Language on pages 4 & 5 stricken and replaced per order filed 12/14/12. - LC

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRY LAWRENCE BURDICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58506

FILED

APR 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a child under 14 years of age, lewdness with a child under 14 years of age, and violation of lifetime supervision. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

The charges against appellant Harry Lawrence Burdick stem from the sexual abuse of two of his grandchildren, A.B. and A.G. On appeal, Burdick asserts that the district court abused its discretion in denying his motion to sever the charges involving two different victims and admitting evidence of prior bad acts and that insufficient evidence supports his convictions for sexual assault and lewdness. Although we conclude that the district court did not abuse its discretion in denying the motion to sever the charges and that the State presented sufficient evidence to support the convictions, we reverse the judgment of conviction in part because the district court abused its discretion in admitting prior bad act evidence and the error was not harmless, thus requiring a new trial on the charges of sexual assault and lewdness.

In the early 1990s, two of Burdick's daughters, S.B. and R.B., accused him of sexually assaulting them. The allegations were

investigated, but both daughters recanted their testimony and the charges were dropped.

In 2010, S.B.—Burdick's daughter and the mother of A.B. and A.G.—was in a relationship, which produced a son, Z.G. As the relationship unraveled, Z.G.'s father became concerned for the safety of his son and contacted Child Protective Services (CPS) to seek help. CPS contacted S.B. to inquire about her children's safety. As a result, she asked her children if anyone had ever harmed them. A.B. disclosed that Burdick had touched her vagina and forced her to perform oral sex and that he had ejaculated. During an interview, A.G. revealed to CPS workers that Burdick had attempted to anally penetrate him. At trial A.G. and A.B. testified and the State presented evidence of the allegations against Burdick by S.B. and R.B.

Denial of motion to sever

Burdick argues that the district court abused its discretion by denying his motion to sever the charges against him. He asserts that the incidents involving A.B. and A.G. differed significantly in nature and time and did not arise out of the same act or transaction or developed from a common scheme. We disagree. NRS 173.115(2) permits two or more offenses to be charged in a single indictment if the offenses are "connected together." See, e.g., Floyd v. State, 118 Nev. 156, 163-64, 42 P.3d 249, 254-55 (2002) abrogated on other grounds by Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008); State v. Boueri, 99 Nev. 790, 796, 672 P.2d 33, 37 (1983). Although several years separated the abuse of the two victims, there is abundant evidence in the record proving that Burdick's acts were connected. The record establishes that the victimization displayed a striking congruity. For example, the victims were: (1) Burdick's

grandchildren; (2) around five or six years old when the abuse began; (3) abused primarily when other adults were not home; and (4) had been victimized in a relative's home. Because joinder was proper and did not unfairly prejudice Burdick, see NRS 174.165, we conclude that the district court did not abuse its discretion by denying his motion to sever the charges.

Sufficient evidence supports Burdick's convictions

Burdick asserts that the State presented insufficient evidence to support his convictions for sexual assault and lewdness because A.B. and A.G.'s testimony was unreliable and factually impossible and they recanted their allegations.

A.B. and A.G. were young children when they were abused and their testimony was not entirely consistent. For example, A.B. testified that Burdick had assaulted her in her home at a time when Burdick was incarcerated. Nevertheless, A.B. testified that Burdick had placed his genitals in her mouth and "white stuff" had come out of his "weenie." A.G. testified that Burdick had attempted to anally penetrate him. The inconsistencies in the children's testimony were brought to the jury's attention through cross-examination, and it was the jury's role to evaluate the children's credibility and determine what weight to give their testimony. Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994). Considering the evidence in the light most favorable to the State, we conclude that a rational fact finder could have found beyond a reasonable doubt, Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984), that Burdick committed the offenses of sexual assault, NRS 200.366(1), and lewdness with a minor, NRS 201.230(1). See Hutchins v. State, 110 Nev.

103, 109, 867 P.2d 1136, 1140 (1994) (stating that sexual assault victim's uncorroborated testimony is sufficient evidence to support conviction).

The district court abused its discretion in admitting evidence of Burdick's bad acts

Burdick argues that the district court abused its discretion in admitting, over his objections, unfairly prejudicial evidence of his sexual assaults on S.B. and R.B. when they were children. We agree.

Generally, evidence of a person's character or character trait is inadmissible to show that the person acted in conformity therewith on a particular occasion. NRS 48.045(1). Evidence of prior bad acts such as Burdick's acts involving S.B. and R.B. is admissible only if: (1) the prior acts are relevant to the crime charged and offered for a purpose other than proving the defendant's propensity; (2) the prior acts are proven by clear and convincing evidence; and (3) the probative value of the prior acts is not substantially outweighed by the danger of unfair prejudice. Bigpond v. State, 128 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 10, March 1, 2012). Here, the State presented the testimony of a former police detective, who relied on his notes from the early 1990s, to establish that the prior bad acts occurred. In the 1990s, S.B. and R.B. had recanted their allegations made to the detective and the charges against Burdick were dropped. Consistent with their recantations, at the Petrocelli[1] hearing S.B. and R.B. testified that the acts never happened and that they made the allegations only because they were angry with Burdick. ~~Under these circumstances, we conclude that the district court abused its discretion in concluding that the alleged sexual assaults on S.B. and R.B. were proved by clear and convincing evidence. See In re Drakulich, 111 Nev. 1556,~~

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

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Stricken per 12/19/12 order. See page 6 for replacement language - JC

~~1566, 908 P.2d 709, 715 (1995) (explaining that "clear and convincing evidence must be 'satisfactory' proof that is 'so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest'" and that while "'[i]t need not possess such a degree of force as to be irresistible, . . . there must be evidence of tangible facts from which a legitimate inference . . . may be drawn'" (quoting Gruber v. Baker, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).~~ While sufficient evidence supports Burdick's convictions, we are not convinced that the jury's verdicts on the sexual assault and lewdness charges were not substantially influenced by the improper admission of the prior bad act evidence and therefore the error was not harmless. See Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (explaining that harmless-error test for nonconstitutional error "is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))), modified in part by Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008).

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter for a new trial.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Nancy L. Allf, District Judge
Law Offices of James Hartsell
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

Per 12/14/12 order, the stricken language on pages 4 and 5 is replaced with the following:

> Under these circumstances, we conclude that the alleged sexual assaults on S.B. and R.B. were of limited probative value given that they recanted and continued to deny the allegations at the Petrocelli hearing, the charges were dropped, and the allegations were remote in time. We further conclude that the district court abused its discretion in concluding that the limited probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We reach this conclusion based on the character of challenged evidence, its weighty role in the State's prosecution against Burdick, and the relatively weak evidence supporting the charges against Burdick.