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Summary of *Mclellan v. State*, 124 Nev. Adv. Op. No. 25

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Mclellan v. State
124 Nev. Adv. Op. No. 25
(May 1, 2008)¹

Criminal Law–Evidence

SUMMARY

Appellant appeals conviction on 22 counts of sexual assault of a minor under 14 years of age and 20 counts of lewdness with a child under 14 years of age. Appellant argues the district court should not have entered telephone conversation recorded in California into evidence. Appellant also argues that evidence regarding uncharged acts should not have been admitted.

DISPOSITION/OUTCOME

Affirmed. The Nevada Supreme Court concluded that evidence is admissible if it was legally obtained within the jurisdiction it was seized. Also, the district court did not abuse its discretion in admitting the evidence of prior bad acts.

FACTS AND PROCEDURAL HISTORY

Appellant Mclellan met J.F. when she was nine years old. Mclellan subsequently married J.F.’s mother and over the course of the marriage repeatedly coerced J.F. into engaging in sexual conduct. The abuse continued until Mclellan and J.F.’s mother separated.

After the separation, J.F. was sent by her mother to live with her aunt and uncle in Mission Viejo, California. There, she told a school counselor about the sexual abuse. The counselor told the Orange County Sheriff’s office who set up a wiretap with the consent of J.F.’s aunt and uncle, so J.F. could get a confession from Mclellan.

The taped conversation was admitted at trial and played without objection. Mclellan also did not object to the admission of prior acts or the district court’s initial failure to issue a limiting statement to the jury.

¹ By: Tyler Ure

DISCUSSION

Admission of taped phone call

While a telephone conversation can only be intercepted with the consent of both parties in Nevada, California only requires consent of one party. McClellan argues that because the telephone conversation would not be legally obtained and therefore be inadmissible under Nevada law, it should not have been admitted. However, NRS 48.077 allows the admission of the contents of any communication lawfully obtained under the laws of another jurisdiction if it was obtained lawfully in that jurisdiction. Because the conversation was lawfully obtained in California, the conversation is admissible in Nevada under NRS 48.077.

Limiting instruction regarding the California incident

When evidence of prior bad acts is admitted, the prosecutor has a duty to request that the jury hear a limiting instruction explaining the purpose of the evidence. Here, the prosecutor failed to request an instruction and the Court reviewed the error under NRS 178.598 and *Kotteakos v. United States*² to determine “whether the error had substantial and injurious effect or influence in determining the jury’s verdict.”³ The Court concluded that since the evidence against Mclellan was overwhelming that the omission of the instruction at the time the evidence was admitted had no injurious effect.

The Court also modified the duty under *Tavares v. State*⁴ to issue a limiting instruction when evidence of prior bad acts is admitted and at the end of the trial. The defendant now may waive the giving of the limiting instruction but he must do so explicitly and before the evidence is admitted.

CONCLUSION

Evidence of a taped communication obtained legally in another jurisdiction is admissible in Nevada. The prosecutor has a duty to request a

² *Kotteakos v. United States*, 328 U.S. 750 (1946)

³ Internal Quotations Omitted

⁴ *Tavares v. State*, 117 Nev. 725, 731 (2001).

limiting instruction when evidence of prior bad acts is admitted, but the defendant can waive the instruction.