IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY JAMES THESSEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40614

FILED

DEC 10 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a controlled substance, a category E felony. The district court sentenced appellant Gregory James Thessen to serve a prison term of 12-48 months and ordered him to pay a fine of $1,000.00. The district court suspended execution of the sentence and placed Thessen on probation with several conditions for a period of 3 years.

First, Thessen contends that the district court abused its discretion in granting the State's motion to admit evidence of a prior bad act. Thessen also contends that the district court failed to give a limiting instruction to the jury prior to the admission of the evidence as required by Tavares v. State.[1] We agree with both of Thessen's arguments and conclude that the judgment of conviction must be reversed and Thessen's case remanded to the district court.

Evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and

[1]117 Nev. 725, 30 P.3d 1128 (2001).

acted in conformity with that trait on the particular occasion in question.[2] Nevertheless, NRS 48.045(2) also states that evidence of other bad acts may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Prior to admitting such evidence, the district court must determine during an evidentiary hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is substantially outweighed by the danger of unfair prejudice.[3] Further, "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[4]

The State sought to admit evidence of Thessen's prior methamphetamine use in order to demonstrate his knowledge of the illegal nature of the substance, and to negate his claim of mistake. Thessen's defense at trial was he did not know that the tin container he had found contained methamphetamine. Thessen claimed he picked up the tin container, located near one of his car tires, and put it in his pants pocket without looking inside. Soon after, he was confronted by police officers and consented to a search. The State also sought to admit evidence of Thessen's prior methamphetamine use in order to prove that Thessen knew that the individual he was going to visit when he was

---

[2]NRS 48.045(2).

[3]See, e.g., Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[4]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

arrested, William Vance, was involved in the trafficking of methamphetamine. The specific bad act sought for admission was that Thessen smoked methamphetamine with Vance sometime during the week prior to the instant offense. Thessen opposed the motion, and the district court conducted a hearing pursuant to Petrocelli v. State.[5]

At the hearing on the State's motion, Vance testified that he "can't say 100 percent sure" whether Thessen smoked methamphetamine with him or the others present on the day in question; he was only sure that Vance lit and passed a pipe.[6] Vance testified that he knew Thessen was coming to his house on the day of their arrests because when they met earlier in the week, Vance told Thessen that he had car stereos for sale. On cross-examination, Vance testified that he was not "hundred percent sure" that the person in court was Thessen, and that he did not remember Thessen's name until given the information by a police officer.

The State presented no other witnesses at the hearing, and during closing arguments, conceded that Vance's testimony "was a little bit shakey." Prior to ruling, the district court stated that Vance "did appear to waffle somewhat on his identification. So there is conflicting evidence regarding that." Nevertheless, the district court found the evidence admissible for the limited purpose of proving knowledge, absence of mistake, and intent. The State asked the district court to provide a limiting jury instruction regarding the evidence "at the time of Mr. Vance's testimony" and during its final charge to the jury. The district

---

[5]101 Nev. 46, 692 P.2d 503 (1985).

[6]Later, at trial, Vance testified that he was "[a]bout 90 percent sure" that Thessen "took a hit" and smoked methamphetamine.

court, however, read the instruction to the jury <u>after</u> Vance's testimony at trial.

We conclude that the district court committed reversible manifest error in admitting evidence of the prior bad act. The admission of uncharged bad acts evidence is heavily disfavored.[7] "The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person."[8] And in the instant case, the admission of the prior bad act "force[s] the accused to defend against vague and unsubstantiated charges."[9] Whether Thessen smoked methamphetamine with Vance prior to their arrests was not proven by clear and convincing evidence. The State presented only one witness at the Petrocelli hearing, and as the prosecutor conceded, Vance's testimony was "shakey." The district court also noted that Vance "waffled" when identifying Thessen. Therefore, we cannot conclude, as the State urges on appeal, that the error in admitting the evidence was harmless.[10]

Additionally, we conclude that the district court erred at trial with regard to the admission of the evidence of the prior bad act as testified to by Vance. As this court held in Tavares, "to maximize the

---

[7]Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

[8]Tavares, 117 Nev. at 730, 30 P.3d at 1131.

[9]Id.

[10]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); see also U.S. v. Vgeri, 51 F.3d 876, 882 (9th Cir. 1995) (holding that the State must show that the error "more probably than not was harmless").

effectiveness of the instructions, . . . the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial."[11] (Emphasis added.) The reason for instructing the jury prior to the admission of the evidence is so the limiting instruction "can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose."[12]

In the instant case, however, the district court instructed the jury immediately after Vance's testimony, thus undermining the rationale behind the holding of Tavares. Moreover, the district court did not specifically instruct the jury with regard to Vance's testimony. The extent of the district court's instruction was as follows:

> Ladies and gentlemen, evidence of other crimes, wrongs or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith.
>
> It may, however, be admissible for other purposes, such as intent, knowledge or absence of mistake or acts.

Notably, the court in Tavares concluded that "[because] of the 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."[13] Here, the prior bad act testimony was admitted before the required limiting instruction. In light of the fact that

---

[11]117 Nev. at 733, 30 P.3d at 1133.

[12]Id. (quoting 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5066 (1977 & Supp. 2001)).

[13]Id. at 732-33, 30 P.3d at 1132-33.

we have already concluded that the prior bad act was not proven by clear and convincing evidence at the Petrocelli hearing, we cannot conclude that the district court's error in providing a rather general instruction after Vance's testimony was harmless, as the State once again urges, or that it did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[14] Furthermore, we cannot conclude that Thessen did not suffer any prejudice.

Next, Thessen raises several allegations of prosecutorial misconduct at trial. Because we have already determined that a reversal of Thessen's conviction is necessary due to the errors involving the admission of the prior bad act, we need not address them. Nevertheless, we have reviewed the allegations of misconduct and conclude that they too warrant reversal because of both the prejudicial and cumulative impact.[15]

This court has stated that "[b]ecause it affects the presumption of innocence, a reference to criminal history, absent special conditions of admissibility, is a violation of due process."[16] During the State's opening argument, and again on at least five occasions during the guilt phase of the trial, the State referenced or attempted to introduce testimony regarding Thessen's criminal history. On each occasion, defense

---

[14]Tavares, 117 Nev. at 732, 30 P.3d 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[15]See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002); see also DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000) (holding that this court will reverse a conviction when the cumulative effect of errors that occur at trial combine to deprive a defendant of his right to a fair trial).

[16]Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281 (1992).

counsel objected and the district court sustained the objection. At one point, the district court interrupted the proceedings and objected on behalf of the defense, based on the State's improper line of questioning, and instructed the jury to disregard any question that the court sustained an objection to. Unlike the situation in Rice v. State and Thomas v. State where we concluded that the comments regarding the defendant's criminal history amounted to harmless error,[17] in the instant case, the statements were either made by the prosecutor or solicited several times by the prosecutor. Moreover, the references clearly were not inadvertent. And also considering the cumulative effect of the misconduct, we cannot conclude that the errors were not prejudicial.

Finally, Thessen contends the district court erred in allowing the State to question him about a statement he made that was included in the presentence investigation report (PSI) prepared by the Division of Parole and Probation. Thessen initially agreed to negotiate his case, but was ultimately allowed by the district court to withdraw his guilty plea and proceed to trial. As a result of the guilty plea, a PSI was prepared. While cross-examining Thessen during the trial, the State sought to elicit testimony that Thessen admitted to having previously used methamphetamine. Defense counsel objected, knowing that the information came from Thessen's PSI, and a conference was held outside the presence of the jury. The district court concluded that the State could ask the question without reference to or presentation of any extrinsic evidence. When the jury returned, the following exchange took place:

---

[17]See id.; Thomas v. State, 114 Nev. 1127, 1141-42, 967 P.2d 1111, 1121 (1998).

> STATE: Isn't it true that in June of 2002, you told Sheryl Eilenfeldt that about a year prior you'd used methamphetamine?
>
> THESSEN: Yes, it is true.

Thessen argues that this line of questioning violates NRS 48.125. We conclude that the district court did not err in allowing the State to question Thessen about his history of methamphetamine use, but we do conclude that the prosecutor again committed misconduct.

NRS 48.125 provides in part:

> 1. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or any other crime is not admissible in a criminal proceeding involving the person who made the plea or offer.

In Mann v. State, this court stated that the statute prevents the prosecution "from making any use of statements made by an accused, either during plea negotiations or while entering a plea of guilty, at a later trial on the same charges."[18] The court noted that allowing such statements to be used for impeachment purposes would defeat the policy of encouraging "candid and honest negotiations necessary for the successful operation of our plea bargaining system."[19] In the instant case, even if the district court erred in allowing the State to pursue this line of questioning, it was harmless. The State, however, did not simply ask

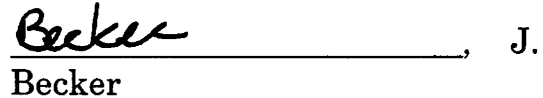
---

[18]96 Nev. 62, 66, 605 P.2d 209, 211 (1980); see also Esquivel v. State, 96 Nev. 777, 778, 617 P.2d 587, 587 (1980) (concluding it was reversible error for the district court to admit, for purposes of impeachment, statements made by the defendant to a psychiatrist during a court-ordered mental examination).

[19]Mann, 96 Nev. at 65, 605 P.2d at 210.

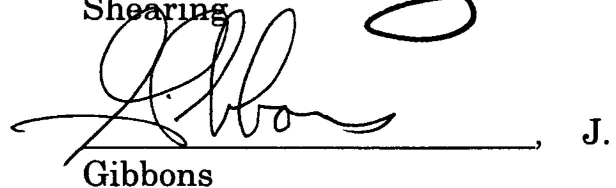
Thessen on cross-examination if he had ever used methamphetamine. Instead, the State specifically referred to Thessen's PSI interview with the Parole and Probation Officer, Sheryl Eilenfeldt, therefore relying upon prohibited extrinsic evidence for support, in defiance of the district court's ruling. Defense counsel did not contemporaneously object to the State's question. Nevertheless, this exchange added to the cumulative effect of the prosecutorial misconduct throughout the trial, and supports our conclusion that Thessen's conviction must be reversed and remanded to the district court. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_______________, J.
Becker

_______________, J.
Shearing



_______________, J.
Gibbons

cc: Hon. Robert E. Estes, District Judge
Lyon County Public Defender
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk