

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID JAMES KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42286

FILED

FEB 03 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction pursuant to a jury verdict of one count of first degree murder. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

FACTS

On January 8, 2003, Tammy Wright began her shift as a bartender at the Old West Bar in Wells at approximately 4:00 p.m. Wright left her home at approximately 3:45 p.m. so she would arrive at work on time. When she left home, appellant David James King was watching his and Wright's two children. Two-month-old Casey's condition was normal or appeared normal. At about 10:30 p.m., King entered Wright's place of employment. He was carrying Casey and told Wright that Casey was not breathing.

Wright took Casey and began performing CPR on him. Wright called 911 emergency services for assistance and then gave the telephone to her sister, Tina Hurst. Although Wright had no training in CPR, she attempted to resuscitate Casey by giving him short breaths. Wright testified that Casey had felt warm to the touch and was wearing only a diaper. During this time period, Wright did not smell or taste any vomit or blood on Casey. She did not notice any vomit or blood on King.

Officer Dale Lotspeich from the Elko County Sheriff's Department arrived on the scene and began CPR. Officer Lotspeich took Casey, Wright, Hurst, and King to the ambulance which was approximately two blocks from the Old West Bar. Once they arrived at the ambulance, they drove onto the freeway where they met the helicopter that flew Casey to the Northeastern Nevada Regional Hospital in Elko. Because the helicopter did not have room for Wright or King, they rode to the hospital in a friend's car. While Wright, Hurst, and King rode to the hospital, King told Wright that Casey had choked and coughed up formula and blood before he quit breathing. Upon arrival at the hospital, a nurse informed King, Wright, and Hurst that Casey had died. The emergency doctor who treated Casey later testified that Casey died before arrival at the hospital. When Wright and King returned to their home, Wright did not notice any blood or vomit on the couch or any other place in the home. Because autopsy evidence indicated that Casey died as a result of abuse, the police arrested King for Casey's murder. The State charged King with one count of first degree murder by means of child abuse.

Prior to trial, the district court conducted a Petrocelli hearing to determine whether the State could introduce evidence of two prior bad acts King had committed. The first incident occurred on July 5, 2002, while Wright was pregnant with Casey. King and Wright had begun arguing about their financial problems, and King had attempted to throw Wright out of their home because Wright had paid back \$150 that King had borrowed from Hurst. King had kicked Wright in the ribs several times and told her that she was holding him back financially. The district court held that this incident was "probative of intent, opportunity, lack of accident or mistake, motive and plan to rid himself of his perceived

financial burdens.” The district court further found that the acts were proven by clear and convincing evidence and that their probative value outweighed any prejudice to King.

The second incident occurred on January 28, 2003, when King left their home and lay down in the middle of the street attempting to get run over. King had been intoxicated and yelled that “his baby was dead and it was Ms. Wright’s fault.” King further declared that “Casey’s death occurred because [Wright] went to work that night, and that nothing would have happened if [Wright] had just stayed home.” The district court held that this evidence was admissible and that its probative value outweighed the danger of unfair prejudice. The district court order did not specifically state on what basis the court relied for admitting this collateral evidence.

During trial, the State introduced the two prior bad acts King had committed. Wright testified regarding the July 5, 2002, incident. Once Wright concluded testifying about the incident, the district court read an instruction that the evidence was being offered only for the limited purpose of showing “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a common scheme or plan.” After the instruction, Wright testified that King had pulled her by the hair to remove her from their trailer. King had ripped out part of Wright’s hair, and she had fallen on the floor. While Wright was on the floor, King had kicked her right side four or five times. This had occurred while Wright was pregnant with Casey and while King was “highly intoxicated.”

Wright also testified about the second incident that had occurred while King was intoxicated. On January 28, 2003, King left their

home and lay down in the middle of the street, attempting to get run over. He had screamed that Wright was responsible for Casey's death and claimed that Casey would not have died if Wright would have stayed home that night. King never said that he killed the baby; he only blamed Casey's death on Wright. After King's attorney cross-examined Wright about these two prior incidents, the district court again read the limiting instruction mentioned above and further instructed the jury that the instruction applied whenever a witness remarked about those two incidents.

During trial, Dr. Christie Lynn Elliott, a forensic pathologist, testified that she had conducted the autopsy on Casey. When Dr. Elliott examined Casey's brain, she immediately noticed a subarachnoid hemorrhage. There had also been subdural bleeding in the brain, and Casey's retinas had been confluent with blood. Based on these findings, Dr. Elliott opined that Casey had died of inflicted abusive head trauma or shaken baby syndrome. On October 1, 2003, the jury found King guilty of first degree murder by means of child abuse. At the sentencing hearing, the jury sentenced King to life in prison without the possibility of parole.

King appeals, contending that (1) the district court abused its discretion in admitting collateral evidence of two prior bad acts because they did not show King's motive, plan, or scheme; (2) evidence of the two prior bad acts was more prejudicial than probative; (3) the cumulative effect of this error was not harmless; and (4) the district court erred in denying King's motion to reduce his sentence from life in prison without the possibility of parole to life in prison with the possibility of parole.

DISCUSSION

Admission of collateral evidence of prior bad acts

King argues that the district court erred in admitting the July 5, 2002, and the January 28, 2003, incidents of misconduct because they did not show King's motive, plan, or scheme. We conclude that King's arguments are without merit.

"[E]vidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question."¹ "However, evidence of other wrongs may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident."² Prior to admitting such evidence,

the trial court must conduct a hearing on the record and determine (1) that the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.³

The district court's determination to admit or exclude such evidence is to be given great deference and will not be reversed absent manifest error.⁴

July 5, 2002, admitted bad act

¹Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

²Id.

³Id.

⁴Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

We conclude that the admission of evidence of King's prior misconduct was not manifestly wrong. The district court held a Petrocelli hearing on the record and determined that the State satisfied the three prerequisites.

First, the State proved this prior bad act was relevant to show King's motive. King had specifically stated that Wright was holding him back financially. King knew that Wright was pregnant with his child at the time, but still kicked her in the ribs four or five times. Because King thought that Wright contributed to his financial problems, a jury could reasonably infer that King had a motive for shaking Casey. Child birth and care incur significant expenses and, therefore, Casey's birth must have worsened King's already unstable financial situation. Consequently, the jury could have reasonably concluded that King had a financial motive to kill Casey.

The district court has great discretion to determine whether collateral evidence should be admitted.⁵ The district court conducted the Petrocelli hearing and made the proper determinations that the evidence was relevant, the incident was proven by clear and convincing evidence, and it was more probative than prejudicial. The district court further stated that the evidence was also admissible to show King's "intent, opportunity, lack of accident or mistake, motive and plan to rid himself of his perceived financial burdens." Therefore, the district court properly admitted the evidence to show King's motive. This prior bad act was also admissible to show a plan and an opportunity to eliminate King's financial

⁵Id.

problems by acting violently toward those whom King perceived as imposing a financial burden upon him.

Second, King provided no evidence that tended to disprove this prior bad act. Nothing in the record impeaches Wright's testimony. The district court was able to observe the witnesses' demeanor and assess their credibility. Therefore, it was within the court's discretion to find King's prior bad act proven by clear and convincing evidence.

Finally, the probative value of King's prior misconduct was great where no apparent motive for Casey's death existed. The district court properly concluded that its probative value was not substantially outweighed by the danger of unfair prejudice. Consequently, allowing testimony about King's prior misconduct was not manifest error.⁶

January 28, 2003, admitted bad act

We conclude that the admission of King's January 28, 2003, incident was not manifestly wrong. The district court held a Petrocelli hearing on the record and determined that the State satisfied the three prerequisites.

During the hearing, Wright testified that King had lain in the middle of the street and told her that she was a murderer. King had told Wright that Casey's death was her fault because she had gone to work that night and that nothing would have happened to Casey if Wright had stayed home. King had then asked motorists to run over him. The district court determined that "[t]he statement could be construed to mean that had Ms. Wright not gone to work, King would not have been left alone with Casey and therefore nothing would have happened." We determine

⁶Qualls, 114 Nev. at 902, 961 P.2d at 766.

that it is possible that King was blaming Wright for Casey's death because if he would not have been alone with Casey that night, he might not have shaken him and caused his death. This evidence is also comparable to an admission of guilt. Because the district court had discretion to determine whether this evidence should be admitted as an admission of guilt, we conclude that it did not manifestly err.

The district court conducted the Petrocelli hearing, determined that the evidence was relevant, this bad act was proven by clear and convincing evidence, and it was more probative than prejudicial. The district court also limited the evidence to King's statements and to avoid other areas. The district court further provided a limiting instruction to the jury. Therefore, the district court properly admitted the evidence. In addition, nothing in the record impeaches this testimony. The district court was able to observe the witnesses' demeanor and assess their credibility. Therefore, we cannot determine that the district court acted beyond its discretion when it found King's prior bad act proven by clear and convincing evidence.

The district court also properly concluded that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the district court did not manifestly err in allowing testimony of King's prior misconduct. Even if this evidence was prejudicial, any error would be harmless because the district court gave the limiting instruction to the jury.

The collateral evidence was more probative than prejudicial

King argues that admitting the July 5, 2002, incident was more prejudicial than probative. We disagree.

NRS 48.035 provides:

(1) Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.

(2) Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

NRS 48.015 further provides that relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” We have held that “[d]istrict courts are vested with considerable discretion in determining the relevance and admissibility of evidence.”⁷ “[T]his court will not overturn the district court’s exclusion of relevant evidence absent an abuse of discretion.”⁸

As we explained above in our analysis of the July 5, 2002, incident, the district court determined that this evidence was more probative than prejudicial and this event was probative of King’s motive to eliminate his perceived financial burdens. The district court conducted a Petrocelli hearing to determine whether this evidence was admissible. The district court is in the best position to determine the weight of the evidence and credibility of witnesses and whether this evidence was more probative than prejudicial. The facts of the July 5, 2002, event demonstrate that King had financial concerns and acted violently when

⁷Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

⁸Hansen v. Universal Health Servs., 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999).

Wright returned \$150 that King had borrowed. Because this evidence appears to demonstrate King's financial motive, the district court determined that the evidence was more probative than prejudicial.

The district court did not err in its ruling that the probative value of the collateral evidence outweighed its prejudicial effect. Admission of the July 5, 2002, evidence was within the district court's discretion, and this court will defer to the lower court's determination when it is not manifestly wrong.

Cumulative effect of errors

King contends that admitting the July 5, 2002, and January 28, 2003, incidents constituted prejudicial error. He further contends that the cumulative effect of admitting the evidence denied King his right to a fair trial. We determine that this argument is without merit.

We will reverse a conviction where the cumulative effect of errors during trial denies a defendant a fair trial.⁹ When determining whether errors are prejudicial, we will consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."¹⁰

While the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though individually the errors are harmless, our prior analysis indicates that the district court did not err in

⁹DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000).

¹⁰Id. (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

admitting evidence of King's prior bad acts.¹¹ Therefore, King's cumulative error argument is without merit.

Denial of King's motion to reduce his sentence

King argued at sentencing that the jury ignored the mitigating facts he presented and sentenced him out of passion to life in prison without the possibility of parole. King argues that his motion to reduce his sentence was erroneously denied. We conclude that King's arguments lack merit.

We give the district court "wide discretion when sentencing a defendant."¹² However, "this discretion is not limitless. When imposing a sentence, a district court may not abuse its discretion."¹³ Therefore, unless the appellant can demonstrate that the district court abused its discretion, we will not disturb the sentence.¹⁴

During the penalty phase the jury heard testimony from Diane Wright, Casey's maternal grandmother, and Tammy Wright, Casey's mother. Diane testified that Casey's death has had a devastating impact on her life. Wright testified that her life has been shattered as a result of Casey's death. She further testified that she felt she had failed as a mother to protect her children and that she cried whenever she looked at a picture of Casey.

King presented several mitigating factors to the jury. First, the State stipulated that King had no prior felony convictions. Second, Dr.

¹¹Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

¹²Parrish v. State, 116 Nev. 982, 988, 12 P.3d 953, 957 (2000).

¹³Id. at 989, 12 P.3d at 957.

¹⁴Id.

Ronald G. Seaborn, a clinical psychologist, testified that King was currently a threat for future violent behavior, but that King was amenable to therapeutic programs in a community or imprisonment setting. Dr. Seaborn further testified that if King was remorseful and eliminated his alcohol addiction, twenty years would be enough time to observe this change.


Third, King's adopted mother, Rebecca King, testified that King came from a very troubled background. Rebecca testified that King's biological mother had abandoned him when he was an infant. King's biological father was "a very disturbed man" and an alcoholic. Rebecca further testified that she was informed that King had suffered severe sexual, emotional, and physical abuse, including being subjected to child pornography, being deprived of food, and suffering broken bones. Despite this suffering, Rebecca and her husband adopted King when he was nine years old. Rebecca testified that King was very respectful and sweet as a youth. Rebecca felt that King was amenable to counseling.


King argues that the jury ignored these mitigating circumstances during sentencing. Specifically, King states that the jury ignored the testimony of Dr. Seaborn and his mother. King, however, does not demonstrate or provide evidence that the jury ignored the mitigating testimony. The district court had the discretion to grant King's motion to reduce his sentence. The district court determined that the jury was properly instructed and returned a sentence within statutory guidelines. Therefore, the district court did not abuse its discretion in denying King's motion.

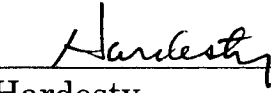
CONCLUSION

We conclude that the district court properly conducted a Petrocelli hearing and determined that the two prior bad acts were admissible for the purpose of showing King's intent, opportunity, lack of mistake, motive, and plan. The admission of the two prior bad acts was more probative than prejudicial and a limiting instruction was given to the jury. Because the district court properly allowed the prior bad acts into evidence, there was no cumulative error at trial. The district court also did not abuse its discretion in denying King's motion to reduce his sentence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk