

IN THE SUPREME COURT OF THE STATE OF NEVADA

KINGSTON WONEGIE RANGE,

No. 36346

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**AUG 10 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
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 one count of false imprisonment.

Appellant Kingston Wonegie Range alleges that the district court erred by admitting evidence of two prior incidents with the victim: (1) sexual assault and (2) battery. We disagree.

In most situations, the State may not use character evidence to show that the defendant acted in conformity therewith.<sup>1</sup>

The natural and inevitable tendency of the tribunal - whether judge or jury - is to give excessive weight to the vicious record of the crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.<sup>2</sup>

This does not mean, though, that respondent the State of Nevada may never present evidence of other bad acts committed by the appellant. Indeed, the State may present evidence of prior crimes, wrongs or acts for other purposes: "motive,

<sup>1</sup>NRS 48.045 (The State may use character evidence to show that the defendant acted in conformity therewith to rebut evidence of good character offered by the defendant.).

<sup>2</sup>1A John Henry Wigmore, Wigmore on Evidence § 58.1, at 1212 (Tillers rev. 1983).

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>3</sup>

Still recognizing that a jury may place undue weight on evidence of prior bad acts, we require that the district court find, after a hearing outside the jury's presence, that three prerequisites have been established.<sup>4</sup> First, the act must be relevant to the crime charged. Second, the act must also be established by clear and convincing evidence. Finally, the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice.<sup>5</sup> This court will not disturb the district court's decision to admit prior bad act evidence absent manifest error.<sup>6</sup>

Prior incident of sexual assault

We conclude that the district court did not abuse its discretion by admitting evidence of the May 24 sexual assault.

Nevada case law has encouraged "a more liberal judicial attitude . . . in admitting evidence of prior and subsequent proscribed sexual conduct" when the defendant is charged with a sex crime.<sup>7</sup> In Keeney v. State, we stated, "In cases involving sex offenses, evidence of sexual aberration is relevant and its probative value outweighs its prejudicial effect."<sup>8</sup>

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<sup>3</sup>NRS 48.045(2).

<sup>4</sup>Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985).

<sup>5</sup>Id. at 52, 692 P.2d at 508.

<sup>6</sup>Id.

<sup>7</sup>Keeney v. State, 109 Nev. 220, 229, 850 P.2d 311, 316-17 (1993) (quoting McMichael v. State, 94 Nev. 184, 189, 577 P.2d 398, 401 (1978) overruled on other grounds by Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985)).

<sup>8</sup>Id.

We conclude that Kingston's first prior bad act falls within this sexual aberration exception. The record reflects that the May 24 sexual assault was also proven by clear and convincing evidence. The victim testified extensively regarding all the incidents at the Petrocelli hearing and trial. Further, at trial, the State presented the testimony of the sexual assault nurse, who thoroughly recounted the victim's injuries and found them to be consistent with those received via sexual assault.

Finally, the district court's determination that the probative value of the prior sexual assault was not substantially outweighed by the risk of unfair prejudice is not manifestly erroneous. The record reflects that the district court acknowledged that the jury might place undue weight on the uncharged assault. Nevertheless, because the incident shows Kingston's sexual aberration with respect to the victim, its probative value is high. Given the liberal judicial attitude toward admitting evidence of sexual aberration in sex crime cases, we conclude that the district court did not abuse its discretion in admitting evidence of the May 24 sexual assault.

Prior incident of battery

We conclude that the district court did not abuse its discretion in admitting evidence of the June 10 battery.

While prior bad act evidence is not admissible to show that Kingston is generally disposed to use violence, it is admissible to show a "virulent hostility toward a specific individual."<sup>9</sup> This hostility toward the victim was relevant

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<sup>9</sup>1 Kenneth S. Broun, et al., McCormick on Evidence § 190, at 666 (John W. Strong ed., 5th ed., West Publishing Co. 1999).

to show Kingston's motive.<sup>10</sup> Also, the fact that the June 10 incident resulted in Kingston's arrest gave him a motive for inflicting harm and exercising control over the victim. Additionally, not much time had elapsed before the charged incident occurred.

We also conclude that the record supports the district court's determination that the State presented clear and convincing evidence that the June 10 incident transpired. As stated above, the victim testified extensively regarding the two prior incidents. In addition, Officer Schmidt testified at trial regarding the victim's bruises when he responded to her call.

Having considered Range's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young J.  
Young  
Leavitt J.  
Leavitt

Becker J.  
Becker

cc: Hon. Mark W. Gibbons, District Judge  
Attorney General  
Clark County District Attorney  
Clark County Public Defender  
Clark County Clerk

<sup>10</sup>NRS 48.045(2).