

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MICHAEL STEINHAUER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40024

FILED

JUN 05 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping and sexual assault. The district court adjudicated appellant David Michael Steinhauer a habitual criminal, sentenced him to life in prison without the possibility of parole, and ordered him to pay various fees and restitution.

Steinhauer contends that evidence of a prior crime he committed, battery with intent to commit sexual assault,¹ was not relevant and was admitted only to show his propensity to commit sexual assault. He also argues that the probative value of the evidence was substantially outweighed by unfair prejudice. He concedes that the prior crime, which he was convicted of pursuant to a guilty plea, was proven by clear and convincing evidence.

Under NRS 48.045(2) and this court's case law, before admitting evidence of other crimes, wrongs, or acts, the district court must conduct a hearing and determine that the other act is relevant to the crime charged, is proven by clear and convincing evidence, and has

¹In its answering brief, the State incorrectly referred to this crime as a "rape."

probative value not substantially outweighed by the danger of unfair prejudice.² The use of uncharged acts is disfavored.³

Prior bad act evidence forces the accused to defend himself against vague and unsubstantiated charges and may result in a conviction because the jury believes the defendant to be a bad person. Thus, using uncharged bad acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal.⁴

The district court's determination to admit or exclude evidence of other acts is within its sound discretion, and this court gives great deference to that determination and will not reverse absent manifest error.⁵

The district court held a pretrial hearing on whether to admit evidence of Steinhauer's prior felony. Ruling from the bench to admit the evidence, the court emphasized the similarity of the prior crime to the charged crime and thus its relevance in establishing identity. The court also found that it was sufficiently proven and its probative value was not substantially outweighed by the danger of unfair prejudice. A later written order set forth the court's finding that the evidence was relevant and admissible in regard to intent, lack of consent of the alleged victim, absence of mistake or accident, and identity.

The similarity between the two crimes was sufficient to make the prior crime relevant to establish identity, and its probative value in regard to identity was not substantially outweighed by the danger of

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

³Braunstein v. State, 118 Nev. ___, ___, 40 P.3d 413, 417 (2002).

⁴Id. (footnote omitted).

⁵Id. at ___, 40 P.3d at 416.

unfair prejudice. But it turned out that Steinhauer did not dispute identity because he testified and admitted to having sex with the victim but claimed that it was consensual. However, at the time of the district court's ruling, neither it nor the State knew that Steinhauer would make this admission. Steinhauer apparently did not reveal his defense strategy until his counsel's opening statement. Also, he apparently did not argue to the district court that the evidence was no longer admissible because identity was not at issue. Therefore, we conclude that the question of whether identity was an improper basis for admitting the evidence was not preserved for appeal.

Moreover, under this court's precedent, evidence of the prior crime was relevant to establish the victim's lack of consent and Steinhauer's intent. In Williams v. State,⁶ this court stated: "The crucial question in determining if a sexual assault has occurred is whether the act is committed without the consent of the victim, and the intent of the accused is relevant to the issue of consent or lack thereof." This court upheld the admission of evidence of Williams's sexual misconduct with other persons where he "admitted committing the act, but claimed to have done so with the victim's consent."⁷

By acknowledging the commission of the act but asserting his innocent intent by claiming consent as a defense, Williams himself placed in issue a necessary element of the offense and it was, therefore, proper for the prosecution to present the challenged evidence, which was relevant on the issue of intent, in order to rebut Williams'

⁶95 Nev. 830, 833, 603 P.2d 694, 697 (1979) (citation omitted).

⁷Id.

testimony on a point material to the establishment of his guilt.⁸

Williams involved presentation of the other act evidence in rebuttal, but the State may present such evidence in its case in chief. We agree with the Delaware Supreme Court, which has held that the prosecution may introduce evidence of a defendant's other acts in its case in chief where the evidence is relevant to an issue or fact that the prosecution must prove as part of its prima facie case, as opposed to rebutting an affirmative defense.⁹ NRS 200.366(1) requires the State to prove, among other things, that sexual penetration occurred "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct." Thus, as Williams recognizes, the victim's lack of consent is "crucial" in proving a prima facie case of sexual assault.

The remaining question is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. As stated above, the standard of review is deferential, and we conclude that there was no manifest error. We also note that the evidence against Steinhauer was overwhelming. Although the victim's testimony that Steinhauer sexually assaulted her was sufficient to support his conviction, a great deal of evidence corroborated that testimony. A medical examination of the victim produced findings consistent with forcible sexual penetration; Steinhauer initially gave police an alibi which turned


⁸Id.

⁹Taylor v. State, 777 A.2d 759, 764-66 (Del. 2001).


out to be false; Steinhauer admitted to a fellow jail inmate that he committed the sexual assault; and Steinhauer asked his roommate to lie about his whereabouts on the night of the sexual assault.

The evidence of Steinhauer's prior crime was relevant to the question of consent, and the district court did not commit manifest error in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰

 J.

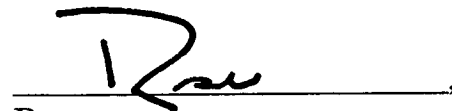
Maupin

 J.

Gibbons

ROSE, J., concurring in the result:

I conclude that the evidence of Steinhauer's prior crime was erroneously admitted. But the error was harmless because the evidence of his guilt in this case was overwhelming. I therefore concur in the result.

 J.

Rose

¹⁰Although Steinhauer has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered his proper person document. We conclude that the relief requested is not warranted.

cc: Hon. Steven R. Kosach, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
David Michael Steinhauer
Washoe District Court Clerk