IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID ALAN STONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67250

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault against a child under the age of 14 years. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant David Alan Stone contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. We disagree.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And "the victim's testimony alone is sufficient to uphold a conviction" for sexual assault. *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007).

B.M. testified that in 2011, when he was 12 years old, he spent the night at Stone's house over Nevada Day weekend. Stone picked B.M.

up on Thursday evening. That night, Stone took B.M. into his bedroom, gave B.M. a massage, and began touching B.M. all over his body. Stone removed B.M.'s clothing and his own clothing. Stone then performed fellatio on B.M. and later Stone anally penetrated B.M. with his penis. B.M. testified that on Friday night Stone again performed fellatio on B.M. and Stone also tried to get B.M. to perform fellatio on Stone. B.M. further testified that on Friday Stone again anally penetrated B.M. with his penis and, while anally penetrating B.M., Stone masturbated B.M. with his hand and wiped off the ejaculate with a rag. B.M. also testified that before anally penetrating him on Friday, Stone applied Vaseline to Stone's penis. A jar of petroleum jelly and a rag that had a semen stain on it was recovered from a drawer in Stone's headboard. Evidence was presented that B.M. was the majority contributor for the DNA recovered from the rag and Stone could not be excluded as the minority contributor of the DNA recovered from the rag. B.M. testified that he did not want Stone to touch him sexually and he tried to resist Stone.

Based on this evidence, the jury could have found beyond a reasonable doubt that Stone subjected B.M., a child under the age of 14 years, to sexual penetration against his will on two occasions. *See* NRS 200.366(1), (3)(c). We therefore conclude sufficient evidence supports the convictions.

Stone also contends the district court erred by admitting prior bad act evidence because the acts were not established by clear and convincing proof and the probative value of the bad act evidence was substantially outweighed by the danger of unfair prejudice to him.

Evidence of prior bad acts is only admissible when, after conducting a hearing outside the presence of the jury, the court

determines "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." *Chavez v. State*, 125 Nev. 328, 345, 213 P.3d 476, 488 (2009) (internal quotation marks and citation omitted). It is within the district court's discretion to admit prior bad act evidence under NRS 48.045 and we will not reverse the district court's decision absent manifest error. *Id.*

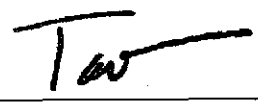
At a hearing prior to trial, J.N., N.B., and C.S. all testified under oath that Stone had previously sexually assaulted them, and the district court found them credible. The district court determined that the prior acts against J.N., N.B., and C.S. were relevant to establish motive, the prior acts were established by clear and convincing evidence, and the probative value of the evidence was not outweighed by the danger of unfair prejudice to Stone. The district court allowed J.N., N.B., and C.S. to testify at trial and instructed the jury on the limited use of their testimony.

We conclude the district court did not abuse its discretion by admitting the prior bad act testimony of J.N., N.B., and C.S. J.N.'s, N.B.'s, and C.S.'s credible testimony, under oath was sufficient to establish the prior acts by clear and convincing evidence. *See Chavez*, 125 Nev. at 345, 213 P.3d at 488 (finding that where evidence of prior abuse was relevant, prior victim testified under oath about prior abuse and appeared to be credible, and district court instructed the jury about the limited use of the prior bad act evidence, there was no manifest error in admitting the prior bad act evidence). The evidence of the prior acts was highly probative and explained to the jury Stone's motive to sexually assault B.M. *See Ledbetter v. State*, 122 Nev. 252, 262-63, 129 P.3d 671, 678-79 (2006). And

here, where there was evidence corroborating B.M.'s allegations of sexual assault, we conclude there was no manifest error in determining the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to Stone. *See id.* Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk