IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES EDMONDSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36359

ORDER OF AFFIRMANCE

This is an appeal by James Edmondson of his conviction for three counts of lewdness with a child under the age of fourteen and one count of sexual assault with a child under the age of fourteen. On appeal, Edmondson asserts that the district abused its discretion by: (1) placing him in double jeopardy by ordering the removal of his daughter from his custody and criminally convicting him for the same underlying offense; (2) admitting evidence of prior bad acts committed by Edmondson; (3) admitting speculative testimony by one of the State's witnesses; (4) excluding evidence offered by Edmondson to show bias by a State's witness; and (5) allowing inadmissible hearsay evidence over Edmondson's objections. We conclude that all of Edmondson's arguments are without merit and that his conviction should be affirmed.

First, Edmondson asserts that his constitutional protection against being placed in double jeopardy was violated because the State punished him twice for the same alleged sexual abuse of his youngest daughter, K.E. Edmondson contends that the State punished him once by subjecting him to the district court family division's rulings removing K.E. from his custody and a second time by subjecting him to criminal

prosecution. Consequently, Edmondson asserts that the district court erred when it denied his motion to dismiss based on double jeopardy. We disagree.

The Double Jeopardy Clause protects against the imposition of multiple criminal punishments for the same offense, but does not bar the imposition of civil sanctions for the same offense.[1] We conclude that the suspension of Edmondson's parental rights to K.E. did not amount to a criminal punishment and, accordingly, Edmondson was not placed in double jeopardy for the same offense. The United States Supreme Court in Hudson v. United States established a two-step analysis for determining whether a penalty should be viewed as a criminal punishment or a civil sanction.[2] First, the court must ask whether the legislature either expressly or implicitly labeled the penalty as civil or criminal.[3] This is a matter of statutory construction.[4] Second, even when the legislature designates the penalty as civil, the court must examine whether the civil penalty is so punitive, in either its purpose or effect, that it transforms what was intended as a civil sanction into a criminal punishment.[5]

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[1]State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679-680 (1998).

[2]522 U.S. 93, 99 (1997).

[3]Id.

[4]Id.

[5]Id. The Hudson Court listed the following factors as relevant in determining whether a civil remedy should be treated as a criminal punishment:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has

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Here, the Nevada Legislature has expressly provided in NRS 432B.410(2) that actions taken by the family division of the district court[6] because of the abuse or neglect of a child will not preclude a subsequent criminal prosecution for offenses arising from the same facts. Furthermore, the removal of K.E. from Edmondson's custody is not so punitive in either its purpose or effect that it must be viewed as a criminal punishment.[7] For instance, Edmondson argues that the suspension of his right to have contact with his daughter is an affirmative restraint and, therefore, the penalty should be viewed as a criminal punishment. However, this conclusion is inconsistent with this court's holding in State v. Lomas.[8] In Lomas, we rejected the argument that the temporary

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> historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963)).

[6]See NRS 432B.050(1) (defining "court" as the family division of the district court).

[7]See Hudson, 522 U.S. at 99 (holding that even when a legislature designates a penalty as civil in nature, the court must examine the penalty to see whether its purpose or effect is so punitive that it transforms what was intended as a civil remedy into a criminal punishment).

[8]114 Nev. 313, 318, 955 P.2d 678, 681 (1998).

suspension of a driver's license was an affirmative restraint.[9] Likewise, we conclude that the temporary suspension of Edmondson's right to have contact with K.E. should not be viewed as an affirmative restraint. Furthermore, while the custody ruling may have an incidental deterrent effect upon Edmondson, we stated in Lomas that "the mere presence of a deterrent purpose is insufficient to render a sanction criminal for purposes of the Double Jeopardy Clause because deterrence also may serve civil goals."[10] Here, the purpose for removing K.E. from Edmondson's custody is to protect K.E., not to punish Edmondson. We conclude that Edmondson's right against being placed in double jeopardy was not violated and, accordingly, that the district court did not err when it denied Edmondson's motion to dismiss.[11]

Second, Edmondson asserts that the district court abused its discretion by admitting evidence of Edmondson's prior sexual bad acts committed against his three older daughters. Edmondson claims that the prejudicial effect of this evidence outweighed any probative value that the evidence might have had. We disagree.

Under Nevada law, a district court has considerable discretion in determining whether to admit evidence.[12] Accordingly, this court will not disturb the determination of the district court absent an abuse of

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[9]Id.

[10]Id. at 319, 955 P.2d at 682.

[11]Although the underlying offense is also a criminal offense, this fact alone is not enough to transform the penalty into a criminal punishment for purposes of double jeopardy. Lomas, 114 Nev. at 318, 955 P.2d at 681. Additionally, the act of removing K.E. from Edmondson's custody is necessary to fulfill the goal of protecting K.E.

[12]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

discretion.[13] Pursuant to NRS 48.045(1), prior bad act evidence is not admissible to show conduct in conformity therewith; however, evidence of prior bad acts may be admissible under NRS 48.045(2) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Nonetheless, when offering evidence of a prior bad act, the State must show by plain, clear and convincing evidence that the defendant committed the offense.[14]

We conclude that the pattern of conduct described by Edmondson's daughters was probative of the modus operandi utilized by Edmondson. While the individual actions may have stretched over a lengthy span of time, Edmondson's persistent pattern of conduct never relented during this time period. Moreover, since Edmondson argues that his conduct was purely accidental or in response to K.E.'s sexual advances, the prior acts were also admissible as evidence of a lack of mistake or accident by Edmondson. Therefore, we conclude that the district court did not abuse its discretion when it admitted evidence of Edmondson's prior bad acts.

Third, Edmondson asserts that the district court abused its discretion when it admitted certain testimony by his oldest daughter, Rhonda. Edmondson argues that Rhonda lacked personal knowledge about facts pertaining to her discovery that her younger sister, Debra, had also been abused. Therefore, Edmondson asserts that Rhonda's testimony should not have been admitted. We agree that the question posed by the State called for speculation. However, we deem the error to be harmless because the question was innocuous. Debra also testified at trial

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[13]Id.

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

regarding Edmondson's actions against her and, therefore, the effect of Rhonda's speculation about Edmondson's actions against Debra was minimal.

Fourth, Edmondson asserts that the district court abused its discretion when it refused to admit a page from his daughter, Kisha's, childhood journal wherein she expressed a hatred for Edmondson and her mother. In particular, Edmondson argues that the district court abused its discretion by not admitting the journal page because it shows Kisha's bias. We disagree.

This court has held that district courts retain wide latitude to restrict cross-examination based on concerns of confusion, witness safety, harassment, repetitiveness or marginal relevance.[15] Here, the excluded journal page was repetitive and of marginal relevance in light of Kisha's earlier testimony.[16] Therefore, we conclude the district court did not abuse its discretion when it excluded the journal page.

Finally, Edmondson asserts that the district court abused its discretion when it admitted alleged hearsay on two separate occasions. First, Edmondson challenges a statement made by John Haats on cross-examination regarding an alleged conversation between Haats and Freddy

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[15]Leonard v. State, 117 Nev. __, __, 17 P.3d 397, 409 (2001).

[16]Edmondson had already demonstrated that Kisha may have harbored a bias against Edmondson. In particular, she testified that she was angry, or at least annoyed, with Edmondson, and that she wanted to kill Edmondson for what he had done to her younger sister. It is difficult to imagine a statement demonstrating a greater potential bias against Edmondson than Kisha's statement that she wanted to kill him. Moreover, the journal page was only marginally relevant to Kisha's potential bias because it expressed her general anger as a child towards both her parents.

Faust. Second, Edmondson challenges a statement made by the State's rebuttal witness, Freddy Faust, who testified about the statement allegedly made by Haats. We conclude that both of Edmondson's arguments are without merit and that the decision of the district should be affirmed.

Hearsay is fully defined under NRS 51.035, but has been more generally referred to by this court as "evidence of a statement made other than by a witness while testifying at the hearing, which is offered to prove the truth of the matter asserted."[17] Hearsay is inadmissible unless it falls within an exception.[18] In regard to the statement made by Haats on cross-examination, we conclude that this statement was not hearsay because it was a prior inconsistent statement.[19] Accordingly, the statement was properly admitted to impeach Haats' earlier testimony on direct-examination. With regard to Faust's statement, we conclude that the statement was not hearsay as defined under NRS 51.035(2). However, this evidence is inadmissible because the State was improperly using Faust's testimony as extrinsic evidence to impeach Haats on a collateral matter.[20] Nonetheless, we conclude that the statement was harmless beyond a reasonable doubt because of the marginal importance of the

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[17]Deutscher v. State, 95 Nev. 669, 683-84, 601 P.2d 407, 416-17 (1979).

[18]Id. at 684, 601 P.2d at 417; NRS 51.065

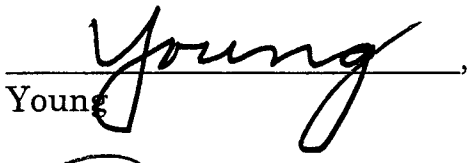
[19]See NRS 51.035(2)(a).

[20]See Efrain v. State, 107 Nev. 947, 949, 823 P.2d 264, 265 (1991) (holding that collateral evidence rule allows questions on cross-examination concerning witness' past conduct; however, if witness denies past conduct, extrinsic evidence contradicting denial is generally inadmissible).

statement to the State's case.[21] The vast majority of the State's evidence against Edmondson came through the testimony of his daughters and through his own admissions. Therefore, the district court's decision should be affirmed with regard to this matter.

Based on the foregoing, we conclude that all of Edmondson's arguments lack merit and, accordingly, we

ORDER the judgment of conviction AFFIRMED.



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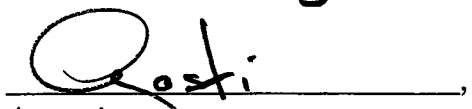
Young



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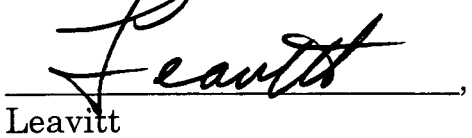

_____, J.
Leavitt

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[21]See Powell v. State, 113 Nev. 41, 47, 930 P.2d 1123, 1126 (1997) (concluding that admission of inadmissible evidence was harmless in light of the defendant's own admissions and the other compelling evidence produced at trial).