IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS PIERRE ASHLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46650

FILED

FEB 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction and sentence. A jury convicted appellant Nicholas Pierre Ashley of one count of lewdness with a minor under the age of 14. The district court sentenced him to serve a term of life in prison with the possibility of parole after 10 years. Third Judicial District Court, Churchill County; Archie E. Blake, Judge.

The State alleged that, on October 18, 2005, Ashley, aged 22, came to the home shared by the 11-year-old victim K.K., her father, stepmother, and brother. Ashley and K.K.'s family were neighbors and would have pizza and watch movies together every few weeks. On the day of the incident, K.K.'s father and stepmother went to bed around 9:30 p.m. K.K., her brother, and Ashley remained in the living room. Ashley left sometime thereafter and either K.K. or her father tied the door shut from the inside because the lock was broken. Ashley subsequently returned to the home, cutting through the cord tying the front door shut. K.K. was asleep on the living room couch. Ashley removed her blanket, unzipped her pants, put his hand inside her pants, and rubbed her vagina. K.K. awoke at some point during the incident, went to her parents' room, and told them Ashley had touched her. K.K.'s father went to the living room and found Ashley asleep or pretending to sleep on the floor. He kicked Ashley and told him to leave. Ashley left, then returned a few minutes

later to retrieve his keys. K.K.'s father gave him the keys, and Ashley left again. K.K.'s father called the police in the morning.

Ashley had a prior conviction for attempted sexual assault of a minor under the age of 16. At Ashley's trial for the charge involving K.K., S.L. testified that, several years prior, she and 18-year-old Ashley were at a party with other teenagers and drinking alcohol. S.L., who was 14 at the time, passed out on the bathroom floor due to her alcohol consumption. She awoke to find Ashley having sexual intercourse with her on the bathroom floor; she then passed out again. Ashley was paroled after serving 22 months of his sentence for the crime against S.L. He was on parole at the time of the incident with K.K.

In this appeal, Ashley argues that the district court erred in allowing S.L. to testify. We agree.

NRS 48.045(2) provides that

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"A district court's decision to admit or exclude evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error."[1]

> "A presumption of inadmissibility attaches to all prior bad act evidence." The principal concern with admitting this type of evidence is that the jury will be unduly influenced by it and convict a

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[1]Ledbetter v. State, 122 Nev. ___, ___, 129 P.3d 671, 676 (2006).

> defendant simply because he is a bad person. The presumption of inadmissibility may be rebutted when prior to the admission of this evidence the district court conducts a hearing outside the presence of the jury and finds that the following three factors set forth in Tinch v. State are satisfied: the evidence is relevant, it is clear and convincing, and its probative value is not substantially outweighed by the danger of unfair prejudice.[2]

Here, the district court conducted a Petrocelli[3] hearing at which the Tinch factors were discussed. The State argued that Ashley's prior conviction was relevant to show lack of mistake, motive, intent, and modus operandi. The defense argued that Ashley was not claiming mistake, accident, or lack of intent as a defense; rather, his defense was that he simply had not touched K.K. The district court ruled that the incidents involving S.L. and K.K. were factually similar in that both involved Ashley's use of alcohol and a victim who was sleeping, pretending to sleep, or unconscious. The district court also ruled that the incident with S.L. was relevant to show motive, opportunity, intent, preparation, and absence of mistake or accident. Other than concluding that the two incidents were factually similar, the district court did not explain how these factors were pertinent to K.K.'s case.

Intent, mistake, and accident were not at issue in this case, as Ashley did not claim that he mistakenly or accidentally touched K.K.

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[2]Id. at ___, 129 P.3d at 677 (quoting Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005) and citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

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

Thus, the incident with S.L. was not relevant for showing these factors and was not properly admitted for this purpose.[4] The district court's oral ruling following the Petrocelli hearing also does not provide us with sufficient information to uphold its determination that the incident with S.L. was relevant to showing that Ashley prepared to victimize K.K. or had the opportunity to do so. S.L.'s testimony could therefore only have been admissible to show motive.

In Ledbetter v. State, we held that "'whatever might "motivate" one to commit a criminal act is legally admissible to prove "motive" under NRS 48.045(2),'"[5] as long as the Tinch test for admissibility is satisfied. Ledbetter was charged with sexually abusing his young stepdaughter L.R. over many years; the State sought testimony from his daughter, another stepdaughter, and his step-granddaughter that Ledbetter had abused them as well. We held that, "under the particular facts" of the case, Tinch was satisfied because testimony from the three former victims was probative on what motivated

> Ledbetter, an adult man who was in a position to care for and protect his young stepdaughter L.R.

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[4]See Rosky, 121 Nev. at 196-97, 111 P.3d at 698 (holding that, where identity is not at issue, admission of a prior bad act is not proper to show modus operandi); Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001) (holding that prior episodes of the defendant abusing children were relevant to rebutting the defendant's claim that he accidentally smothered the child victim); Daniels v. State, 121 Nev. 101, 105-06, 110 P.3d 477, 480 (2005) (holding that evidence of a prior burglary was relevant to rebut the defendant's entrapment defense by showing defendant had a predisposition to commit crimes).

[5]122 Nev. at ___, 129 P.3d at 678 (quoting Richmond v. State, 118 Nev. 924, 937, 59 P.3d 1249, 1258 (2002)).

> from harm, to instead repeatedly sexually abuse her over so many years. . . . The evidence of Ledbetter's prior acts of sexual abuse [against female relatives] showed Ledbetter's sexual attraction to and obsession with the young female members of his family, which explained to the jury his motive to sexually assault L.R.[6]

Ashley's case does not warrant a similar conclusion. The two incidents are factually similar only in that Ashley was drinking alcohol before the incidents and the two victims were unconscious, asleep, or pretending to sleep when they occurred. Ashley and S.L. were both teenagers with a few years between their ages and were acquaintances who were both drinking alcohol at a party when that assault occurred; whereas 11-year-old K.K. was 10 years younger than Ashley when that assault took place after Ashley broke into her home. The assault on S.L. did not demonstrate that Ashley was an adult male who had a "sexual attraction to and obsession with" young girls whom he was substantially older than. Our previous cases have upheld evidence from prior victims when the incidents were far more factually similar: in Ledbetter,[7] the victims were all the daughters, stepdaughters, or stepgrandaughters of the defendant; in Rhymes v. State,[8] the defendant intended to use his skills as a massage therapist to facilitate sexual contact with the victims; in Braunstein v. State,[9] the defendant was an adult male and the victims

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[6]Id. at ___, 129 P.3d at 678-79.

[7]Id. at ___, 129 P.3d 671.

[8]121 Nev. 17, 107 P.3d 1278 (2005).

[9]118 Nev. 69, 40 P.3d 413 (2002).

were adolescent girls who spent time in Braunstein's home and were both assaulted there.

Thus, we conclude that the incident with S.L. was not relevant under Tinch for showing motive, opportunity, intent, preparation, or absence of mistake or accident in the case involving K.K. We review the erroneous admission of evidence of other acts for harmless or prejudicial error.[10] Factors relevant to this analysis include "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[11] Here, the remaining evidence was not so substantial that we may conclude with any degree of certainty that a jury would have convicted Ashley without evidence of the incident with S.L.; the error was substantial and involved evidence particularly susceptible to misuse by the jury; and Ashley is charged with a crime carrying a significant sentence, including lifetime supervision. We therefore conclude that the admission of S.L.'s testimony was not harmless and Ashley is entitled to a new trial.

Ashley also claims the district court impugned his defense counsel in front of the jury, possibly tainting the jury's verdict. When defense counsel asked a witness if K.K.'s stepmother told the witness that K.K.'s stepfather had shown her a video of a child rape, the State objected, and the district court said that defense counsel had not discussed that piece of evidence and that the question was "inappropriate, outside the bounds of propriety, outside the bounds of what was agreed upon by counsel and ordered by the court." Ashley cites no other comments by the

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[10]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).

[11]Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

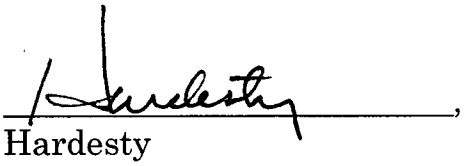
district court in the jury's presence that reflected the district court's opinion of defense counsel's performance. While the district court's comments may have exceeded what was required to sustain the objection, we conclude that this single incident did not prejudice Ashley.[12]

In light of our conclusion that Ashley's conviction must be reversed, we decline to consider his other assignments of error.

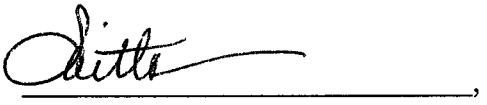
Having reviewed Ashley's contentions and concluded that he is entitled to a new trial, we

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

_____, J.
Parraguirre



_____, J.
Hardesty



_____, J.
Saitta

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[12]Cf. Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998). Ashley also claims the district court impugned his defense counsel and denied him due process by appearing impatient and trying to "hurry things along." Our review of the record reveals that the district court encouraged both defense counsel and the State to keep the trial moving on several occasions. Ashley provides no authority for the proposition that this was error. "This court has consistently held that it will not consider assignments of error that are not supported by relevant legal authority." Jones v. State, 111 Nev. 848, 855, 899 P.2d 544, 547-48 (1995).

cc: Third Judicial District Court Dept. 2, District Judge
Martin G. Crowley
Attorney General Catherine Cortez Masto/Carson City
Churchill County District Attorney
Churchill County Clerk