IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER WILLIAM HULL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37953

FILED

JAN 31 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of lewdness with a child under the age of fourteen years and one count of sexual assault. The district court sentenced Hull to two consecutive life terms with the possibility of parole after ten years and twenty years respectively.

The charges against Hull involve accusations made by Hull's eight-year-old biological daughter. Originally, the daughter stated that her step-grandfather was sexually molesting her. She indicated that the molestation included oral copulation and open-mouthed kissing. However, during the preliminary hearing involving the charges against her step-grandfather, she testified that her father had also engaged in similar sexual acts with her. Prior to that disclosure, she told police detectives that her father had never sexually abused her.

Immediately after the preliminary hearing, the daughter and Hull were interviewed by police detectives. During Hull's interview, he disclosed to police that he had a prior conviction for a sexual offense against another daughter from 1991. He denied sexually abusing the victim in this case. Instead, he explained that the victim had "French kissed" him and that he asked her how she knew about that type of kissing. Hull indicated that was when his daughter said the step-

grandfather was molesting her. He indicated he asked her to show him exactly how the step-grandfather kissed her. Hull also admitted to getting an erection while kissing his daughter but indicated he did not ask her to demonstrate the kissing to achieve sexual gratification. Hull denied having his daughter perform oral copulation on him.

The State filed charges and sought to admit evidence of Hull's prior sexual misconduct and of his prior conviction as evidence of Hull's intent and motive and, as res gestae evidence. The State also sought to admit evidence of uncharged sexual acts with other minor girls, but withdrew the request prior to a ruling on its motion to admit the prior bad acts. In arguing the probative value of the prior bad act evidence, the State relied on McMichael v. State,[1] for the proposition that the "evidence of sexual aberration is relevant and its probative value outweighs its prejudicial effect." Hull opposed the motion.

The district court held a Petrocelli hearing on the admission of the prior bad act. Relying on McMichael, the district court concluded that Hull's taped statement regarding his prior sexual conviction relating to his older daughter as well as the judgment of conviction relating to the older daughter were admissible as evidence of Hull's intent and as evidence that Hull's conduct constituted "predatory sexual aberration." Hull made continuing objections to the use of the prior bad acts throughout the course of trial.

The jury was given a limiting instruction regarding the use of the prior sexual conduct. Instruction number 23 stated:

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[1]94 Nev. 184, 577 P.2d 398 (1978).

> Evidence of other crimes, acts or wrongs is not admissible to show that he acted in conformity therewith on a particular occasion.
>
> However, such evidence is admissible for other purposes, such as proof of motive, intent, knowledge, identity, or common scheme or plan, and as evidence that the person possesses a specific emotional propensity for sexual aberration. (Emphasis added)

Following deliberations, the jury found Hull guilty of one count of lewdness with a child under the age of fourteen and one count of sexual assault. Hull filed this appeal.

Hull first contends that the district court erred in admitting prior bad act evidence. Hull asserts that, while the prior bad act was proven by clear and convincing evidence as determined by the district court, the remaining substantive criteria were not met. Specifically, Hull contends that the district court misapplied the third prong of the Tinch v. State[2] test (i.e., that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice). Hull argues that the district court found that the admission of the prior bad act evidence was "more probative than prejudicial," which is not the correct standard of review. Additionally, Hull asks the court to clarify its standard regarding the admission of evidence of sexual aberration. Hull asserts that evidence of sexual aberration is not necessarily always relevant and, when relevant, the prejudicial effect of such evidence may substantially outweigh its probative value. Pursuant to our recent decision in Richmond v. State,[3] we conclude Hull properly preserved his

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[2]113 Nev. 1170, 946 P.2d 1061 (1997).

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

right to object to the admission of the prior acts and, therefore, this case is controlled by our holding in Braunstein v. State.[4]

Hull contends that the evidence was not admissible under Braunstein to show intent because there was little similarity between Hull's prior conviction for a sexual offense (i.e., digital penetration of his then twenty-four-month-old daughter) and the current allegations of sexual misconduct by his eight-year-old daughter (i.e., open-mouth kissing and oral copulation) and that the prior acts were too remote in time.

The State argues the evidence was properly admitted under NRS 48.045(2).[5] The State asserts that Hull put his mental state into issue when he pled not guilty, particularly on the lewdness charge. Hull indicated, through his statements, that he was not seeking sexual gratification when he asked his daughter to demonstrate a "French kiss." Therefore, the State argues, his prior sexual conduct is relevant to proof of intent to seek sexual gratification. Thus, the State argues there is an independent basis for admitting the evidence, as from the McMichael emotional propensity for sexual aberration language. We agree.

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

[5]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, opportunity, intent, preparation, plan, knowledge, identity, or absence mistake or accident.

We review the district court's decision to admit prior bad acts evidence for manifest error.[6] 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.[7] NRS 48.045(2) contains the general rule for admitting prior bad acts evidence. Prior bad acts evidence is admissible if: "(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."[8]

At the time of trial, this court's holdings in McMichael,[9] Findley v. State,[10] and Keeney v. State[11] controlled the issue of prior bad act evidence used to prove sexual aberration. McMichael concluded that the admission of prior bad acts to demonstrate that a defendant possessed a propensity to sexual aberration was relevant to the defendant's intent in a sex crime prosecution.[12] The court concluded that its decision was a narrow exception to the general rule prohibiting the admission of such evidence as proof of character.[13] The court stated that application of the

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

[7]Id.

[8]Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

[9]94 Nev. at 184, 577 P.2d at 398.

[10]94 Nev. 212, 577 P.2d 867 (1978).

[11]109 Nev. 220, 850 P.2d 311 (1993).

[12]McMichael, 94 Nev. at 189, 577 P.2d at 401.

[13]Id. at 189-90, 577 P.2d at 400-01; see also NRS 48.045.

exception mandated proof of similar offenses by a complaining victim which: (1) were near in time to the principal offense; (2) which did not apply to "mere criminal propensities in general but rather specific sexual proclivities"; and (3) involved sexual aberration.[14] The court went on to state that evidence admitted under the exception should be admitted with "extreme caution," that its relevancy must be clear or, if in doubt, the court must weigh "the probative value of the proffered evidence against the bias or prejudice likely to result."[15]

Following the Petrocelli hearing, the district court concluded that: (1) intent was a substantial factor in this case; (2) the State had proven by clear and convincing evidence that Hull was a sexual offender based upon a certified conviction stemming from the sexual abuse of his older daughter in 1991; (3) under McMichael, Hull's acts against his older daughter constituted predatory sexual aberration; (4) although prejudicial, the testimony involving his older daughter was more probative than prejudicial as it went to the issue of intent, which was one of the key elements that the State had to prove; (5) the State voluntarily limited the field of prior bad acts; and (6) Hull's sexual acts with the younger daughter were not strikingly similar to the acts that allegedly occurred with the older daughter but were within the general range of sexual activities Hull previously admitted to committing on female children of various ages. Thus, the district court concluded that the evidence was relevent to show both intent and an emotional propensity for sexual aberration.

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[14]Id. at 190, 577 P.2d at 401-02.

[15]Id. at 190, 577 P.2d at 401-02 (internal citations omitted).

The failure of the district court to correctly articulate the correct prejudice versus probative standard is not necessarily grounds for reversal. The district court's failure to consider the factors enunciated in Petrocelli and Tinch is not reversible error if this court can determine from the record that the evidence is admissible.[16] The record indicates that the district court considered the factors enunciated in Petrocelli.[17] The acts were admissible under McMichael and Finley. However, they were also admissible under a conventional NRS 48.045(2) analysis under Braunstein. We conclude the district court did not err in finding the acts admissible as to intent, in light of Hull's denial that his actions were prompted by sexual gratification. The record demonstrates that the probative value was not substantially outweighed by the danger of unfair prejudice.

Hull next contends that the district court erred in instructing the jury regarding evidence of the prior bad acts. Hull argues that the inclusion of language stating that evidence of prior bad acts is admissible for other purposes and "as evidence that the person possesses a specific emotional propensity for sexual aberration" removes from the State the burden of proving intent. Hull contends that the inclusion of such language allowed the jury to conclude that, if Hull had the propensity to commit a sexual crime against one child, he therefore had the propensity to commit a sexual, though dissimilar act, against another child. Hull

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[16]See King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000).

[17]See also Keeney, 109 Nev. at 220, 850 P.2d at 311.

asserts that the language "propensity for sexual aberration" is synonymous with "in conformity therewith"[18] and, therefore, prohibited.

The State argues that the disputed evidence was admissible to prove Hull's mental state and that the instruction given by the district court merely acknowledges the allowable use of the evidence as well as its prohibited use.

"In general, the district court does not err by refusing to give a jury instruction that is substantially covered by another instruction provided to the jury. Further, a jury instruction is proper where it merely states the law rather than instructs the jury to find a presumed fact against the accused."[19] Even where it was error to admit a particular jury instruction, such error is harmless where sufficient evidence (i.e., beyond a reasonable doubt) is adduced of defendant's guilt.[20]

This court's decision in Bolin v. State[21] relied entirely on McMichael and its progeny for the proposition that a jury may properly be instructed on the consideration of prior bad acts as evidence of predatory sexual aberration. Under the McMichael standard, applicable at the time of Hull's trial, jury instruction number 23 was proper. However, as Braunstein is controlling, we still must consider whether giving of the Bolin instruction constitutes reversible error. We conclude that the error

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[18]See NRS 48.045(2).

[19]Bolin v. State, 114 Nev. 503, 529, 960 P.2d 784, 800-01 (1998) (internal citations omitted).

[20]Guy v. State, 108 Nev. 770, 777-78, 839 P.2d 578, 583 (1992).

[21]114 Nev. at 529, 960 P.2d at 801, cert. denied, 525 U.S. 1179 (1999).

was harmless because the jury could still have considered the evidence as to the issue of intent. Thus, we conclude beyond a reasonable doubt that deletion of the Bolin language would not have resulted in a different verdict.[22]

Lastly, Hull contends that substantial evidence was not adduced at trial to support his convictions. Specifically, in conjunction with his argument that the admission of the prior bad act was error, Hull asserts that the evidence adduced at trial was tainted, and without the bad act evidence, there was insufficient evidence to support his convictions. In response, the State contends that the uncorroborated testimony of the victim is sufficient evidence of the charged offenses.[23] We agree.

"When the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt."'"[24] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness

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[22]See Guy, 108 Nev. at 777-78, 839 P.2d at 583.

[23]Citing Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

[24]Hutchins, 110 Nev. at 107-08, 867 P.2d at 1139 (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

testimony and other trial evidence.[25] Finally, circumstantial evidence alone may sustain a conviction.[26]

The State correctly states that the uncorroborated testimony of the victim of a sexual offense alone is sufficient to sustain a conviction for the charged offenses.[27] A reasonable jury, upon hearing the daughter's testimony, could find the essential elements of the crimes charged beyond a reasonable doubt. Therefore, we conclude that substantial evidence was adduced at trial to support Hull's convictions.

Having considered Hull's contentions and finding them to be without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Becker

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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[25]Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

[26]McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

[27]See Hutchins, 110 Nev. at 109, 867 P.2d at 1140.

ROSE, J., dissenting:

I disagree with the majority's conclusion that prior bad acts evidence was admissible to demonstrate Hull's intent. In light of our decision in Braunstein v. State,[1] I conclude that it was improper for the district court to admit this evidence thereby allowing the State to prove intent by arguing Hull's sexual aberration and his penchant for sexual relations with his daughters. Moreover, I conclude that the evidence is insufficient to show intent because Hull's conduct with his older daughter is not sufficiently similar to the alleged conduct with his younger daughter and occurred over eight years ago.[2] Additionally, I conclude that the admission of the prior bad acts evidence was more prejudicial than probative given that the evidence was not essential, as Hull had admitted to the police that he was sexually aroused by the kiss.[3]

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[1]118 Nev. ____, ____, 40 P.3d 413, 417 (2002) (concluding that evidence showing an accused possesses a propensity for sexual aberration is not relevant to the accused's intent).

[2]See id. (observing that this court has generally held inadmissible prior acts that are remote in time and involve conduct different from the charged conduct); see also Walker v. State, 116 Nev. 442, 447, 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" to the defendant's intent).

[3]See Walker, 116 Nev. at 447 (observing that prior bad acts may unduly influence the jury resulting in a conviction based on the accused's propensity to commit a crime rather than on the State's ability to prove all the elements of the crime, and thus, such evidence should only be admitted when its probative value substantially outweighs the danger of prejudice); Cf McKenna v. State, 101 Nev. 338, 346-347, 705 P.2d 614, 620 (1985) (concluding that the trial court did not abuse its discretion in refusing to permit a witness to testify when such testimony would be cumulative because two witnesses had already given similar testimony).

Even if the prior bad acts evidence was properly admitted, I conclude that the district court erred in instructing the jury that it could consider the evidence that Hull "possesses a specific emotional propensity for sexual aberration." This instruction permits the jury to do precisely what we stated was improper in Braunstein—allowing the jury to consider the prior bad acts as evidence that Hull possesses a propensity for sexual aberration, and thus, had the intent to commit the charged crime in this instance. It is one thing to justify the receipt of evidence under a different theory; it is quite another thing to instruct the jury that it can consider such evidence for an improper purpose. Indeed, in State v. Richmond,[4] we recently concluded that giving this identical instruction was error and directed district courts to cease giving it. Thus, I conclude that the use of such an instruction in this case was reversible error.

_____, J.
Rose

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[4]118 Nev. ___, ___, ___ P.3d ___ (Adv. Op. No. 94, December 27, 2002).