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### Summary of Rhymes v. State, 121 Nev. Adv. Op. 4

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## **EVIDENCE - PRIOR BAD ACTS**

### **Summary**

Appeal from a judgment of conviction, pursuant to a jury verdict, on charges of lewdness with a minor under the age of fourteen.

### **Disposition**

Affirmed. The Court concluded that the district court properly admitted evidence of the defendant's prior bad acts, but that the district court erred by failing to give a limiting instruction related to the uncharged bad acts evidence at the time the evidence was introduced. The Court held that when evidence of prior bad acts relates to bad acts that are uncharged in the case at bar, instructions must be given both at the time the evidence is admitted and again during jury instructions. Even though the district court failed to give a limiting instruction at the time the uncharged bad acts evidence was introduced, the Court concluded that the failure to give such an instruction constituted harmless error.

### **Factual and Procedural History**

On December 7, 2001, Defendant/Appellant Michael Rhymes was living with Irene Vela, her daughter, and her three sons. Vela's daughter invited a twelve-year-old friend (the victim) to spend the night at Vela's house. The victim awoke when she felt her pajama bottoms being pulled down and saw Rhymes lying next to her. Rhymes told her that he had taken massage classes as he massaged her leg. She told Rhymes to stop, then woke Vela's daughter and attempted to return to the victim's apartment. She told Vela's daughter about what had happened.

After returning home, the victim told her mother what happened. The mother called the police, who interviewed Vela's daughter and the victim. The girls corroborated each other's stories. The victim underwent a sexual assault exam, the results of which were negative. Police also interviewed Rhymes, who denied touching the victim. Rhymes was subsequently charged with one count of lewdness with a child under the age of fourteen.

Before trial, the State filed a motion to admit evidence of other bad acts for which Rhymes was not presently being charged, asserting that the acts were admissible to show intent and the absence of mistake. To show his prior bad acts, the State called two witnesses who had filed sexual misconduct complaints against Rhymes in the past. Both women alleged that Rhymes, while giving them massages, committed acts of sexual misconduct against them. In a separate case, the State charged Rhymes with sexual misconduct as a result of these allegations.

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<sup>1</sup> By Patrick Murch

The district court admitted the evidence based on the State's argument that it was relevant to establish intent and that there was a similarity between the prior bad acts and the acts alleged by the victim in the present case. It also determined that the probative value of the prior bad acts evidence was not substantially outweighed by the danger of unfair prejudice to Rhymes. The court failed, however, to determine whether the State proved the prior case by clear and convincing evidence. The court also neglected to give the required limiting instruction when the prior bad acts evidence was introduced, but did give such an instruction when the jury was charged.

Rhymes was convicted of lewdness with a minor under the age of fourteen and was sentenced to life imprisonment with the possibility of parole after a minimum of ten years. On appeal, Rhymes contended that the district court erred by: (1) failing to conduct a hearing, pursuant to the requirements of *Petrocelli v. State*,<sup>2</sup> to determine the admissibility of the prior bad acts evidence; and (2) failing to give a limiting instruction at the time the evidence was admitted at trial.

## **Discussion**

### **1. Failure to hold a *Petrocelli* hearing.**

Evidence of other crimes, wrongs, or acts may not be introduced as proof of a person's character, but may be introduced to prove, *inter alia*, intent and absence of mistake or accident.<sup>3</sup> Prior bad acts evidence, however, is looked upon with disfavor because such evidence is often irrelevant and prejudicial. Consequently, it is presumed to be inadmissible and the State bears the burden of requesting that the evidence be admitted and establishing its admissibility.<sup>4</sup> To do this, the State must demonstrate at a hearing outside the jury's presence that: (1) the prior incident is relevant to the present crime; (2) the prior 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.<sup>5</sup>

The trial court has the discretion to admit or exclude prior bad acts evidence, and its ruling will stand absent a showing that its decision was manifestly incorrect.<sup>6</sup> If the court fails to conduct the requisite pre-admission hearing, such failure is reversible error unless: (1) the record is sufficient for the Nevada Supreme Court to determine that the evidence is admissible pursuant to the *Tinch* standard; or (2) the result would have been the same if the lower court did not admit the evidence.<sup>7</sup>

In *Rhymes*, the Nevada Supreme Court found that the trial court conducted the necessary *Petrocelli* hearing and determined that the prior bad acts testimony was relevant as to both intent and similarity and that its probative value outweighed its prejudicial effect, but that the court failed to determine that the prior bad acts were proven by clear and convincing evidence. Nevertheless, the Court concluded that the record sufficiently established the occurrence of the prior bad acts by clear and

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<sup>2</sup> 692 P.2d 503 (Nev. 1985).

<sup>3</sup> NEV. REV. STAT. 48.045(2) (1971).

<sup>4</sup> *Tavares v. State*, 30 P.3d 1128, 1131 (Nev. 2001).

<sup>5</sup> *Tinch v. State*, 946 P.2d 1061, 1064-65 (Nev. 1997).

<sup>6</sup> *Braunstein v. State*, 40 P.3d 413, 416 (Nev. 2002).

<sup>7</sup> *Qualls v. State*, 961 P.2d 765, 767 (Nev. 1998).

convincing evidence. Moreover, the district court's determination that the bad acts evidence was relevant was not manifestly erroneous, so the evidence was properly admitted in this case.

2. The district court's failure to give a limiting instruction at the time the evidence was admitted.

The district court failed to give the jury a limiting instruction at the time the bad acts evidence was introduced. The Nevada Supreme Court held that this was a harmless error because the court gave the jury a limiting instruction prior to being charged. When uncharged bad acts are admitted into evidence, a limiting instruction should be given both at the time of admission and in the trial court's final charge to the jury.<sup>8</sup> The requirement of instruction upon admission is important because it allows the instruction to take effect prior to the jury's becoming accustomed to thinking of it in terms of the inadmissible purpose of the evidence.<sup>9</sup> Nevertheless, if a court fails to give such a limiting instruction, that failure is harmless if the error did not have a substantial, injurious effect, or if it did not influence the jury's verdict.<sup>10</sup>

In *Rhymes*, the State contended that *Tavares* was distinguishable from the present case because in *Tavares*, the defendant never faced charges for the commission of the prior bad acts, but the defendant in *Rhymes* did, in fact, face charges for the prior bad acts. The Court disagreed, noting that the term "uncharged bad acts" refers to any acts uncharged in the instant case, and does not refer to any prior bad acts that were never charged in any case. The Court stated that the fact that prior bad acts have been charged in another case does not relieve the State of its burden of requesting a limiting instruction prior to the admission of bad acts evidence, nor does it relieve the trial court of its burden of giving the instruction *sua sponte* if the State fails to request such an instruction.

The Court held that even though the trial court failed to give a limiting instruction at the time of the admission of prior bad acts evidence, it gave the instruction at the time the jury was charged. The jury was instructed that the evidence could only be considered for the purposes of proving intent and similarity. Because the jury received the instruction prior to deliberation, and because there was uncertainty as to whether the prior bad acts were "uncharged bad acts," the district court's failure to give an instruction at the time of admission of the evidence did not substantially affect *Rhymes*' rights.

## **Conclusion**

The Nevada Supreme Court concluded that the district court erred when it failed to expressly determine if the State proved the occurrence of *Rhymes*' prior bad acts by clear and convincing evidence, but that the failure constituted harmless error because the record sufficiently demonstrated, by clear and convincing evidence, that *Rhymes* committed the prior bad acts. Moreover, the Court found that the district court erred by failing to give the jury a limiting instruction at the time the prior bad acts evidence was introduced, but that such error was harmless because the jury received such an instruction

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<sup>8</sup> *Tavares*, 30 P.3d at 1133.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1132.

prior to being charged. Furthermore, there was no evidence that Rhymes requested such an instruction at the time the evidence was admitted. If he had, the district court would have been obligated to give the instruction. Thus, the Court affirmed the conviction.