IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL ALFRED BOUTEILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36741

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vs.
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No. 36742

FILED

JAN 31 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals[1] from judgments of conviction, pursuant to a jury trial, of one count of sexual assault and five counts of lewdness with a child under fourteen years of age. On the sexual assault count, the district court sentenced appellant, Paul Alfred Bouteiller, to life imprisonment with the possibility of parole after twenty years. On the five lewdness counts, the district court sentenced Bouteiller to consecutive prison terms totaling twenty to fifty years.

At Bouteiller's first trial, the State charged him with four counts of sexual assault, and he was convicted of one count. Bouteiller appealed and this court reversed and remanded the case.[2] In the instant case, the district court joined the remanded sexual assault count with the

[1]Two separate judgments of conviction were filed after a single jury trial.

[2]Boutellier v. State, Docket No. 31835 (Order of Reversal and Remand, December 14, 1999).

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five additional counts of lewdness with a child under fourteen years of age.

Bouteiller challenges the admission of prior bad act evidence, the joinder of the sexual assault and lewdness counts, and the sufficiency of the evidence to support one of the lewdness counts. Bouteiller also alleges prosecutorial vindictiveness, a statute of limitations violation on four of the five lewdness counts, and improper motives on the part of the district court in sentencing him. We conclude his arguments lack merit, and therefore, affirm the judgment of conviction.

Prior bad act evidence

In Richmond v. State,[3] this court determined that Braunstein v. State is to be applied to cases on direct appeal. Braunstein requires the admissibility of prior bad act evidence in prosecutions involving sexual misconduct to be analyzed by the standard set forth in NRS 48.045(2).[4] The district court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference.[5] NRS 48.045(2) contains the general rule for admitting prior bad act evidence.[6] Prior bad act evidence is admissible if: "(1) the

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[3]118 Nev. ___, 59 P.3d 1249 (2002).

[4]118 Nev. ___, 40 P.3d 413 (2002).

[5]See Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

[6]NRS 48.045(2) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

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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."[7]

The trial court held a Petrocelli[8] hearing at which Bouteiller's twenty-seven-year-old biological daughter and her friend both alleged Bouteiller committed acts of sexual assault and lewdness against them in the early 1980s when they were under fourteen years of age. Although the alleged prior bad acts were remote in time, we have held that proximity in time between the prior bad acts and the charged offense goes to the weight of the evidence and "does not destroy admissibility."[9] The district court determined that this testimonial evidence: (1) was relevant to prove intent, identity, and modus operandi; (2) was strikingly similar to the present victim's testimony on the charges in the instant case; (3) was clear and convincing; and (4) the probative value of the evidence substantially outweighed the prejudicial effect.

We perceive no error in the district court's decision to admit the testimony of Bouteiller's adult daughter and her friend.[10] In view of

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opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

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

[9]Findley v. State, 94 Nev. 212, 214, 577 P.2d 867, 868 (1978), overruled on other grounds by Braunstein, 118 Nev. at ___, 40 P.3d at 413.

[10]The dissenting justice states that our recent decision in Braunstein compels reversal in this case. 118 Nev. ____, 40 P.3d 413. The decision in Braunstein is consistent with the proper admission of the evidence of prior bad acts. The district court in this case determined that the evidence of

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Bouteiller's testimony admitting that he touched his step-daughter, but that she was mistaken about his sexual intent, the evidence of his sexual activity with his older daughter and her friend was clearly admissible under NRS 48.045(2) to show absence of mistake or accident and intent.

Joinder of offenses

In Honeycutt v. State, this court stated "'[t]he decision to sever is left to the discretion of the trial court, and an appellant has the "heavy burden" of showing that the court abused its discretion.'"[11] Joinder of offenses is proper when the offenses charged are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan."[12] Acts occurring at different times and in different places, but occurring under similar circumstances and with the same modus operandi, can be part of a common scheme or plan.[13] The joinder of charges is reversible only if the simultaneous trial of the offenses renders the trial fundamentally unfair so as to be a violation of due process.[14] That is not the case here.

The sexual assault count and the lewdness counts involved sexual abuse of the same victim within a short period of time and,

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prior bad acts was relevant under the standard in NRS 48.045(2), which is the standard that Braunstein recognizes on the issue of relevance. Id. at ____, 40 P.3d at 418.

[11]118 Nev. ___, ___, 56 P.3d 362, 367 (2002) (quoting Middleton v. State, 114 Nev. 1089,1108, 968 P.2d 296, 309 (1998)).

[12]NRS 173.115(2).

[13]See Shannon v. State, 105 Nev. 782, 786, 783 P.2d 942, 944 (1989).

[14]Honeycutt, 118 at ___, 56 P.3d at 367.

therefore, constituted part of a common scheme or plan. Additionally, the evidence on the remanded sexual assault count would have also been admissible in a separate trial on the lewdness counts, to prove intent and common plan or scheme. Consequently, joinder was proper.

Bouteiller charges that adding the additional counts after the first trial constitutes vindictive prosecution. There is no such evidence. On the contrary, the State contends that after the first trial it received significant additional evidence that justified filing the lewdness charges. The State learned for the first time that Bouteiller previously committed acts of lewdness with his adult daughter and her friend when they were minors. The district court properly denied Bouteiller's motion to dismiss counts II-VI for prosecutorial vindictiveness. [15]

Sufficiency of evidence

On appeal, Bouteiller challenges the sufficiency of the evidence on count VI, lewdness with a child under the age of fourteen years. Count VI alleged that Bouteiller, on one or more occasions, masturbated in front of the victim.

NRS 201.230 provides, in pertinent part, that masturbating in front of a child constitutes lewdness when a person "willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years." At trial, the victim testified as follows:

Q: Did [Bouteiller] ever ask you to touch a part

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[15]See United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir. 1982) (noting that when a prosecutor adds charges as a result of a "continuing investigation, there is no realistic likelihood of prosecutorial abuse") (citations omitted).

of his body with your hands in a way that made you feel uncomfortable?

A: I think once.

Q: Describe that.

A: We had been laying on the bed, and he was masturbating himself, and he asked me to help him.

Q: What did he have you do?

A: He had me grab his penis and rub it back and forth.

Q: Now, when these kinds of things happened, where [Bouteiller's] penis was out where you could see it, did it ever change physically?

A: Yes.

Q: Describe how it was.

A: It became erect.

Q: Did you ever see anything come out of his penis?

A: Yes.

Q: Describe that.

A: It was semen.

Based on this testimony, we conclude there was sufficient evidence to convict Bouteiller on count VI.[16]

Criminal statute of limitations

For the first time on appeal, Bouteiller raises a statute of limitations defense and asks this court to reverse his convictions on four of the five lewdness charges. Because Bouteiller failed to raise this issue

[16]See Townsend v. State, 103 Nev. 113, 120-21, 734 P.2d 705, 709-10 (1987).

below, he waived this defense, and we will not consider it now.[17]

Sentencing

Bouteiller alleges the district court based its increased sentence in the second trial on improper motives. We disagree. After the second trial, Bouteiller faced more time in prison than he did after the first trial because he was convicted of five additional counts of lewdness. At sentencing, the district court explained that it found Bouteiller to be a danger to the community as a sex offender. Therefore, Bouteiller's allegations of improper motives in the sentencing are without foundation. Accordingly we,

ORDER the judgment of conviction AFFIRMED.

Shearing, J.

Becker, J.

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[17]See Hubbard v. State, 110 Nev. 671, 677, 877 P.2d 519, 522 (1994). Bouteiller requests that we reconsider our 1994 Hubbard decision and conclude that a statute of limitations violation is not waivable. We have already reconsidered Hubbard once before and have affirmed the decision. We decline to review the issue again. See Hubbard v. State, 112 Nev. 946, 920 P.2d 991 (1996); see also Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997).

ROSE, J., dissenting:

While I have registered my dissent regarding using prior bad sexual acts as evidence to show intent to commit a subsequent sexual crime, I must abide by the decision of this court to do so. However, even recognizing our recent decisions, I find two things wrong with the convictions in this instance.

First, the district court specifically ruled that the jury could not consider the prior bad sexual acts to establish intent and instructed the jury accordingly, yet the majority now states that the jury could have considered such evidence to show intent despite the instruction to the contrary. Second, while we said in Braunstein v. State[1] that prior bad sexual acts could not be admitted to show Braunstein's aberrant and abnormal sexual behavior, the majority permits Bouteiller's prior bad sexual acts to come in under other exceptions and then lets stand the district court's instruction permitting the jury to consider such evidence to establish "sexually aberrant behavior with children."

The majority is permitting exactly what we said should not happen in Braunstein—allowing prior bad sexual acts to be admitted into evidence while expressly permitting the jury to consider them to show the defendant committed the crime because of his prior sexually aberrant behavior. Moreover, the majority overlooks the fact that in State v. Richmond,[2] we recently concluded that an instruction that allowed the jury to consider such evidence to establish that the defendant exhibited

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[1]118 Nev. ___, ___, 40 P.3d 413, 417 (2002).

[2]118 Nev. ___, ___, ___ P.3d ___ (Adv. Op. No. 94, December 27, 2002).

sexually aberrant behavior was error and directed district courts to cease giving such an instruction. It is one thing to justify the receipt of evidence under a different theory; it is quite another to instruct the jury that it can consider such evidence for an improper purpose.

After the Petrocelli[3] hearing, the district court specifically ruled that the prior bad act evidence was not admissible to show intent under NRS 48.045(2), but ruled that it was admissible to show commonality and modus operandi. The district court eliminated "identity" from the prior bad act jury instruction, but specifically instructed the jury that it could consider the prior bad act evidence to demonstrate whether the similarities between the incidents involving Bouteiller's step-daughter and the prior acts involving his adult daughter and her friend "evince a commonality or modus operandi demonstrating a specific emotional propensity for sexual aberration with children." Although I recommend that we accept the district court's determination that the prior bad sexual act evidence is not admissible to show intent or identity, I conclude that even if the evidence is admissible to show intent, this case should be remanded for a new trial with instructions properly stating that the evidence can be considered to show intent, but eliminating the "sexual aberration" language.

Furthermore, I do not think that this court should uphold the use of prior bad sexual acts evidence in this case to show a common plan or scheme, which is what the State argues the district court meant when it stated "commonality or modus operandi" in the instruction. The commonality language in the instruction was clearly to demonstrate

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

sexual aberration, which runs afoul of our Braunstein decision. Additionally, the commonality and modus operandi clause does not directly convey the concept of a common plan or scheme; and with such a specific reference, it is difficult to conclude that the jury thought the commonality language really meant plan or scheme.

Even assuming the jury concluded that the commonality clause really meant common plan or scheme, I conclude that the common plan or scheme exception is inapplicable here because the evidence does not tend to prove that Bouteiller had a preconceived plan to sexually abuse his step-daughter.[4] After the investigation into the step-daughter's allegations, Bouteiller's adult daughter came forward and stated that her father also abused her when she was a child; however, she admitted that her memory of the things to which she was testifying was bad. I object to the use of such evidence to establish a common plan or scheme when the victim of the prior bad acts admits that her memory of the events is poor and when the acts occurred two decades earlier.[5]

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[4]See Cirillo v. State, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980) (observing that evidence of a common plan or scheme must tend to prove the defendant's commission of the charged crime by showing that the defendant planned to commit it); Nester v. State, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959) (explaining that a common plan or scheme means that "one act or one plan or scheme might involve the commission of two or more crimes under circumstances that would make it impossible to prove one without proving all.").

[5]See Walker v. State, 116 Nev. 442, 997 P.2d 803, 807 (2000) (concluding that events that were between six and ten years old were clearly remote in time, and thus less relevant); McMichael v. State, 94 Nev. 184, 190, 577 P.2d 398, 401 (1978) (observing that other act evidence "should be received with extreme caution, and if its relevancy is not clear, the evidence should be excluded.").

Bouteiller also argues that adding five charges of lewdness with a child after this court reversed the case was vindictive prosecution. I agree with the majority that it is not clear whether the additional charges were added out of vindictiveness. However, I conclude that the acts of the district attorney and the district court, when viewed together, show institutional conduct that resulted in an unfair sentence for the appellant.

The sentence of sexual assault of a child under fourteen years of age is life with parole possibility only after twenty years have been served. The five lewdness counts were each punished with terms of four to ten years. By running the sentences consecutively, Bouteiller is not eligible for parole until he has served forty years. In effect, the sentence is life without the possibility of parole, which I find excessive. Indeed, the sentence imposed by the district court was the harshest possible and not even requested by the Department of Parole and Probation. Perhaps the district court was improperly influenced by the prior bad act evidence.[6]

This Court has long had a policy that we will not review a sentence as long as it is legally possible to assess and does not amount to cruel and unusual punishment.[7] However, I would modify the sentence in this case and have the five convictions for lewdness with a minor run concurrent with the sexual assault conviction. Under such a modified

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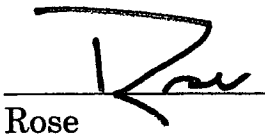
[6]See Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (observing that a district court has discretion to consider prior uncharged crimes at sentencing, cannot punish a defendant for those crimes).

[7]See Tanksley v. State, 113 Nev. 997, 946 P.2d 148 (1997); Sims v. State, 107 Nev. 438, 814 P.2d 63 (1991).

sentence, Bouteiller would still have to serve twenty actual years before being eligible for parole.



_____, J.
Rose