IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM LYONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42423

FILED

MAR 23 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, upon a jury verdict, of two counts of sexual assault against a minor under 14 years of age and eight counts of lewdness with a minor under 14 years of age. The district court sentenced Lyons to life imprisonment for each of the ten counts and ordered that the sentences run consecutively. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Prior conviction

We disagree with Lyons' contention that the district court abused its discretion by admitting a 1982 California misdemeanor conviction for lewdness with a child under the age of 14.

The district court may admit evidence of prior bad acts such as a criminal conviction if it tends to prove intent, motive, identity, or a common scheme or plan.[1] The district court may admit such evidence if it determines, outside the presence of the jury, that the evidence is relevant, the prior acts are proved by clear and convincing evidence, and the danger

[1]Cirillo v. State, 96 Nev. 489, 492-93, 611 P.2d 1093, 1095 (1980); Findley v. State, 94 Nev. 212, 214, 577 P.2d 867, 868 (1978), overruled on other grounds by Braunstein v. State, 118 Nev. 68, 75, 40 P.3d 413, 418 (2002).

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of unfair prejudice does not substantially outweigh its probative value.[2] We conclude that the district court properly considered the probative value and prejudicial effect of the conviction outside the presence of the jury in accord with the procedure set forth in our opinion in Tinch v. State.[3] Moreover, defense counsel acknowledged in district court that the State proved the prior conviction by clear and convincing evidence.[4]

Evidence of other acts that show a defendant's sexual attraction to or obsession with minor victims is relevant to explain the defendant's motive in committing an act of sexual abuse, so long as the evidence satisfies the three-factor test for admissibility set forth in Tinch.[5] While we approach the admission of such evidence to establish motive with circumspection, we conclude that under the facts of this case, the 1982 lewdness conviction was admissible as proof of Lyons' motive to sexually abuse the minor victims.

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

[3]Id.

[4]See Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1281 (2005) (concluding that the district court's failure to make a determination that the State has proven prior bad acts by clear and convincing evidence was harmless when the uncharged bad act is supported by clear and convincing evidence in the record).

[5]Ledbetter v. State, 122 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 22, March 16, 2006); see Richmond v. State, 118 Nev. 924, 939 n.14, 59 P.3d 1249, 1259 n.14 (2002) (Maupin, J., concurring in part and dissenting in part) ("Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the 'other purpose' of explaining why a crime of sexual deviance was committed.").

The trial testimony demonstrated that Lyons used his membership in his church to offer his home to families with personal and financial problems. At least three of the families that stayed at Lyons' home included young girls, and Lyons offered to watch the girls in this sequestered environment. Five girls testified that Lyons fondled various private parts of their bodies and/or digitally penetrated them while they were under his supervision. Moreover, Lyons admitted to Las Vegas Metropolitan Police Department (LVMPD) Detective Donald Cullison that the girls sat on his lap, he patted them on the buttocks, and M.M. slept in his chair when she had trouble sleeping. The cultivation of a relationship with the victims' families, the seclusion of the victims during the abuse, and the specific nature of the abuse bear striking similarity to the conduct underlying Lyons' prior conviction. We conclude that the 1982 conviction was relevant to Lyons' motive to sexually abuse these victims and that its probative value outweighed its prejudicial effect in demonstrating Lyons' motive.

Moreover, the prosecution's use of the 1982 conviction was not an attempt to bolster an otherwise relatively weak case and did not heighten the likelihood of unfair prejudice.[6] Given the overall strength of the State's case against Lyons, "the danger that the admission of this evidence was unfairly prejudicial was minimal."[7] Accordingly, the district court did not abuse its discretion by admitting the prior conviction as evidence of motive.

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[6]Ledbetter, 122 Nev. at ___, ___ P.3d at ___.

[7]Id. at ___, ___ P.3d at ___.

The district court erred by admitting the conviction for the purpose of demonstrating a common scheme or plan. However, this error was harmless. "[W]e will affirm a district court's correct decision to admit evidence, even if it gave an incorrect reason for doing so."[8] Because we conclude that Lyons' prior conviction is relevant to prove motive and that its probative value outweighs its risk of prejudice, we conclude that the district court correctly admitted the conviction.

Jury instructions

Lyons contends that the district court erred in not instructing the jury at the start of the trial as to the limited purposes for which the jury could consider prior bad acts. The jury was not so instructed prior to the State's opening statement. However, a limiting instruction was given prior to deliberations. The absence of such an instruction "did not have a substantial and injurious effect or influence the jury's verdict" and, thus, any error in this regard is harmless.[9]

Enhancement

We agree with Lyons' argument that the district court improperly enhanced his sentences by considering his prior conviction. Assembly Bill 78 added NRS 200.366(4) and NRS 201.230(3) to provide that a person convicted of either sexual assault against a minor or lewdness with a minor, who has previously been convicted of a sexual

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[8]Id. at ___, ___ P.3d at ___.

[9]Rhymes, 121 Nev. at ___, 107 P.3d at 1282.

offense against a minor, shall be punished by "imprisonment in the state prison for life without the possibility of parole."[10]

Article I, Section 10 of the United States Constitution prohibits the states from enacting ex post facto laws. The Ex Post Facto Clause presumes that in the absence of clear, unambiguous intent of the Legislature, "legislation, especially of the criminal sort, is not to be applied retroactively."[11] We will not apply criminal statutes to the prosecution of crimes committed before the statutes become effective.[12]

We review questions of statutory construction de novo.[13] We will not look beyond the statutory language unless the language is ambiguous.[14] The plain language of Assembly Bill 78 states that it applies retroactively to determine "whether a person is subject to" the amended statutes.[15] Convictions predating October 1, 2003, may be used to enhance sentences for offenses committed after October 1, 2003. However, the statutory sentencing enhancements do not apply to offenses committed before October 1, 2003, even though the district court sentenced Lyons after that date. Lyons was tried and convicted in September 2003 for crimes that occurred no later than 2000.

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[10]2003 Nev. Stat., ch. 461, §§ 1-2, at 2825-26; NRS 200.366(4); NRS 201.230(3).

[11]Johnson v. United States, 529 U.S. 694, 701 (2000).

[12]Houtz v. State, 111 Nev. 457, 461, 893 P.2d 355, 357 (1995).

[13]Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004).

[14]State v. Kopp, 118 Nev. 199, 202, 43 P.3d 340, 342 (2002).

[15]2003 Nev. Stat., ch. 461, § 9, at 2831 (emphasis added).

Hearsay

We disagree with Lyons' contention that the district court abused its discretion in admitting hearsay statements to corroborate the minor victims' testimony. First, Detective Cullison's testimony that A.A. told him that Lyons had digitally penetrated her was not hearsay because it was not offered to prove the truth of A.A.'s statement; it was offered to explain why Detective Cullison contacted the Sexual Abuse Intervention Team (SAINT). Second, SAINT nurse Phyllis Suiter's testimony that A.A. told her that Lyons had touched her vagina and that it had hurt was admissible under an exception to the hearsay rule as a statement made for the purposes of medical diagnosis or treatment. Third, although A.A.'s mother testified that A.A. told her about Lyons' abuse, Lyons elicited much of this testimony through his cross-examination of A.A. Fourth, Tammy T.'s testimony that M.M. told her that Lyons had touched her underneath her underwear and T-shirt was an excited utterance under NRS 51.095. In addition, A.A. and M.M. testified at the trial and were subject to cross-examination.

Further, even if the district court erred in admitting the testimony discussed immediately above, the error was harmless, beyond a reasonable doubt.[16] M.M. testified that Lyons would ask her to sleep on his lap and that he touched private parts of her body. Lyons admitted to Detective Cullison that he patted M.M.'s and the other victims' buttocks.

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[16]Chapman v. California, 386 U.S. 18, 24 (1967).

We conclude that Tammy T.'s testimony was merely cumulative and did not contribute to the verdict.[17]

Supplemental voir dire

We disagree with Lyons' contention that the district court abused its discretion by not permitting him to conduct additional voir dire and question prospective jurors as to their views on sex offender rehabilitation. Supplemental voir dire is within the discretion of the district court.[18] However, the district court may not unreasonably restrict supplemental voir dire.[19] We conclude that the district court unreasonably denied Lyons' supplemental voir dire, but that this error was harmless beyond a reasonable doubt.

Double jeopardy

We disagree with Lyons' argument that he was charged and convicted in violation of the Double Jeopardy Clause. We conclude that Lyons' fondling and digital penetration of M.M. constituted three separate acts of lewdness and one act of sexual assault. There is no violation of the Double Jeopardy Clause.

Psychosexual evaluation

Lyons argues that the district court erred in denying his request for a psychosexual evaluation in preparation for his defense. We

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[17]Lyons also contends that the admission of the victims' statements violates the United States Supreme Court's ruling in Crawford v. Washington, 541 U.S. 36, 50-56 (2004). All five victims testified in this case and were subject to cross-examination. We conclude that the victims' statements were not testimonial because they were made to family members and acquaintances and thus did not trigger the Crawford rule.

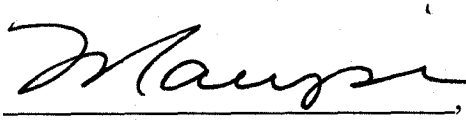
[18]Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

[19]NRS 175.031.

conclude that nothing in the record shows that the district court precluded Lyons from enlisting an expert to conduct such an evaluation.

Having considered all of Lyons' contentions on appeal, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART. We further REMAND this matter to the district court for a new sentencing hearing consistent with this order.



_____, J.
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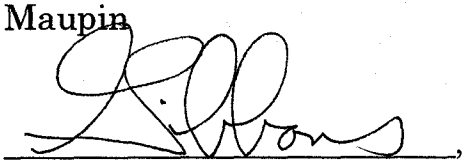

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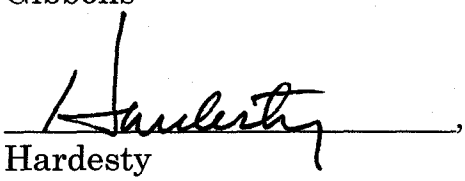

_____, J.
Hardesty

cc: Hon. Donald M. Mosley, District Judge
Pike & Associates
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk