IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE W. SPADER, II A/K/A GEORGE W. SPADER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41539

FILED

DEC 22 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered upon jury verdicts finding appellant George W. Spader guilty on six counts of sexual assault upon a minor under the age of fourteen and four counts of lewdness with a child under the age of fourteen. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

FACTS AND PROCEDURAL HISTORY

Spader and his wife adopted a minor child, J.S., in September 1999. In August 2001, J.S. informed police that she was the victim of sexual abuse at the hands of Spader. During the resulting investigation, Child Protective Services requested that Spader take a polygraph examination. Spader took the examination and made a post-test inculpatory statement to the examiner. Over a month later, police arrested Spader and the State charged him with multiple sex-related offenses concerning J.S.

Before trial, the State moved to admit evidence of Spader's sexual abuse of another minor child in Utah in 1987, along with the resulting conviction for attempted aggravated sexual abuse. Spader moved to admit evidence that J.S. made three prior false accusations of sexual assault, to require J.S.'s submission to an independent

psychological examination, and to exclude the testimony of the polygraph examiner. Pursuant to a series of pretrial hearings on the various motions, the district court admitted: (1) evidence of Spader's prior conviction and the facts leading to it; (2) admitted evidence concerning one of the alleged prior false accusations; (3) excluded evidence of the two additional alleged false allegations (the "Utah" and "Las Vegas" allegations) and (4) admitted the polygraph examiner's testimony. The district court denied Spader's motion for psychological examination of J.S.

The jury convicted Spader on all counts in the amended information as described above.[1] The district court sentenced Spader to ten concurrent life sentences: six with parole eligibility after twenty years on counts one, two, three, eight, nine and ten (sexual assault with a minor under fourteen years of age); and four with parole eligibility after ten years on counts four, five, six and eight (lewdness with a minor under fourteen years of age). The court awarded Spader credit toward the sentences for 589 days served in local custody; imposed a $25 administrative assessment, a $30 supervision fee, a $150 DNA analysis fee, and lifetime supervision upon any release from imprisonment; and ordered Spader to pay $300 in restitution.

On appeal, Spader argues that the district court erred in admitting evidence of his prior conviction, admitting only one of J.S.'s prior false accusations of sexual abuse, denying his motion for a psychological examination of J.S., and by admitting the polygraph examiner's testimony.

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[1]Spader pleaded guilty to one count of failure to register as a convicted sex offender, for which he received a prison term of twelve to forty-eight months.

DISCUSSION

Admission of prior bad act evidence

Spader first argues that the district court committed reversible error by admitting evidence of his 1987 conduct in Utah with another child, including the prior conviction.

Evidence of prior bad acts is "not admissible to prove the character of a person in order to show that he acted in conformity therewith."[2] However, this evidence may be admissible for other purposes, such as to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3] "This court has stated that the use of uncharged bad acts is heavily disfavored and is likely to be prejudicial and irrelevant."[4] Accordingly, "using uncharged bad acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal."[5] In Braunstein, we repudiated the notion that evidence showing an accused's propensity for sexual aberration is relevant to the accused's intent.[6] It is also a violation of NRS 48.045(2) to use a prior conviction to prove propensity of the accused to commit the crime charged.[7] However, as with the use of prior uncharged conduct, a prior

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[2]NRS 48.045(2).

[3]Id.; see also Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

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

[5]Id.

[6]Id. (overturning McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978)).

[7]See Yates v. State, 95 Nev. 446, 596 P.2d 239 (1979).

conviction and the facts leading to it may be used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[8]

A presumption of inadmissibility attaches to all prior bad act evidence.[9] In order to overcome the presumption, the prosecutor must request a Petrocelli[10] hearing and establish that "(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."[11] "The trial court's determination of whether to admit or exclude such evidence will not be disturbed on appeal absent manifest error."[12] However, "[t]his court has generally held inadmissible prior acts that are remote in time and involve conduct different from the charged conduct."[13]

The district court ruled that Spader's 1987 actions and his resulting conviction were properly admissible as evidence of motive, opportunity, common plan or scheme and a "signature crime." Spader

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[8]NRS 48.045(2).

[9]Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001).

[10]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[11]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also Tavares, 117 Nev. at 731, 30 P.3d at 1131 ("'[i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[12]Walker v. State, 116 Nev. 442, 446, 997 P.2d 803, 806 (2000).

[13]Braunstein, 118 Nev. at 73, 40 P.3d at 417.

argues that his prior conviction implicates none of the stated grounds for admissibility.

Common scheme or plan

The common plan or scheme exception to the rule against the admissibility of character/propensity evidence requires that both the prior bad act and the charged crime be an "'integral part of an overarching plan explicitly conceived and executed by the defendant.'"[14] ""The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a pre-conceived plan which resulted in the commission of that crime."""[15] In fact, as this court noted in Richmond, even a sexual assault perpetrated in the same location and manner a month before the assault at issue may not establish a common plan.[16]

While similarities exist between the crimes charged below and the 1987 acts, and while the prior conviction proved the prior action by clear and convincing evidence, we cannot conclude that these events were part of a single preconceived overarching plan that resulted in a sexual assault of J.S. These crimes were independent of one another; and neither could be planned until each victim came within reach. This is underscored by the testimony of Spader's former spouse that she was the driving force behind their adoption of J.S., not Spader. Finally, the other offense took

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[14]Richmond, 118 Nev. at 933, 59 P.3d at 1255 (quoting McCormick on Evidence § 190, at 661 (John W. Strong ed., 5th ed. 1999)).

[15]Id. at 933, 59 P.3d at 1255 (quoting Nester v. State of Nevada, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959) (quoting 1 John Henry Wigmore, Wigmore on Evidence § 300 (2d ed. 1923))).

[16]Id. at 934, 59 P.3d at 1255.

place some fifteen years prior to the trial of this matter below. Therefore, we conclude that the district court abused its discretion in admitting evidence of Spader's 1987 actions and the resulting Utah conviction as evidence of a common plan or scheme.[17]

Signature crime

The district court also found the 1987 bad act admissible as a "signature crime." The signature crime theory is often referred to as the modus operandi exception to the rule against admission of character evidence to demonstrate conforming behavior.[18] As this court explained in Mortensen v. State, modus operandi evidence falls within the identity exception to NRS 48.045(2).[19] Generally, modus operandi evidence is proper in "situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime so clear as to establish the identity of the person on trial."[20]

Spader's identity was never a factor in the trial and there was no doubt that Spader was the proper suspect. Thus, we find that the

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[17]The State also argues that Spader's statements to the polygraph examiner raise issues of mistake. See discussion infra. We conclude that the probative value of the prior conduct on that point does not cure the overall prejudicial effect of this evidence. We also conclude that the motive exception to NRS 41.045(2) could not be relied upon as a basis for admission of the Utah evidence.

[18]See 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.22(5)(c) (Joseph M. McLaughlin ed., 2d ed. 2004).

[19]115 Nev. 273, 280-81, 986 P.2d 1105, 1110 (1999).

[20]Id. at 280, 986 P.2d at 1105 (citing Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988); Mayes v. State, 95 Nev. 140, 591 P.2d 250 (1979)).

district court abused its discretion in admitting the 1987 bad act evidence as evidence of a "signature crime."

Reversible error

"Failure to exclude [inadmissible character] evidence in a Petrocelli hearing is harmless error where overwhelming evidence supports the conviction."[21] Here, the State presented very little evidence, other than J.S.'s testimony, that Spader sexually assaulted J.S.[22] Thus, we cannot conclude that the highly prejudicial evidence concerning the 1987 prior bad acts was harmless beyond a reasonable doubt.[23]

Prior false allegations of sexual abuse

Spader next argues that the district court committed reversible error by refusing admission of evidence concerning two of the three alleged prior false accusations of sexual assault.

"'The decision to admit or exclude evidence is within the sound discretion of the district court.'"[24] We review claims of error arising from the admission or exclusion of evidence for manifest abuse of discretion.[25]

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[21]Richmond, 118 Nev. at 934, 59 P.3d at 1255.

[22]In this, we note that Dr. Jay Johnson testified that J.S.'s injuries were consistent with her report of prior sexual abuse and that the findings of the 2001 examination by Kathryn Gelo revealed essentially the same hymenal tear present in a 1991 sexual assault examination.

[23]See Richmond, 118 Nev. at 934, 59 P.3d at 1255; Chapman v. California, 386 U.S. 18, 23 (1967).

[24]Byford v. State, 116 Nev. 215, 232, 994 P.2d 700, 712 (2000) (quoting Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997)).

[25]Hughes v. State, 112 Nev. 84, 88, 910 P.2d 254, 256 (1996).

NRS 50.090[26] generally prohibits an accused from presenting "evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness." However, in Miller v. State,[27] this court held that NRS 50.090 is not an absolute bar to cross-examination or the introduction of extrinsic evidence concerning whether an alleged victim of sexual assault has fabricated prior sexual assault accusations.[28] Because "the complaining witness' credibility [in a sexual assault case] is critical . . . an alleged victim's prior fabricated accusations of sexual abuse or sexual assault are highly probative of a complaining witness' credibility concerning current sexual assault charges."[29]

"As a prerequisite to admitting a complaining witness' prior sexual assault and sexual abuse accusations and corroborative extrinsic evidence proving the falsity thereof, a threshold inquiry must establish

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[26]NRS 50.090 states:

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

[27]105 Nev. 497, 779 P.2d 87 (1989).

[28]Id. at 501, 779 P.2d at 89.

[29]Id. at 500, 779 P.2d at 89.

both the fact of the accusations and the falsity thereof even before defense counsel launches into cross-examination."[30] Thus, in a hearing outside the presence of the jury, "the defendant must establish, by a preponderance of the evidence, that (1) the accusation or accusations were in fact made; (2) that the accusation or accusations were in fact false; and (3) that the evidence is more probative than prejudicial."[31] Only after satisfying these conditions may the defendant cross-examine the complaining witness, and only after the witness denies or fails to recall having made such accusations may the defendant introduce extrinsic evidence.[32]

"The preponderance of the evidence test is not mechanistically satisfied according to 'which side has produced the greater quantum, without regard to its effect in convincing [the trier of fact's] mind of the truth of the proposition asserted.'"[33] "Proof of falsity must be something more than a bare, unsupported opinion that the complaining witness is lying about certain events. Purported false allegations require some independent factual basis of falsity in order to be admissible in evidence."[34]

Spader asserts that he satisfied the requisite evidentiary standards at two separate Miller hearings regarding additional prior false accusations made by J.S. in Las Vegas and in Utah. Accordingly, he

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[30]Id. at 502, 779 P.2d at 90.

[31]Id.

[32]Id.

[33]Brown v. State, 107 Nev. 164, 166, 807 P.2d 1379, 1380-81 (1991).

[34]Id. at 166, 807 P.2d at 1381.

asserts that the district court erred in preventing him from cross-examining J.S. and from introducing evidence regarding these accusations. In this, he alleges violations of his Sixth Amendment right to prepare a defense and cross-examine witnesses. We address Spader's offers of proof, made under Miller, below.[35]

Las Vegas allegation

At one of the Miller hearings, Spader presented evidence that J.S. had falsely accused a minor, T.C., of sexual conduct. T.C. lived next door to J.S. at the time of the alleged accusation. T.C.'s mother testified that T.C. came home one afternoon in an extreme state of agitation. T.C. eventually told his mother that J.S. had been telling neighborhood children that T.C. had sex with J.S. after climbing through her bedroom window. T.C.'s mother testified that she confronted J.S. with these accusations the day after learning of them, asked J.S. to put herself in

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[35]Spader also contends that prior false accusations are not "previous sexual conduct" for rape shield purposes. He therefore reasons that NRS 50.090 did not bar his attempted cross-examination of J.S. and that the district court erroneously sustained the State's objection to this line of questioning before the jury at trial. Our opinion in Miller recognized that the rape shield statute does not bar cross-examination relating to prior allegations of sexual abuse. See Efrain v. State, 107 Nev. 947, 949, 823 P.2d 264, 265 (1991) (quoting Miller, 105 Nev. at 501, 779 P.2d at 89). However, "if the defendant wishes to cross-examine the complaining witness about prior false sexual abuse or sexual assault accusations and to introduce extrinsic evidence of these false accusations, the defendant must first file a notice of intent to do so" and an evidentiary hearing must be held on the matter. Id. We reject Spader's notion that the district court erred by cutting off the cross-examination of J.S. Allowing a party to cross-examine a complaining witness regarding false allegations after a district court has ruled that Miller is unsatisfied would circumvent the rule and eviscerate the delicate balance that Miller and its progeny were intended to protect.

T.C.'s shoes and stated that she expected an apology. According to T.C.'s mother, J.S. never responded to her questions. With regard to this proposed evidence, we note that T.C. testified at the hearing that a friend had referred to a rumored "affair" between J.S. and T.C., but that he could not recall the name of the source of the rumor.

The district court ruled that Spader had not established, by a preponderance of the evidence, that an accusation implicating T.C. had in fact been made, or if made, that the accusation was false. We cannot conclude on this record that this ruling constitutes an abuse of discretion under the Miller "preponderance" standard.[36]

Utah allegations

Through the testimony of Alice Rick at another Miller hearing, Spader attempted to show that J.S. had falsely accused Joseph and Dustin James of sexual molestation. The Miller hearing transcript shows that Joseph and Dustin James became aware of this accusation during the investigation of the current charges, that authorities never formally interrogated or charged Joseph or Dustin regarding the allegations, and that both Joseph and Dustin denied that any sexual contact with J.S. had occurred. Going further, no one ever went to the authorities with these allegations. However, the district court noted that J.S. never really identified the purported assailants to Ms. Rick. Thus, after reviewing the record, we cannot conclude that the district court manifestly erred in concluding that the defense failed to meet its burden of proving by a

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[36]See Brown, 107 Nev. at 168, 807 P.2d at 1382 (stating that a district court is vested with the discretion to determine the relevancy and admissibility of false allegation under Miller).

preponderance of the evidence that J.S.'s statement to Kathy Rick actually implicated Dustin and Joseph James.

Psychological evaluation of complaining witness

Spader next contends that the district court erred in denying his application for a psychological examination of J.S.

In State v. Romano, this court recently confirmed "that a trial court has the discretion to order alleged victims to submit to psychological examination under certain narrow circumstances."[37] In Romano, we modified the test set forth in Koerschner v. State[38] and held that

> a defendant is entitled to a psychological examination of an alleged sexual assault victim only where: (1) the State notices the defendant that it intends to have the victim examined by its own expert, and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination. In determining whether a compelling need exists, the trial court must consider: (1) whether little or no corroboration of the offense exists beyond the victim's testimony, and (2) whether there is a reasonable basis "for believing that the victim's mental or emotional state may have affected his or her veracity."[39]

This court applies new rules "to all cases on direct appeal regardless of whether the new rule is based on the Federal Constitution or

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[37]120 Nev. ___, ___, 97 P.3d 594, 599 (2004).

[38]116 Nev. 1111, 13 P.3d 451 (2000).

[39]Romano, 120 Nev. at ___, 97 P.3d at 600 (quoting Koerschner, 116 Nev. at 1117, 13 P.3d at 455).

state law."[40] Applying Romano to the facts of this case, we conclude that the district court did not abuse its discretion in its denial of Spader's request for a psychological examination. While very little evidence corroborated J.S.'s allegations, and a reasonable basis existed for believing that J.S.'s mental and emotional state may have affected her veracity, the State did not seek examination of J.S. by its own expert witness. Under Romano, only the State's notice of intent to conduct its own psychological exam triggers the inquiry into whether a compelling need exists for the defense to conduct its own exam.[41] Because the State did not seek an examination of J.S. by a psychological expert, the district court did not err in refusing Spader's requested examination.[42]

Admission of the polygraph examiner's testimony

Spader's last contention is that the district court erred by allowing Ron Slay, a certified polygraph examiner, to testify to Spader's post-polygraph inculpatory statements. In this, Spader asserts that the admission of this evidence runs afoul of Jackson v. State,[43] in which we held that, "[a]bsent a written stipulation, polygraph evidence may be properly excluded."[44] We disagree. No explicit mention of Slay's capacity as a polygraph examiner was ever made in the presence of the jury. Slay

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[40]Richmond v. State, 118 Nev. 924, 929, 59 P.3d 1249, 1252 (2002) (adopting the rule stated in Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

[41]Romano, 120 Nev. at ___, 97 P.3d at 600.

[42]See Romano, 120 Nev. at ___, 97 P.3d at 600.

[43]116 Nev. 334, 997 P.2d 121 (2000).

[44]Id. at 336, 997 P.2d at 122.

restricted his testimony to quasi-inculpatory statements made by Spader in response to Slay's post-examination inquiries.

In Paulette v. State, we held that a defendant's voluntary pre-polygraph statements are admissible.[45] Many courts have applied this rule to voluntary post-polygraph interview statements.[46] We agree and conclude that our ruling in Paulette also allows for the admission of an accused's post-polygraph statements, provided they are voluntary. Although Spader has not raised the voluntariness of his admission on appeal, we reach this issue sua sponte because it affects his substantial rights.[47]

The voluntary confession analysis is a subjective one.[48] The test depends on whether "the defendant's will was overborne."[49] "[A] confession is involuntary if it was coerced by physical intimidation or psychological pressure."[50] The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence.[51]

The district court never reached the issue of whether Slay coerced Spader into making the post-polygraph statements by using the

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[45]92 Nev. 71, 72-73, 545 P.2d 205, 206 (1976).

[46]See, e.g., People v. Gennings, 808 P.2d 839, 843-47 (Colo. 1991) (applying the voluntary confession analysis to post-polygraph admissions).

[47]See Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

[48]See Lynumn v. Illinois, 372 U.S. 528, 534 (1963).

[49]Id.

[50]Brust v. State, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992).

[51]Barren v. State, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983).

results of the polygraph exam.[52] Although Slay Mirandized[53] Spader prior to the examination and Spader consented to the procedure, it appears that Slay may have improperly used the polygraph results to cajole Spader into admitting that his penis may have accidentally come in contact with the victim. Accordingly, we direct the district court on remand to conduct an evidentiary hearing concerning whether Spader's post-polygraph statements to Slay were otherwise voluntary.

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[52]See State v. Craig, 864 P.2d 1240, 1242 (Mont. 1993) (condemning the use of polygraph results "to elicit or coerce a confession from defendants").

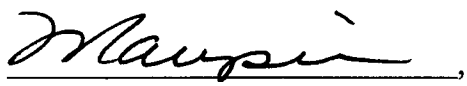
[53]Miranda v. Arizona, 384 U.S. 436 (1966).

CONCLUSION

Because the district court erroneously admitted the 1987 act as probative of a common plan or scheme and as evidence of a "signature crime" we

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

_____, J.
Rose



_____, J.
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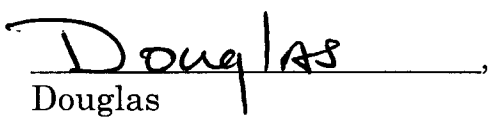

_____, J.
Douglas

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk