evidence alone may constitute sufficient evidence for a jury to convict a defendant." State v. Love, 109 Nev. 1136, 1140, 865 P.2d 322, 324 (1993). The uncorroborated testimony of a victim, without more, is sufficient to uphold a conviction for sexual offenses. Gaxiola v. State, 121 Nev. 638, 647-50, 119 P.3d 1225, 1231-33 (2005).

The State presented sufficient evidence to support the convictions for sexual assault and lewdness with a minor

We conclude that Sevrence's argument is without merit. As the State points out, Sevrence's argument would improperly require this

court to dismiss the jury's weighing of the evidence and credibility of the witnesses, determine that only Dr. O'Donohue's testimony was accurate, and that the testimony of all the other witnesses had no credibility. There is undeniably sufficient evidence throughout the record to support Sevrence's conviction. S.S.'s testimony alone was sufficient to convict Sevrence under Gaxiola, but there was also testimony by countless other witnesses to support Sevrence's conviction, including testimony by two other children living with Sevrence and the victim and Dr. James Carter-Hargrove, who S.S. told about the sexual abuse. The verdict was supported by sufficient evidence because the evidence presented "would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard, 114 Nev. at 1209-10, 969 P.2d at 297.

Prosecutorial misconduct

Sevrence argues that the prosecutor committed misconduct by disparaging defense counsel throughout the trial proceedings with comments about the failure to interview S.S. He further contends that the prosecutor committed misconduct by insinuating that Dr. O'Donohue was paid a lot of money for his testimony and that he provided his report to the State late in order to gain an advantage for the defense. Sevrence asserts that the State embarrassed defense counsel by stating that he was not prepared to proceed to trial since he had failed to interview S.S. and disparaged Dr. O'Donohue because he was paid a lot of money for his testimony and provided his report to the State in an untimely fashion. Sevrence argues that through this alleged prosecutorial misconduct, the State shifted the burden of proof to him and deprived him of the presumption of innocence. The State counters that Sevrence failed to show that the prosecutor committed misconduct because Sevrence failed to

object to the prosecutor's statements, the statements were not made in the presence of the jury, and the statements were not disparaging.[1]

Sevrence also argues that the prosecutor committed misconduct by intentionally encouraging S.S.'s testimony regarding additional acts of sexual misconduct, which was received on the morning of trial without prior notice to the defense. Sevrence contends that the State violated his due process rights by purposefully withholding this evidence with the intent of depriving him of a fair trial. The State argues that since it demonstrated that the district court did not abuse its discretion in denying Sevrence's motion for mistrial regarding the additional uncharged incidents of sexual abuse S.S. testified to, Sevrence cannot show prejudicial prosecutorial misconduct.

Standard of review

When determining if prosecutorial misconduct occurred, the relevant inquiry is whether the prosecutor's conduct so infected the proceedings with unfairness as to result in a denial of due process. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). The court must consider the context of the conduct and recognize that a criminal conviction is not to be lightly overturned on the basis of a prosecutor's conduct standing alone. Id.

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[1]We note that Sevrence objected to some of the prosecutor's statements, but for the most part, he failed to object. Our conclusion would be the same under a plain error review.

The prosecutor did not engage in misconduct that warrants reversal of the judgment of conviction

We conclude that Sevrence's arguments that the prosecutor engaged in misconduct are without merit. When the prosecutor pointed out that the defense failed to interview S.S., it was outside the presence of the jury. The State did not disparage defense counsel and Sevrence selectively chose the challenged "belittling" quote from the district court. The district court judge stated, "What I am going to do now, I will admonish [the prosecutor] not to say anything in front of the jury that would in any way be interpreted to belittle defense counsel. We don't want that to happen in the case." The district court did not state that the prosecutor was belittling counsel but based upon the contentious discussions going on outside the presence of the jury, admonished her not to say anything that would be interpreted as belittling Sevrence's attorneys. This claim is without merit.

In addition, Sevrence's argument regarding Dr. O'Donohue's payment is without merit. Our review of the record shows that it was Sevrence who initially asked Dr. O'Donohue whether he was paid for his testimony during direct examination; the State simply asked follow up questions during its cross-examination. Sevrence also fails to show why the State's questioning of Dr. O'Donohue regarding his report was improper. We conclude that the State did not engage in misconduct in questioning Dr. O'Donohue about payment for his testimony or his report.

Further, we conclude that Sevrence's claims that the prosecutor shifted the burden of proof through this alleged misconduct and continued to present inadmissible evidence are not supported by authority or argument. Sevrence made motions for mistrial on several occasions, claiming that he did not have notice or a chance to defend; in response, the

State asserted that he had ample opportunity to interview the witnesses before trial. There is no indication that the prosecutor's conduct so infected the proceedings with unfairness as to result in a denial of due process. Anderson, 121 Nev. at 516, 188 P.3d at 187.

Finally, Sevrence's argument that the State improperly withheld evidence until the morning of trial lacks merit and the district court did not abuse its discretion in denying Sevrence's motions for mistrial regarding the additional allegations of sexual abuse. The alleged misconduct did not infect the proceedings with unfairness as to result in a denial of due process. Anderson, 121 Nev. at 516, 118 P.3d at 187.

Double Jeopardy Clause

Sevrence argues that the State violated his constitutional rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by discussing allegations of penile penetration with S.S. even though he had been acquitted of that charge in the first trial. Sevrence contends that he cannot be re-prosecuted for sexual intercourse with S.S. under the Double Jeopardy Clause. The State counters that Sevrence was not put in double jeopardy by the admission of this evidence because, as discussed above, Sevrence agreed that such evidence could be admitted in order for him to impeach S.S. with her prior inconsistent statements.

Standard of review

A claim that a conviction violates double jeopardy is generally subject to de novo review. Davidson v. State, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008). The Double Jeopardy Clause of the Fifth Amendment, enforceable against the States through the Fourteenth Amendment, prohibits: (1) "a second prosecution for the same offense after acquittal," (2) "a second prosecution for the same offense after conviction," and (3)

"multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

Sevrence's constitutional rights were not violated

As discussed above, the district court rejected Sevrence's argument that allowing testimony regarding penile penetration, a charge he was acquitted of in his first trial, would subject him to double jeopardy since he planned on attacking S.S.'s credibility based on inconsistent statements regarding his sexual abuse.[2] In addition, the criminal information charged Sevrence with sexual assault on a child in violation of NRS 200.366 for willfully and unlawfully subjecting S.S. to sexual penetration. The State's questioning and S.S.'s testimony fell within this charge and did not violate Sevrence's constitutional rights.

Further, the record shows that the State only asked S.S. what Sevrence had touched her with, and she answered that he mostly touched her with his hands and with his penis. Before continuing that line of questioning, the State stopped her and asked her questions regarding Sevrence rubbing her privates with Bag Balm. The State then asked the judge to give a limiting instruction before asking S.S. more questions about Sevrence touching her with his penis. The questioning was brief and did not elicit information that Sevrence had intercourse with S.S. The limiting instruction was properly given under Tavares, 117 Nev. at 731, 30 P.3d at 1132, and Sevrence failed to show that S.S.'s testimony regarding

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[2]The parties are familiar with the facts of the first trial and we do not recount them here.

penile penetration amounted to a second prosecution for the same offense after he was acquitted of sexual assault in the first trial.

Motions for mistrial[3]

Sevrence argues that the district court abused its discretion in denying his various motions for mistrial regarding testimony of uncharged offenses, the cross-examination of Delores and Dr. O'Donohue, and brief references to Sevrence's conviction.

Standard of review

"Denial of a motion for mistrial is within the district court's sound discretion, and this court will not overturn a denial absent a clear showing of abuse." Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

The district court did not abuse its discretion

We conclude that there is no clear showing of abuse, and the district court did not abuse its discretion in denying each of Sevrence's motions for mistrial. There is nothing in the record to support Sevrence's claim that the State knowingly put forward additional prejudicial testimony regarding uncharged offenses of sexual abuse. S.S.'s testimony regarding more than one incident of digital penetration was consistent with the charges against Sevrence, and the district court did not abuse its discretion in denying Sevrence's motion for mistrial based on such testimony. The district court also did not abuse its discretion in allowing S.S.'s testimony regarding the pornography that Sevrence showed her; it

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[3]Sevrence moved for mistrial on seven occasions. The parties are familiar with these facts and we do not detail each motion except as pertinent to our discussion.

heard extensive arguments from both sides before determining that Sevrence was on notice of such testimony based on consistent testimony by S.S. in his previous trial, and denied his motion for mistrial.

In addition, the district court did not abuse its discretion by denying Sevrence's motion for mistrial based on the State's cross-examination of Delores or Dr. O'Donohue. Delores was asked if she had ever come home to find S.S. in bed with Sevrence, and she testified that she had no knowledge of it; there is nothing in the record to support Sevrence's argument that he was prejudiced by this exchange. Further, the State did not improperly question Dr. O'Donohue regarding R.S. witnessing Sevrence's sexual contact with S.S., as the district court found that the State's questioning was fair to point out certain factors Dr. O'Donohue used in evaluating S.S.'s accusations. Sevrence's arguments regarding these motions for mistrial are without merit, and the district court did not abuse its discretion in denying them.

Sevrence also argues that the district court abused its discretion by denying his motions for mistrial when two witnesses testified that he had been convicted or had been in prison. We disagree. In the first instance, Sevrence elicited S.S.'s statement that she did not bring new allegations of abuse to the police because she had been adopted and he was already convicted. In the second instance, Delores made a comment that she assumed that Sevrence could not keep his parental rights since he was in prison.

"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). In both

instances, the district court cured the references by admonishing the jury after S.S. and Delores made their comments. Further, in Richmond v. State, a witness testified twice that the defendant had previously been in jail. 118 Nev. 924, 935, 59 P.3d 1249, 1256 (2002). The Richmond court determined that the district court's failure to strike the testimony did not amount to plain error because "the remarks were brief, . . . the attorneys did not purposefully solicit them . . . and [the witness] did not state why [the defendant] was in jail." Id. We conclude that the brief mentions of Sevrence being convicted and in prison are similar to the facts in Richmond, and the district court did not abuse its discretion in denying Sevrence's motions for mistrial based on the brief comments. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.

Gibbons, J.

Pickering, J.

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk