IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD CARBAUGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40455

FILED

JAN 0 5 2004

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of lewdness with and one count of sexual assault of a child under 14 years of age.

The State charged appellant Harold Carbaugh with six counts of lewdness with and one count of sexual assault of a child under 14 years of age. The charges arose from acts perpetrated by appellant against his great-grandniece, who was then between six and seven years old. A jury found appellant guilty of all of the charges. The district court subsequently sentenced appellant to six concurrent terms of life imprisonment with the possibility of parole in ten years for the lewdness counts, and a consecutive term of life imprisonment with the possibility of parole in 20 years for the sexual assault.

Evidence supporting appellant's convictions at trial included testimony by the victim, her mother and grandmother, and a pediatric emergency room physician with extensive training in sexual abuse. The victim testified that appellant touched her vaginal area and buttocks on more than three occasions during the approximately six months that he lived with her family. She also said that on the night of the sexual assault, appellant reached under her panties, causing her pain, and also

squeezed her buttocks. She additionally reported that she experienced painful urination after appellant had fondled her. Her mother testified that the victim's teacher reported a decline in the child's scholastic performance during the time that appellant resided in their home. The mother also stated that on the evening of the sexual assault, she found appellant and the victim in the same bed and that, upon entering the room, she saw the victim pull the covers up over her legs in a manner suggesting she had something to hide. The mother further explained that later that night, when she asked the victim whether something had happened between her and appellant, the victim stated that he had touched her vaginal area and her buttocks. The victim's grandmother testified that the victim told her about the incident giving rise to the sexual assault charge and indicated on a stuffed monkey that appellant had rubbed her vaginal area. The victim also told her grandmother that appellant would kiss her across her forehead. When the grandmother asked the victim why she had not spoken of appellant's conduct earlier, the victim answered that "she was too scared. She thought she had been doing something bad." Theresa Vergara, M.D. testified that her examination of the victim revealed definite evidence of sexual abuse because there was localized hymenal injury, i.e., abrasions and redness to the hymen itself, which could only have been caused by penetration of the victim's genital opening. Dr. Vergara further stated that the victim sustained the injuries 24-48 hours earlier, a time period consistent with the victim's testimony regarding the sexual assault.

Appellant first argues that the district court abused its discretion in denying his pretrial motion to preclude admission of a prior bad act. Specifically, appellant sought to exclude evidence of his having

kicked or stomped a kitten that belonged to the victim's mother, precipitating its death. Appellant contends that evidence of this incident "can only be relevant for one purpose: to prove that [he] was of bad character and acted in conformity with his bad character." The State counters that appellant opened the door to admission of the incident. In his police statement, appellant suggested that the victim's mother might have fabricated the accusations against him in retaliation, and defense counsel raised the issue at the preliminary hearing. The State also contends that the motion was untimely and that it is part of the res gestae under NRS 48.035(3). The district court denied the motion, finding it untimely and the evidence relevant. While we disagree that the motion was untimely or that the evidence was relevant, we conclude that appellant was not prejudiced by its admission.[1]

First, appellant's motion was not properly subject to the time provisions for filing pretrial motions to suppress evidence under NRS 174.125.[2] In his motion, appellant did not allege that evidence of the cat incident was illegally obtained; rather, he sought to exclude the evidence for evidentiary reasons.[3] Moreover, evidence of the cat incident was

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[1]Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (stating that this court "will affirm the order of the district court if it reached the correct result, albeit for different reasons").

[2]See NRS 174.125(1) (providing that "[a]ll motions in a criminal prosecution to suppress evidence . . . must be made before trial"); NRS 174.125(3)(a) (requiring that motions to suppress "be made in writing not less than 15 days before the date set for trial").

[3]See State v. Shade, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994) ("'Motion to suppress' is a term of art which is defined as a request for the

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improperly admitted. Before admitting bad act evidence, the district court must determine, outside the presence of the jury, that the incident is relevant to the crime charged, the act is proven by clear and convincing evidence, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[4] The prior bad act evidence was not properly admissible because it was not relevant to an element of the crimes charged.[5] Further, because the cat incident formed no part of appellant's theory of defense at trial, it was not properly subject to rebuttal by the State.[6] Admission of the evidence was also unfairly

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. . . *continued*
exclusion of evidence premised upon an allegation that the evidence was illegally obtained.").

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

[5]See NRS 201.230 (defining lewdness, in relevant part, as the willful and lewd commission of "any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child); see also NRS 200.366(1) (providing, in relevant part, that a person "who subjects another person to sexual penetration . . . 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, is guilty of sexual assault); NRS 200.364(2) ("'Sexual penetration' means . . . any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning").

[6]See Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846 (1993) ("[T]he state may not present character evidence as rebuttal to a defense which the accused has not yet presented.").

prejudicial because the incident then only, and improperly, suggested appellant's general propensity to behave badly.[7] Finally, admission of the cat incident was not necessary to establish "the complete story of the crime" because an ordinary witness could have described the crimes charged without referring to the incident at all.[8]

However, despite improper admission of the prior bad act, we conclude that any error was harmless beyond a reasonable doubt.[9] Dr. Vergara's testimony independently supports appellant's sexual assault conviction, and the victim's testimony alone is sufficient to sustain the lewdness convictions.[10] Appellant does not contest the victim's competence or credibility, and there is nothing in the record to suggest

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[7]See NRS 48.045(2) ("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.").

[8]Cf. NRS 48.035(3) (providing that "[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded").

[9]See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) ("We have routinely treated the erroneous admission of evidence of other bad acts as subject to review for harmless or prejudicial error.").

[10]Cf. Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996) ("It is well established law in Nevada that a jury may convict an individual of sexual assault based upon the victim's uncorroborated testimony."); see also Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (stating that the test for sufficiency of the evidence 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 beyond a reasonable doubt'") (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

that she knew of the cat incident or that anyone urged her to fabricate the allegations in retaliation. Further, the prior bad act is entirely unrelated to sexual misconduct, and the incident was remote in time, having occurred approximately one year before anyone accused appellant of sexual improprieties. Thus, we conclude that the result would have been the same even if the trial court had not admitted the evidence.[11]

Second, appellant contends that the district court abused its discretion in denying his motion to cross-examine the victim's grandmother regarding an allegedly false prior accusation of sexual misconduct committed against the victim. When the victim was two years old, the grandmother took the victim to the hospital to be examined for possible sexual abuse by the grandmother's then boyfriend. Appellant relies on Miller v. State[12] in support of this claim.

Appellant's claim lacks merit, and his reliance on Miller is inapposite. In Miller, this court held that "prior false accusations of sexual abuse or sexual assault by complaining witnesses do not constitute 'previous sexual conduct' for rape shield purposes."[13] We concluded, therefore, that in a sexual assault case, the rape shield statute "does not bar the cross-examination of a complaining witness about prior false accusations" where the defendant establishes, by a preponderance of the

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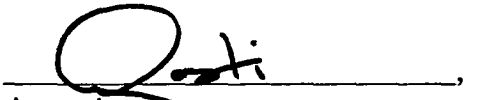
[11]See Qualls, 114 Nev. at 903-04, 961 P.2d at 767 (stating that the district court's failure to conduct a proper hearing prior to admitting evidence of other bad acts will not require reversal "where the result would have been the same if the trial court had not admitted the evidence").

[12]105 Nev. 497, 779 P.2d 87 (1989).

[13]Id. at 500-01, 779 P.2d at 89.

evidence, that (1) the accusation or accusations were in fact made; (2) that they were in fact false; and (3) that the evidence is more probative than prejudicial.[14] Here, appellant has merely identified an occasion of suspicion on the part of a witness who knew the victim. This showing does not even establish that accusations were made. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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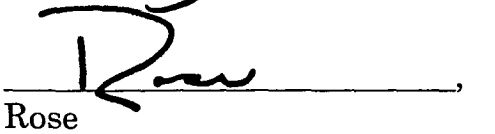

_____, J.
Rose

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Maupin

cc: Hon. Sally L. Loehrer, District Judge
Gregory L. Denue
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[14]Id. at 501-02, 779 P.2d at 89-90.