IN THE SUPREME COURT OF THE STATE OF NEVADA

RENARD T. POLK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39457

FILED

AUG 25 2003

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

ORDER OF AFFIRMANCE WITH LIMITED REMAND FOR CORRECTION OF JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction pursuant to a jury verdict of sexual assault on a minor under fourteen years of age and attempted sexual assault on a minor under fourteen years of age. On appeal, Polk makes the following arguments: (1) the district court committed reversible error by allowing Polk's testimony on cross-examination regarding prior drug use; and (2) the district court abused its discretion by denying Polk's motion for mistrial after the State asked Polk about his failure to raise an insanity defense during cross-examination.

FACTS

Polk lived in Las Vegas with his four younger siblings and his grandmother. In January 1999, eighteen-year-old Polk attempted to anally penetrate his twelve-year-old sister. Polk managed to penetrate her enough to cause her pain. Polk later apologized for his actions. His victim told only her ten-year-old sister what took place.

Several months later, Polk's ten-year-old sister remained at home with Polk while her two older sisters went to the store. Polk forced his sister into his room, which was across the hall from his ailing grandmother. Once inside his room, Polk pushed her to the floor on her hands and knees and anally penetrated her. When she asked him to stop, Polk decided instead to put a pillow over her head to cover her mouth.

The victim told her older sisters what happened, as both sisters were aware Polk had molested the victim before.

The children's aunt called the police, but Polk fled before police arrived. Las Vegas Police Department Detective David Dunn investigated the assault by interviewing all three sisters. The sexual abuse investigative team examined both victims but at separate times. Dunn submitted the case to the district attorney several days later.

Several months after Polk's attack, Officer Newton responded to a call from an individual wanting to surrender. Polk, the caller, incorrectly thought there was an outstanding sexual assault warrant for his arrest. Polk told Newton he was ashamed of sexually assaulting his sister six months earlier and wanted to surrender. Newton took Polk into custody.

Although there was no outstanding warrant for Polk, Detective Timothy Moniot interviewed Polk based on a brief narrative in the police database. The interview took place in the office of a juvenile hall employee. Moniot provided Polk a card with Miranda rights printed on it; Polk signed a form acknowledging he received his Miranda warnings.

Next, Moniot recorded an interview with Polk regarding the sexual assaults. During the interview, Polk admitted raping his little sister on several occasions since 1996. Specifically, Polk told Moniot he "did her [his sister] in the booty." Polk stated he was "high and drunk" when the rapes occurred. He also admitted attempting to anally penetrate his other younger sister as well. Police released Polk after the interview because there was no outstanding arrest warrant. The record is silent as to why police failed to arrest Polk at that time.

The State filed an amended complaint charging Polk with three counts of sexual assault with a minor under fourteen years of age. Polk waived his preliminary hearing and negotiated a plea agreement with the State. At the arraignment, however, Polk changed his mind and wanted to proceed to trial. The district court ordered Polk to undergo psychological evaluation to determine competency. Pursuant to NRS 178.425, the district court remanded Polk to a secure mental health facility. Doctors found Polk competent to stand trial, so the district court set the matter for trial.

The Legislature statutorily prohibited Polk from pleading not guilty by reason of insanity when initially charged. When this court found that prohibition unconstitutional, however, Polk's counsel asked for and was granted a continuance to prepare an insanity defense. At trial, Polk pleaded not guilty without raising insanity as a defense.

In his opening statement, Polk's counsel raised concern over Polk's mental stability. Polk was the defense's only witness. Throughout direct examination, Polk's counsel questioned Polk's mental health. One of the first questions Polk's counsel asked was, "I know you said you were a little mentally unstable, but how is it you wouldn't know that?" Notably, Polk had not testified as to his mental health prior to that question.

On cross-examination, the State asked Polk about his discussions with the court-appointed doctor, Dr. Paglini. Polk's counsel did not object to these questions. The State continued questioning Polk about his mental stability and suicidal thoughts. The State also attempted to clarify Polk's defense.

Polk's counsel did not contemporaneously object to the State's questioning, except for objecting to the phrasing of the question. Polk's

counsel did, however, move for a mistrial outside the presence of the jury at the conclusion of the trial the following day. The district court denied the motion, finding Polk opened the door during direct examination regarding his mental health.

After a three-day trial, the jury returned guilty verdicts on one count of attempted sexual assault with a minor under fourteen and one count of sexual assault with a minor under fourteen. The jury found Polk not guilty on the third count of sexual assault with a minor under fourteen. This appeal followed.

DISCUSSION

1. Prior drug use testimony

Polk argues the State improperly inquired about past drug use during Polk's cross-examination. Further, Polk contends his testimony about illicit drug use tainted his ability to receive a fair trial. We conclude Polk's argument lacks merit.

Generally, character evidence is inadmissible if introduced to show the defendant acted in a manner consistent with the character trait.[1] An exception to the rule allows the prosecution to offer rebuttal evidence to character evidence introduced by the accused.[2]

The State argues the drug use testimony was relevant because defense counsel "opened the door" by stating Polk lacked education and was mentally unstable. The inference is that Polk's voluntary confession is unreliable due to mental instability; therefore, testimony regarding

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[1]NRS 48.045(1).

[2]NRS 48.045(1)(a).

drug use is relevant to rebut such a claim. We agree and conclude the district court properly admitted the State's rebuttal evidence.

In addition, failure to raise a contemporaneous objection at trial normally precludes appellate review.[3] When the issue involves admission of prior bad act evidence, however, the burden is not solely on the defendant.[4] The State has a duty to ask for a limiting instruction regarding the use of prior bad act evidence.[5] "Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue sua sponte."[6]

In Tavares v. State, we eliminated plain error review for the absence of a limiting instruction.[7] Instead, we review a case "for error under NRS 178.598, which provides that '[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'"[8] We further concluded that failure to give a limiting instruction regarding prior bad act evidence was a nonconstitutional error.[9] Therefore, the test "is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[10] Notably, we held that because "of the

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[3]McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[4]Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

[5]Id.

[6]Id.

[7]Id.

[8]Id. at 731-32, 30 P.3d at 1132.

[9]Id. at 732, 30 P.3d at 1132.

[10]Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

potentially highly prejudicial nature of uncharged bad act evidence . . . it is likely that cases involving the absence of a limiting instruction . . . will not constitute harmless error."[11]

The primary reason prior bad acts are generally inadmissible is that the jury might be prejudiced by the evidence and convict the defendant simply "because it believes the accused is a bad person."[12] Evidence of past drug use, however, seems unlikely to prejudice a jury faced with hearing a voluntary confession by an older brother who anally rapes his younger sisters.

Here, there is overwhelming evidence of Polk's guilt; thus, his testimony regarding past drug use did not impact the jury's verdict. First, Polk called the police to turn himself in. He gave a voluntary, detailed, and recorded statement to police regarding the anal rape of one sister and the attempted anal rape of his other sister. Polk's confession is supported by the testimony of the two victims, his own sisters.

"The Constitution guarantees a fair trial, not necessarily a perfect one."[13] The issue of guilt in this case is not close because overwhelming evidence supported the jury's verdict. Thus, we conclude the lack of a limiting instruction was harmless error.

2. Insanity defense

Polk contends the State impermissibly shifted the burden of proof when it inquired about an insanity defense during cross-

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[11]Id. at 732-33, 30 P.3d at 1133.

[12]Id. at 730, 30 P.3d at 1131.

[13]Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (citing Lutwak v. United States, 344 U.S. 604, 619 (1953)).

examination. Although Polk's counsel did not object contemporaneously, he moved for a mistrial the following day. In addition, Polk argues the inquiry violated attorney-client privilege. We conclude the State improperly questioned Polk about an insanity defense; however, we hold the error was harmless.

Despite failing to object, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[14] Plain error affects a "defendant's substantial rights, if the error either: '(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.'"[15] "'To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record.'"[16]

A. Prejudicial impact

When the trial is examined as a whole, two things become clear. First, the defense, while not claiming Polk was insane, attempted to portray Polk as mentally unstable. Second, overwhelming evidence supports the jury's verdict that Polk anally raped one of his sisters and attempted to anally rape another sister.

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[14]NRS 178.602, quoted in Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

[15]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

[16]Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1256 (2002) (quoting Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), cert. denied, 532 U.S. 929 (2001)).

Polk's mental instability defense began with his counsel's opening statement. Polk's counsel encouraged the jury to examine Polk closely. He told the jury, "Mr. Polk looks fine . . . but he's not. He's not fine. You will learn he has some problems. Not to the level of he doesn't understand what's happening here, but he has some great difficulties." Polk's counsel concluded his opening statement by stating, "And again, I want to reiterate that although he may look very straight forward to you, he doesn't have to testify, but if he does, you'll see that he's not quite altogether there."

When Polk testified, his counsel almost immediately questioned his mental health. Specifically, Polk's counsel asked, "How is it that you don't know? I know you said you were a little mentally unstable, but how is it you wouldn't know that?" Notably, Polk had not previously testified as to his mental health.

Later, Polk testified on direct examination that "I know I'm not right in the head." Polk's counsel then inquired at length about Polk's mental problems, including hospitalization, suicide attempts, and prescription drug treatment for mental illness.

On cross-examination, the State asked Polk several questions pertaining to an insanity defense. Specifically, the State asked Polk, " You have not entered a not guilty by reason of insanity, is that correct?" After an objection by Polk's counsel asking for clarification only, the State asked Polk, " Did you enter a plea of not guilty by reason of insanity?" Polk answered, "That was my lawyer's choice." Finally, the State repeated its original question by asking, "Have you entered a plea of not guilty by reason of insanity?" As stated previously, this exchange took place

without objection by Polk's counsel. The following day, however, Polk's counsel moved for a mistrial.

The State's response to Polk's mistrial motion was that Polk opened the door for questions about his mental stability on cross-examination. Further, the State argued the questions about Polk's defense did not shift the burden of proof to Polk. We hold the district court did not err in finding that the defense testimony on direct examination allowed for the State's questions on cross-examination.

Moreover, overwhelming evidence supported Polk's guilt. Polk voluntarily called the police to turn himself in and gave a voluntary, detailed, and recorded statement regarding the anal rape and attempted anal rape of his younger sisters.

We hold the State's questions regarding insanity had no impact on the verdict "'when viewed in context of the trial as a whole.'"[17] As stated previously, questions regarding Polk's sanity could do little to prejudice a jury confronted with an adult brother who anally raped his younger sisters.

B. Judicial proceedings

It is impermissible for the State to shift the burden of proof to the defendant through improper questioning about defenses not raised.[18] Such conduct would preclude the defendant from receiving a fair trial and warrant reversal.[19]

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[17]Rowland, 118 Nev. at 38, 39 P.3d at 118 (quoting Libby, 109 Nev. at 911, 859 P.2d at 1054, vacated on other grounds, 516 U.S. 1037 (1996)).

[18]See Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989).

[19]Id.

In the instant case, the State did not shift the burden of proof to Polk. Polk's counsel portrayed Polk as mentally unstable and begged the jury to see "he's not quite altogether there." The State's questions, while improper, did not affect the integrity of the proceedings. The State's questioning did not affect Polk's substantial rights; thus, any error was harmless.

C. Attorney-client privilege

NRS 49.095 states, "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications . . . [b]etween himself . . . and his lawyer." In addition, NRS 49.055 defines a communication as confidential "if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

The attorney-client privilege is a rule of evidence, not a constitutional right.[20] That said, "government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights."[21] Interference violates the Sixth Amendment "only when it substantially prejudices the defendant."[22]

Polk's counsel intimated several times that he intended to plead an insanity defense. First, Polk's counsel asked for a continuance to prepare an insanity defense. Second, Polk's counsel asked for psychiatric records from the court-ordered mental facility. Finally, the continued

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[20]Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985).

[21]Id.

[22]Id.

references to Polk's mental instability at trial suggest the communications were not confidential.

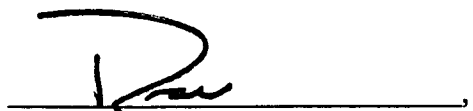
Polk contends the State's inquiries into his failure to plead insanity violated his right to a fair trial because he could not answer the questions without revealing privileged information. We conclude Polk waived the attorney-client privilege regarding his mental instability.

3. Judgment of conviction

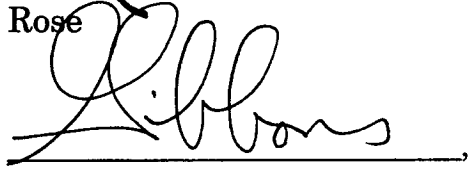
The judgment incorrectly indicates Polk pleaded guilty when, in fact, a jury convicted Polk after a three-day jury trial. Thus, while we affirm the judgment of conviction, it must be remanded and corrected to reflect the jury's guilty verdicts.

Accordingly, we

ORDER this matter AFFIRMED WITH LIMITED REMAND to the district court to correct the judgment to reflect the jury's guilty verdicts.



_____, J.
Rose

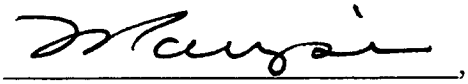


_____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

MAUPIN, J., concurring:

I concur in the result only.

 , J.

Maupin