IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY LEE NELSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 36056

FILED
SEP 10 2001
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault and two counts of lewdness with a minor under fourteen years of age. For the two convictions of sexual assault, the district court sentenced appellant to serve two consecutive terms of life imprisonment, with parole eligibility after serving ten years on each sentence. For the two convictions of lewdness with a minor under fourteen years of age, the district court sentenced appellant to serve a term of four years for each conviction, to be served concurrently with each of the sexual assault convictions.

Appellant Jimmy Lee Nelson raises three arguments on appeal. First, Nelson argues that the district court committed reversible error in admitting testimonial evidence of his prior bad acts. Second, Nelson contends that the district court committed reversible error by permitting improper witness vouching. Third, Nelson asserts that the evidence presented at trial was insufficient to support his conviction of two counts of sexual assault and two counts of lewdness with a minor under fourteen years of age. We conclude that each argument lacks merit.

As to Nelson's first argument, evidence of prior bad acts is not admissible to show that the defendant has bad character, and that he has acted in conformity with that bad character on prior occasions. Rather, evidence of prior bad

01-15178

acts is only admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[1]

For evidence of a prior bad act to be admissible, the district court must find, 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."[2] Furthermore, the determination of the trial court will not be overturned absent manifest error.[3]

In McMichael v. State,[4] this court stated that the standard for admitting evidence of other proscribed sexual conduct is more liberal in cases involving sexual aberration. Specifically, this court held that where the other acts are similar and not remote in time, they may be admitted to show that the defendant possesses a specific emotional propensity for sexual aberration.[5] In Findley v. State,[6] this court extended the rule of McMichael to evidence of misconduct with persons other than the victim. This court stated that remoteness alone will not preclude admissibility, but merely goes to the weight to be given to the evidence.[7]

---

[1]NRS 48.045(2).

[2]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[3]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

[4]94 Nev. 184, 189-90, 577 P.2d 398, 401 (1978), overruled on other grounds by Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985).

[5]McMichael, 94 Nev. at 189-90, 577 P.2d at 401.

[6]94 Nev. 212, 214, 577 P.2d 867, 868 (1978).

[7]Id. at 214, 577 P.2d at 868.

In this case, the district court conducted a Petrocelli[8] hearing, outside the presence of the jury, and heard the testimony of V.J. and B.B. After the Petrocelli hearing, the district court concluded that V.J. and B.B. could testify at trial regarding Nelson's prior bad acts because "their testimony was clear, it was convincing and the probative value substantially outweighs the prejudice to the defendant, it is highly relevant and it should be allowed." We conclude that the district court properly admitted B.B.'s testimonial evidence of Nelson's prior bad acts, but the admission of V.J.'s testimony was error. Nonetheless, we conclude that the admittance of V.J.'s testimony constitutes harmless error.

With respect to B.B.'s testimony, we conclude that the district court properly admitted her testimony because it is relevant to the issue of Nelson's motive and opportunity to commit the crimes charged in this case. As to motive, B.B.'s testimony reveals that Nelson offered to show her how to have sex; similarly, one of the victims in this case testified that Nelson offered to show her how to have sex. As to opportunity, B.B.'s testimony demonstrates that when B.B.'s mother was married to Nelson, Nelson had the opportunity to sexually abuse her. Also, the victims in this case testified that when they were alone with Nelson in his home, Nelson sexually abused them. Accordingly, the district court properly admitted B.B.'s testimony because it shows that Nelson had motive as well as the opportunity to abuse.

Additionally, we conclude that Nelson's abuse of B.B. is similar to the abuse committed against the victims in this case. B.B. testified that Nelson put his fingers inside her vagina; similarly, both victims testified that Nelson put

[8]101 Nev. 46, 692 P.2d 503.

his fingers inside of them. B.B. testified that Nelson offered to show her how to have sex; correspondingly, one of the victims testified that Nelson offered to show her how to have sex.

Finally, we conclude that B.B.'s testimony is not too remote in time. Nelson's sexual abuse of B.B. took place approximately nineteen years prior to the alleged sexual abuse of the victims in this case. We are persuaded by the State's argument that the lapse in time is due to children growing up and Nelson no longer having the opportunity to abuse. We believe that the State sufficiently demonstrated that when children reappeared in Nelson's life, he again began to abuse. Accordingly, we conclude that the district court properly admitted B.B.'s prior bad act testimony into evidence.

As to V.J.'s testimony, we conclude that her testimony is not relevant to the crime charged because, unlike B.B.'s testimony, it is not relevant to any other issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rather, V.J.'s encounter with Nelson shows that, when she was fourteen years old, she engaged in "make out" sessions with Nelson. Moreover, V.J.'s encounter with Nelson is not similar to the alleged sexual abuse committed against the victims in this case because V.J. testified that she was a willing participant. Further, although Nelson told V.J. not to tell anyone about their relationship, V.J. testified that she did not tell anyone because she was a willing participant, and because she was afraid of Nelson. Accordingly, we conclude that the district court erred in admitting V.J.'s testimonial evidence of Nelson's prior bad acts.

Although we conclude that the district court erred in admitting V.J.'s testimony of Nelson's prior bad acts, we

(O)-4892

conclude that the error was harmless. In Big Pond v. State,[9] this court set forth certain considerations to be evaluated when determining whether error is harmless or prejudicial. These considerations include "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[10]

The crimes of which Nelson was convicted were grave. However, we conclude that the issue of innocence or guilt was not close. Nelson testified that the sexual assault did not occur; however, the jury chose to disbelieve his testimony. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[11] Further, the victims both testified that Nelson sexually assaulted them. The jury found their testimony credible.

Additionally, the quantity and character of the error in permitting V.J. to testify regarding Nelson's prior bad acts was slight. V.J. testified that she was fourteen years old when she engaged in "make out" sessions with Nelson and that she was a willing participant. Therefore, we conclude that any error committed by the district court in allowing V.J. to testify was harmless error. Thus, reversal of the jury verdict is not warranted.

Second, Nelson argues that the district court committed reversible error by permitting improper witness vouching. At trial, the State asked Geraldine Kerr, a marriage and family counselor, "Have you been able to form an opinion regarding whether or not [the complainants] have been

---

[9]101 Nev. 1, 692 P.2d 1288 (1985).

[10]Id. at 3, 692 P.2d 1289; accord Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993).

[11]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

(O)-4892

the victim[s] of sexual abuse?" Kerr replied, without objection, "My opinion is clearly that they have been victims of sexual abuse." Nelson argues that this testimony constitutes improper witness vouching. Moreover, Nelson asserts that such testimony, although not objected to by defense counsel, amounts to reversible error because his right to a fair trial was prejudiced.

Preliminarily, we note that even though defense counsel failed to raise an objection to Kerr's testimony at trial, this court may review the error on appeal if the error is patently prejudicial.[12] Here, we conclude that Kerr improperly vouched for the credibility of the victims, and that the district court erred when it permitted such testimony. Nonetheless, we conclude that the admission of Kerr's testimony was not prejudicial.

In Marvelle v. State,[13] this court stated that "[i]t has long been the general rule that it is improper for one witness to vouch for the testimony of another." The rationale behind this rule is that the jury is charged with resolving the factual issues, judging the witnesses' credibility and ultimately determining whether the accused is guilty or innocent.[14] Therefore, one witness may not vouch for the credibility of another witness or a victim.

In this case, the State elicited Kerr's opinion regarding whether the complainants had been victims of sexual abuse. Moreover, the State reiterated Kerr's statement during

---

[12]Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986); accord Todd v. State, 113 Nev. 18, 22, 931 P.2d 721, 723 (1997).

[13]114 Nev. 921, 931, 966 P.2d 151, 157 (1998).

[14]See McNair, 108 Nev. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses.").

(O)-4892

closing argument by saying: "Miss Kerr said that [the victims] had been sexually abused and [the victims] said it was that man." Accordingly, we conclude that the State improperly asked Kerr to vouch for the credibility of the victims. Moreover, we conclude that the State attempted to capitalize on the improper testimony when it repeated Kerr's statement to the jury during closing argument. Thus, we conclude that the district court erred when it permitted such testimony and argument to be presented to the jury.

Although the district court erred by permitting improper witness vouching, we conclude that the error was not prejudicial. As previously stated, the issue of innocence or guilt is not close. Although Nelson testified that the alleged sexual abuse did not occur, the jury heard his testimony and was able to resolve the issue of his credibility. The victims both testified that Nelson sexually assaulted them, and the jury was able to evaluate their credibility as well. Additionally, testimony was properly admitted for the jury's consideration concerning Nelson's prior bad acts against B.B. Although the district court erred by permitting Kerr to express her opinion that the victims had been sexually assaulted, we conclude that the quantity and character of the error is slight because the evidence against Nelson was overwhelming. Thus, we conclude that Nelson's right to a fair trial was not prejudiced.

Finally, Nelson argues that the evidence presented at trial was insufficient to support his conviction of two counts of sexual assault and two counts of lewdness with a minor under fourteen years of age. We conclude that this argument lacks merit.

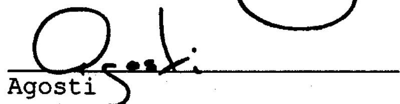
We conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Nelson committed two counts of sexual assault and two counts of

lewdness with a minor under fourteen years of age. Here, the victims testified regarding the sexual abuse.[15] Further, the jury heard Nelson testify and deny the allegations. We conclude that the jury weighed the conflicting evidence and determined that the victims' testimony was more credible. Thus, the jury acted reasonably when it concluded that the State presented sufficient evidence to prove beyond a reasonable doubt that Nelson sexually assaulted the victims. And, although the district court erred in admitting V.J.'s testimony, and in permitting improper witness vouching, we conclude that these errors are harmless in light of the victims' testimony and B.B.'s prior bad act testimony. Accordingly, we conclude that the State presented sufficient evidence to support Nelson's conviction of two counts of sexual assault and two counts of lewdness with a minor under fourteen years of age.

Having considered Nelson's arguments on appeal and concluded that they lack merit, we

ORDER the judgment of conviction affirmed.

Shearing, J.



Agosti, J.

cc: Hon. John P. Davis, District Judge
Attorney General
Harold Kuehn
Nye County Public Defender
Nye County District Attorney
Nye County Clerk

---

[15] See May v. State, 89 Nev. 277, 279, 510 P.2d 1368, 1369 (1973) (holding that the uncorroborated testimony of a victim is sufficient to uphold a rape conviction); accord Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

ROSE, J., dissenting:

I agree with the majority's analysis of the evidence that was admitted and of the two errors that occurred, those being reference to a prior bad act and expert Kerr's opining that the victims were sexually abused. But I disagree that these errors were harmless, and therefore I dissent.

The evidence against Nelson was primarily the testimony of two minor female victims who stated that six years earlier Nelson rubbed lotion on them in separate incidents and in so doing rubbed them inside their vaginas. No physical evidence or witnesses were produced to support their testimony of these events. Nelson took the stand and adamantly denied both incidents. I do not consider this to be overwhelming evidence of guilt.

Because the evidence was not overwhelming, any error made in admitting evidence against Nelson becomes highly prejudicial because it bolsters the victims' sketchy uncorroborated testimony. The first error was admitting prior bad act evidence that occurred 24 years earlier and showed conduct similar to what Nelson apparently displayed in the present case, even though the act itself was dissimilar. The second error was permitting Kerr, marriage and family therapist, to conclude that the minor victims were sexually abused. This was an expert opinion that certainly bolstered the victims' testimony.

In view of the less-than-overwhelming evidence of guilt, I believe the district court improperly admitted evidence that was important in convicting Nelson. Thus, I cannot conclude that these two errors in admitting evidence were harmless beyond a reasonable doubt. Reaching this

conclusion, I am compelled to dissent based on this Court's prior cases.[1]

I would reverse the conviction and remand the case for a new trial.

_______________, J.
Rose

[1] See Boehm v. State, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (reversing a judgment of conviction where, although the admissible evidence against the defendant was "considerable," it was not "overwhelming" as required to support a conviction in the face of trial errors); Angle v. State, 113 Nev. 757, 763-64, 942 P.2d 177, 181-82 (1997) (concluding that overwhelming evidence could not be found where prosecutor commented on defendant's silence and the court admitted an improperly redacted videotape).