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Summary of Bigpond vs. Nevada, 128 Nev. Advanced Opinion No. 10

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Bigpond vs. Nevada,128 Nev. Advanced Opinion No. 10 (Mar. 01, 2012)[1]

EVIDENCE – CHARACTER OR PROPENSITY

Summary

The Court considered an appeal from a district court regarding admission of evidence of "other crimes, wrongs or acts" for non-propensity purposes not listed in NRS 48.045(2).

Disposition/Outcome

The Court concluded that evidence of "other crimes, wrongs or acts" may be admitted for non-propensity purposes other than those listed in NRS 48.045(2) because the purposes listed represent an illustrative, not exhaustive, list of permitted purposes.

The Court recognized previous inconsistent applications of NRS 48.045(2) and overruled previous opinions that applied a broad rule of exclusion. Other bad act evidence still has the presumption of inadmissibility, and the Court modified the first of the three *Tinch* factors so that prosecutors must request a hearing to (1) prove that the prior bad act is not only relevant but offered to prove purposes other than propensity, (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. The Court concluded that the district court satisfied the three factors, thus did not abuse it discretion in allowing in the other bad act evidence.

Factual and Procedural History

Appellant Donald Bigpond was charged with battery constituting domestic violence for striking his wife, knocking her unconscious. This was Appellant's third offense within seven years. Prior to trial, the State motioned to admit the victim's prior allegations of domestic violence against the Appellant, suspecting that, upon taking the stand, the victim would recant her pretrial statements. The State claimed that it offered the evidence of prior domestic violence for non-propensity purposes, namely as a possible explanation for the victim's anticipated recantation and to put the couple's relationship in context. Appellant filed a motion in limine, arguing the evidence did not fall under one of the non-propensity purposes listed under NRS 48.045(2). The First Judicial District Court reserved judgment until the trial to see if the victim would recant. After the victim recanted, the district court allowed admission of the prior allegations as its relevancy was relevant to explain the recantation and the couple's relationship. Appellant was convicted and appealed.

Discussion

Justice Douglas wrote for the Court, sitting as a three justice panel. The Court began its analysis with Appellant's argument that the district court abused its discretion by allowing evidence of prior acts of domestic violence. Appellant cited to *Rowbottom v. State* to support his argument.[2] *Rowbottom* precluded admission of prior bad acts when offered to show the

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[2] 105 Nev. 472, 485, 779 P.2d 934, 942 (1989), *overruled on other grounds by Jezdik v. State*, 121 Nev. 129, 139 n. 34, 110 P.3d 1058, 1065 n.34 (2005).

relationship between the defendant and his family because NRS 48.045 did not explicitly allow for such a non-propensity purpose. In the current case, the Court overruled this portion of *Rowbottom*, finding that the reasoning reflects Nevada's prior bad act jurisprudence and not the approach codified in NRS 48.045.

Under common law, courts either narrowly excluded evidence of uncharged misconduct or favored broad exclusion, unless a narrow list of exceptions applied.[3] Under this original rule, such evidence was excluded only if its relevance relied solely on proving the defendant's criminal disposition. It was admissible if the evidence had any other relevant purpose.[4] The second, broader view, excluded evidence of uncharged misconduct unless "it tend[ed] to establish either (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan, so related to each other that proof of one tends to establish the others or (5) the identity of the person charged."[5] The broader rule became the norm in *People v. Molineux*,[6] and Nevada followed that trend in *State v. McFarlin*.[7]

The original "narrow rule" resurged with the codification of the Model Code or Evidence, Uniform Rules of Evidence, and finally the Federal Rules of Evidence. FRE 404 (b) "plac[ed] greater emphasis on (the) admissibility of uncharged misconduct evidence."[8] The Nevada State Legislature adopted NRS 48.045(2), which closely mirrors the language of the FRE 404 (b), diverging only where the federal provisions sharply differed from Nevada law.[9]

In interpreting the plain meaning of NRS 48.045(2), the Court found that the language narrowly excludes evidence of previous crimes and wrongdoings, as the "other purposes" listed in the statute illustrate rather than limit when such evidence may be admitted. NRS 48.045(2) prohibits the admission of other bad acts to prove propensity, but such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake of accident."[10] The statute also states that "evidence of other crimes may be admissible when offered for purposes that fall outside the narrow limits of the general rule."[11] The Court found that the statute permits other bad act evidence, so long as it is not admitted to prove propensity. The inclusion of a list of "other purposes" provides an illustrative rather than exhaustive list of other non-propensity purposes.

The Court recognized its previous inconsistent applications of NRS 48.045(2).[12] However, it emphasized that the narrow exclusion does not remove the "presumption [that] inadmissibility

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[3] Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938).
[4] *Id.*
[5] State v. McFarlin, 41 Nev. 486, 494, 172 P.371 373 (1918).
[6] 61 N.E. 285, 293-94 (N.Y. 1901).
[7] 41 Nev. 486, 494, 172 P.371 373 (1918).
[8] EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:31 (2009) (quoting H.R. REP. NO. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7081.
[9] *See A Proposed Evidence Code for the State of Nevada: Hearing on S.B. 12 Before the Senate Judiciary Comm*., 56th Leg. (Nev., February, 10 1971) (statement of Assemb. Melvin D. Close, .Jr, Chairman, Subcomm. For Study of an Evidence Code); LEGIS. COMM'N OF THE LEGIS. COUNSEL BUREAU, A PROPOSED EVIDENCE CODE, Bulletin No. 90 (Nev. 1970).
[10] Nev. Rev. Stat. § 48.045(2) (2009).
[11] *Id.*
[12] Previous decisions where the Court broadly excluded evidence, unless admitted for specified purposes include: Theriault v. State, 92 Nev. 185, 189, 547 P 2.d 668, 671 (1976), *overruled on other grounds by* Alford v. State, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995); *see also Rowbottom* at 485, 779 P.2d 934, 942; Willet v. State, 94 Nev. 620 622, 584 P.2d 684, 685 (1978). Previous decisions where the Court narrowly excluded evidence unless it is substantially relevant for purposes other than propensity include: Williams v. State, 95 Nev. 830 833, 603 P.2d

attaches to all prior bad act evidence"[13] and that uncharged bad act evidence is often irrelevant and has a prejudicial effect.[14]

In *Tinch v. State*,[15] the court outlined three factors other bad act evidence must meet prior to admission: (1) the evidence must be relevant to the crime charged, (2) the act is proven by clean and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The Court modified the test to accommodate for the narrow limits of exclusion. Under the current modifications, prosecutors must request a hearing, establish the elements of the test, and prove that the prior bad act is not only relevant but offered to prove purposes other than propensity.

In this case, the Court found that the district court did not abuse discretion in allowing the evidence of previous domestic violence, as the court satisfied the three factor *Tinch* test outside the presence of the jury.[16] First, the evidence of previous domestic violence is relevant to the case as it provides a possible reason as to why the victim may recant her prior accusations and puts the victim's relationship with the appellant in context.[17] Second, the previous bad acts can be proven with clear and convincing evidence, as the appellant previously pleaded guilty to the two previous domestic violence charges involving the victim. Third, the court weighed the probative value of the evidence and found that it was not outweighed by the danger of unfair prejudice. The district court took steps to limit the danger of unfair prejudice, as it admitted only the victim's prior accusations and not the previous convictions. Further, it issued a limiting instruction[18] to the jury clarifying that the prosecution offered the testimony only to provide a possible explanation for the victim recanting and for the purpose of putting the couple's relationship in context. Thus, the Court affirmed the district court's judgment of conviction, but further cautioned that use of prior bad act evidence relies heavily of the facts of the case.[19]

Conclusion

Evidence of "other crimes, wrongs, or acts" may be admitted for non-propensity purposes other than those listed in NRS 48.045(2).

694, 696 (1979); Shults v. State, 96 Ned. 742, 748, 616 P.2d 38, 392 (1980); *see also* Braunstein v. State, 118 Nev. 68, 74, 40 P.3d 413, 417-18 (2002).

[13] Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005).

[14] Tavers v. State, 118 Nev. 725,730, 30 P.3d 1128, 1131 (2001).

[15] 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[16] *See* Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

[17] The district court relied on two Hawaii cases which held that evidence of prior acts of domestic violence involving the victim and defendant is admissible if the victim recants pretrial accusations to explain the victim's recantation and show the context of the victim and defendant's relationship. State v. Clark, 926 P.2d 194, 208 (Haw. 1996); State v. Asuncison, 129 P.3d 1182, 1195 (Haw. Ct. App. 2006).

[18] *See* Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 11 (2008).

[19] *Ledbetter* at 264, 129 P.3d at 679-80.