

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLANDO VALLEJOS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37716

NOV 05 2002

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ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT
BY *J. Edwards*
DEPUTY CLERK

Orlando Vallejos appeals from a conviction, pursuant to a jury verdict, of sexual assault of a minor under the age of fourteen. We conclude that Vallejos' arguments are without merit, and accordingly, we affirm the district court's judgment of conviction.

First, Vallejos argues that the district court abused its discretion by admitting prior bad acts evidence that Vallejos sexually assaulted K.T. twenty-four or twenty-five times between 1992 and 1994. Vallejos failed to object to the admission of K.T.'s testimony. Generally, failure to object at trial precludes appellate review.¹ However, this court may address an issue sua sponte for plain error.²

NRS 48.045 prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith."³ However, evidence of other acts may be used as "proof of motive, opportunity, intent, preparation, plan, knowledge,

¹Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000).

²Id. at 666, 6 P.3d at 482-83; see NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

³NRS 48.045(2).

identity or absence of mistake or accident."⁴ For prior acts evidence to be admissible the district court must determine, outside the presence of the jury, 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."⁵

Although K.T.'s testimony amounted to prior bad acts evidence, the district court's admission of the evidence without conducting a Petrocelli⁶ hearing is harmless error.

[T]he trial court's failure to conduct a proper hearing on the record is cause for reversal on appeal unless: (1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence.⁷

Here, K.T. testified that all of the acts occurred within the two-year time period between 1992 and 1994. Additionally, all of the acts occurred under very similar circumstances, where Vallejos would have K.T. sit on his lap while he rubbed and inserted his finger into her vagina. Therefore, the prior acts are relevant, proven by clear and convincing evidence and their probative value is not substantially outweighed by the danger of unfair prejudice. Accordingly, the district court properly

⁴Id.

⁵Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

⁶Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁷Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

admitted K.T.'s testimony under the common scheme or plan, intent and knowledge and absence of mistake or accident exceptions of NRS 48.045(2) to the general rule excluding evidence of prior bad acts.

Second, Vallejos argues that the district court's failure to give a limiting instruction to the jury regarding the use of the prior bad acts at the time the evidence was introduced as required by Tavares v. State⁸ constitutes reversible error. Vallejos cites Tavares for the proposition that the district court should have given a specific jury instruction prior to the admission of the evidence, explaining why the prior bad acts evidence was being admitted, as well as a general instruction at the end of trial reminding the jury of the evidence's limited purpose.

Tavares was decided after Vallejos was tried and sentenced. Since the holding in Tavares only applies prospectively,⁹ Tavares does not apply to the district court's actions here. Therefore, the district court did not err by failing to give the jury a limiting instruction prior to admitting the evidence; however, even if the district court had a duty to give the contemporaneous limiting instruction, there was overwhelming evidence of Vallejos' guilt at trial. In addition, the district court instructed the jury at the close of evidence and prior to jury deliberation as to the limited purposes of the prior bad acts evidence.

Third, Vallejos briefly argues that the district court abused its discretion by admitting W.T.'s testimony of prior acts of sexual abuse committed against her by Vallejos. Vallejos argues that W.T.'s testimony


⁸117 Nev. ___, ___, 30 P.3d 1128, 1132 (2001)

⁹Id. (stating "we conclude that the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence. Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue sua sponte.")

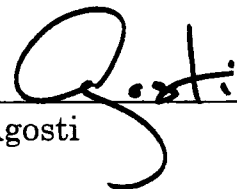
that Vallejos attempted vaginal intercourse with her in his bedroom is substantially different from the acts committed against K.T..

W.T. was six years old at the time of her alleged sexual abuse, the same age as K.T. during the time period that she alleged sexual abuse. Additionally, both girls alleged that Vallejos had them sit on his lap, and both girls alleged that Vallejos penetrated their vaginas. Although W.T.'s allegations of sexual intercourse and oral sex go beyond the allegations made by K.T., the district court did not abuse its discretion in deciding that the acts were relevant for the purposes of intent, motive and absence of mistake or accident, and that the probative nature of the testimony was not substantially outweighed by unfair prejudice.

Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Archie E. Blake, District Judge
Law Office of Kenneth V. Ward
Attorney General
Lyon County District Attorney
Lyon County Clerk