IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY A. FRITZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64770

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Gregory A. Fritz was convicted of sexual assault of a minor under the age of sixteen (16) years and lewdness with a child under the age of fourteen (14) years following a jury trial.[1] On appeal, Fritz argues the district court erred by (1) admitting uncharged prior bad act evidence; (2) giving a flight instruction to the jury; and (3) by prohibiting Fritz from cross-examining a prior bad act witness about an allegedly false prior accusation of sexual assault.

We review a district court's admission of other bad act evidence for abuse of discretion. *Newman v. State*, 129 Nev. ___, ___, 298 P.3d 1171, 1178 (2013). NRS 48.045(2) allows admission of evidence of other bad acts to show "motive, opportunity, intent, preparation, plan,

[1]We do not recount the facts except as necessary to our disposition.

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knowledge, identity, or absence of mistake or accident" or other appropriate purposes. *See Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1249 (2012). Notably, bad act evidence is disfavored and is presumed inadmissible. *Rosky v. State*, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005). However, the presumption of inadmissibility is rebutted when the district court determines that (1) the prior bad act evidence is relevant to the crime charged and for a purpose other than proving the defendant's propensity; (2) the prior bad act is proven by clear and convincing evidence, and for a purpose other than proving the defendant's propensity, and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. *Bigpond*, 128 Nev. at ___, 270 P.3d at 1250 (modifying *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061,-65 (1997)).

In the proceedings below, the district court held a *Petrocelli* hearing where the prior bad act witness (S.R.) testified, giving detailed accounts of the abuse. S.R.'s mother also testified, corroborating S.R.'s testimony and testifying that Fritz once confessed to her. The district court concluded that S.R.'s testimony was very credible; the prior bad act was proved by clear and convincing evidence; the prior bad act was relevant to show motive, opportunity, preparation and common scheme or plan with respect to Fritz gaining access to young girls who were members of his own household; and found that the prior bad acts were more probative than prejudicial.

The evidence that Fritz previously sexually assaulted S.R. was relevant to show motive pursuant to *Ledbetter v. State*, as it showed Fritz's ongoing "sexual attraction to and obsession with the young female members of his family, which explained to the jury his motive to sexually

assault." 122 Nev. at 263, 129 P.3d at 679. This evidence was also relevant for other nonpropensity purposes, including explaining the circumstances surrounding the abuse, why the victims delayed reporting the abuse, and why the victims recanted at various times. Therefore, we cannot say the district court abused its discretion in determining the testimony was relevant to Fritz's motive and opportunity, was proved by clear and convincing evidence, and was more probative than prejudicial.[2]

Additionally, the district court did not abuse its discretion in giving a flight instruction to the jury. *See Grey v. State*, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008) (we review the issuance of a jury instruction for an abuse of discretion or judicial error). A flight instruction may be given if the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest. *Rosky v. State*, 121 Nev. 184, 199, 111 P.3d 690, 700 (2005) (citing *Walker v. State*, 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997)). A flight instruction is proper when it is reasonable to infer flight from the evidence presented. *Carter v. State*, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

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[2]However, the district court did err in finding S.R.'s prior bad act testimony was relevant to a common scheme or plan. *See Ledbetter*, 122 Nev. at 260-61, 129 P.3d at 677-78 (prior act evidence going to a common scheme or plan is admissible when the evidence establishes a preconceived plan, not simply when the prior act evidence has elements in common with the crime charged). As in *Ledbetter*, the prior bad acts and the crimes charged share many similarities, but these appear to be the result of Fritz's opportunity to access his victims more than indicative of an overarching, preconceived plan.

Here, Fritz admits he left the scene of a party when A.K.'s friends confronted him, accused him of sexually abusing A.K., and threatened to report the abuse to a nearby police officer. Fritz also admits he moved to Colorado after the accusation, although he contends that he did not do so for the purpose of evading arrest. In addition, the State presented evidence that Fritz left the scene of the party by taking off in his vehicle "as fast as he could" and also that Fritz only left for Colorado after attending an initial hearing in juvenile court relating to the subject victim, despite having no place to live for weeks upon his arrival in Colorado. We conclude that a reasonable jury could infer from this evidence that Fritz had a consciousness of guilt and fled because he feared being arrested; accordingly, the district court did not abuse its discretion in giving the flight instruction.

Lastly, the district court did not commit reversible error in precluding testimony related to S.R.'s alleged prior false accusations. The decision to admit or exclude evidence is within the sound discretion of the district court and will not be reversed absent manifest error. *Ledbetter*, 122 Nev. at 259, 129 P.3d at 677. It is also within the trial court's discretion to admit or exclude evidence of a victim's prior false allegations. *Abbott v. State*, 122 Nev. 715, 732, 138 P.3d 462, 473 (2006); *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (citing *Greene v. State*, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997)).

In sexual assault cases, "NRS 50.090 [Nevada's rape shield statute] does not bar the cross examination of a complaining witness about prior false accusations. . . . and if the witness denies making the allegations, counsel may introduce extrinsic evidence to prove that, in the

past, fabricated charges were made." *Miller v. State*, 105 Nev. 497, 501, 779 P.2d 87, 89 (1989). However, if a defendant intends to cross-examine the complaining witness about a prior false allegation of sexual assault, the defendant must first file notice of his intent. *Id.* at 501, 779 P.2d at 90. Then, the court must conduct a hearing outside the presence of the jury, where the defendant must establish, by a preponderance of the evidence: (1) the accusation(s) were in fact made; (2) the accusation(s) were in fact false; and (3) the evidence is more probative than prejudicial. *Id.* Moreover, there must be an adequate showing that the prior allegations were false before admitting them; "proof of falsity must be more than a bare, unsupported opinion that the complaining witness is lying[;] . . . false allegations require some independent factual basis of falsity in order to be admissible in evidence." *Abbott v. State*, 122 Nev. 715, 734, 138 P.3d 462, 474-75 (2006).

By its plain language, NRS 50.090 and *Miller* relate to the testimony of a "complaining witness." Fritz therefore contends that *Miller* and NRS 50.090 do not apply to this case because S.R. was not the complaining witness. Contradictorily, Fritz then argues that the district court erred under the requirements of *Miller*. In opposition, the State contends that *Miller* and NRS 50.090 should apply to this case.

We need not determine whether *Miller* governs this case. Even if we were to assume that *Miller* and NRS 50.090 apply, Fritz admits that he did not provide the advance notice required by *Miller*. He argues that such notice was not required because the State already knew that he might attack S.R.'s alleged prior false allegation because the allegation came up at the *Petrocelli* hearing. However, even under *Miller*, Fritz's

argument is unavailing because the purpose of *Miller* notice is not merely to apprise the State of his intention, but also to allow the district court the opportunity to hold a hearing outside the presence of the jury to determine whether the allegation was truly made, whether the allegation was false, and whether the evidence relating to the allegation is more probative than prejudicial. *Miller*, 105 Nev. at 502, 779 P.2d at 90. Here, the district court was never afforded this opportunity because Fritz failed to give the notice that would have suggested the need for such a hearing. Consequently, even if *Miller* might have applied to S.R.'s testimony in this case, Fritz failed to comply with its requirements.

Furthermore, even if a *Miller* hearing had been held, the only evidence that Fritz cites that indicates either that S.R.'s prior allegation had actually been made, or that it was false, is his assertion that charges were never previously filed against Fritz and that S.R. appears to have recanted. But asserting a negative proposition -- that no charges were ever filed -- is not evidence, but rather the lack of evidence, and we cannot conclude from this assertion alone that, had the district court conducted a *Miller* hearing, it would necessarily have concluded either that S.R. had made a prior accusation, that the prior accusation was false, or that the evidence relating to the allegation would have been more probative than prejudicial. *See Miller*, 105 Nev. at 502-03, 779 P.2d at 90-91.

Moreover, preclusion of this evidence (or lack of evidence) did not infringe Fritz's right to confront his accusers. *See Summit v. State*, 101 Nev. 159, 163, 697 P.2d 1374, 1377 (1985) (citing *State v. Howard*, 426 A.2d 457, 461 (N.H. 1981)) (in balancing a defendant's right to confront witnesses against him and a complaining witness's right to protection

under the rape shield statute, upon defendant's motion, giving him the opportunity to demonstrate that the probative value outweighs its prejudicial effect provides a proper means of deciding whether such evidence should be admitted). Therefore, even if Fritz is correct and *Miller* applies, he failed to comply with its requirements and cannot now complain.

On the other hand, if *Miller* and NRS 50.090 do not apply to S.R.'s testimony because she was not a "complaining witness," then his objection would be governed by the general rules that apply to the examination of all witnesses. Under those rules, a witness's credibility may be attacked by any party. NRS 50.075. Additionally, specific instances of a witness's conduct may be inquired into on cross-examination, but may not be proved by extrinsic evidence, subject to the general limitations upon relevant evidence. NRS 50.085.

Here, if it is true that S.R. previously made a false allegation against another perpetrator, that false allegation would have been relevant to her credibility. Although Fritz could not have proven the existence of a prior false allegation through extrinsic evidence, he was entitled to investigate through cross-examination whether S.R. had ever made a prior false allegation. Thus, assuming that NRS 50.090 and *Miller* would not have applied to S.R.'s testimony, the district court erred under NRS 50.085 by precluding Fritz from asking S.R. about her alleged prior false accusation on cross examination.

Nonetheless, we conclude that any error was harmless beyond a reasonable doubt in this case because the evidence of Fritz's guilt was overwhelming and did not depend upon S.R.'s testimony. Even if S.R.'s

testimony were deemed incredible or disregarded in its entirety, Fritz offers no reason why the testimony of the actual victim in this case would not have sufficed to support his conviction apart from any error relating to S.R.'s testimony. *See Hutchins v. State*, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) ("this court has long ago determined that the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction").

We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Jessie Elizabeth Walsh, District Judge
Brent D. Percival
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk