IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF N.J., A MINOR CHILD

NARA MIKHAL JOHNSON
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Case No. 70220

APPEAL FROM AN ORDER FINDING THAT A MINOR CHILD

COMMITTED A DELINQUENT ACT

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that judges of this court may evaluate possible disqualification or recusal:

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Tenth Judicial District Court

The Honorable Thomas Stockard, District Judge

David K. Neidert, Esq.

TABLE OF CONTENTS

Title **Page**

TABLE OF AUTHORITIES

Authorities

JURISDICTIONAL STATEMENT

A. STATUTE ALLOWING JURISDICTION

NRS 62D.500

B. TIMELINESS OF THIS APPEAL

The District Court filed the written dispositional order on March 21, 2016. The notice of entry of order was filed on March 23, 2016. The notice of appeal was filed on April 20, 2016.

C. TYPE OF APPEAL

Direct Appeal from order of the District Court finding a juvenile minor child committed a delinquent act.

ROUTING STATEMENT

This matter involves issues of first impression specifically is uncharged misconduct evidence allowed to be presented in juvenile delinquency matters and if so what safeguards should be in place to make them admissible so therefore, it appears that this appeal should remain with the Nevada Supreme Court per NRAP 17(a)(13).

ISSUES PRESENTED FOR REVIEW

I. **IMPROPER BAD ACT EVIDENCE WAS PRESENTED TO THE COURT AND ADMITTED DURING THE ADJUDICATORY HEARING IN VIOLATION OF THE MINOR CHILD'S FIFTH, SIXTH, AND FOURTEEN AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL.**

II. **INSUFFICENT EVIDENCE WAS PRESENTED BY THE STATE TO SUPPPORT A FINDING OF DELINQUENCY**

STATEMENT OF THE CASE

On October 28, 2015, the State of Nevada filed a petition under the juvenile court act alleging one count of battery and one count of harassment. AA at 001. An adjudicatory hearing was held on March 16, 2016. AA at 004. The minor child was found delinquent as to both counts. AA at 128. This appeal followed. AA at 142.

STATEMENT OF FACTS

Several juveniles including the alleged victim and Ms. Johnson were together at Oats Park in Fallon. AA at 010-011. The juveniles proceeded to a wooded area behind Walmart. AA at 014. Tiara McQueen and Ms. Johnson

were angry at the alleged victim and were yelling at her. AA at 15. Raymond Wilkes filmed the confrontation with his cell phone. AA at 15-16. The video was a fair and accurate representation of the incident. AA at 24. The video does not show Ms. Johnson striking the alleged victim in anyway, nor did Raymond Wilkes see Ms. Johnson strike the alleged victim in anyway. The alleged victim originally claimed that Ms. Johnson punched her in the temple (AA at 37), but later admitted the video did not show Ms. Johnson strike her in anyway. AA at 48. The alleged victim told Tierra McQueen that Ms. Johnson did not do anything wrong, but it was not her choice to press charges. AA at 51-53. Ms. McQueen is on the video attacking and battering the alleged victim several times hitting and kicking the alleged victim. AA at 48. Witness Kate Wiesman testified that Ms. Johnson did not hit the alleged victim. AA at 68. Witness Tierra McQueen said she did not see Ms. Johnson hit the victim. AA at 74. Witness Ruben Gutierrez stated that he did not see Ms. Johnson hit the victim. AA at 84.

SUMMARY OF ARGUMENT

The District Court and the Prosecutor erred in allowing the State to admit uncharged misconduct evidence in the adjudicatory hearing that violated the minor child's Fifth, Sixth, and Fourteen Amendment rights to Due Process and a Fair Trial.

There was insufficient evidence presented to prove the allegations against the minor child beyond a reasonable doubt.

LAW AND ARGUMENT

I. IMPROPER BAD ACT EVIDENCE WAS PRESENTED TO THE COURT AND ADMITTED DURING THE ADJUDICATORY HEARING IN VIOLATION OF THE MINOR CHILD'S FIFTH, SIXTH, AND FOURTEEN AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

A. This Court should find that bad act evidence is inadmissible in juvenile proceedings because there is no provision in NRS Chapter 62 that would allow for such evidence to be presented.

First and foremost, this Court appears to have never weighed in on whether bad act evidence is allowed in a proceeding pursuant to NRS Chapter 62D in the first instance. In adult criminal cases, NRS 48.045 allows for the admission of uncharged bad act evidence for certain limited purposes. There is no such provision similar to NRS 48.045 located in NRS Chapter 62D. Therefore,

appellant would assert that they are inadmissible in juvenile proceeding as a matter of law. This court has already ruled that the juvenile court is limited in scope to the statutes as provided in the NRS. Specifically this Court has held: "[T]he juvenile court system is a creation of statute, and it possesses only the jurisdiction expressly provided for it in the statute. A court which is the creation of statute has only the authority given to it by the statute. *Kell v. State*, 96 Nev. 791, 792-793, 618 P.2d 350 (1980).

Based on the above and by analogy, if there is no provision in the juvenile court statutes allowing for bad act evidence to be admissible in adjudicatory hearing, then the court could not admit the evidence because the juvenile court possesses only those powers as defined in the statute. As stated above there is no provision that mirrors NRS 48.045 that would allow a juvenile court to consider uncharged misconduct evidence. Therefore, the evidence is inadmissible.

The State may attempt to convince this court that NRS 62D.420 allows for such evidence. NRS 62D.420(1) states in pertinent part:

> 1. In each proceeding conducted pursuant to the provisions of this title, the juvenile court may:
>
> - (a) Receive all competent, material and relevant evidence that may be helpful in determining the issues presented, including, but not limited to, oral and written reports; and
>
> - (b) Rely on such evidence to the extent of its probative value.

Nev. Rev. Stat. Ann. § 62D.420

Although at first glance this provision may appear extremely broad, it certainly cannot be used to unconstitutionally deprive a juvenile of due process right or the right to a fair trial. Further this statute cannot be viewed in a vacuum. To read the statute literally that all competent, material, and relevant evidence that may be helpful in determining the issue presented would give the juvenile court unfettered discretion to admit all normally inadmissible evidence which could go so far as searches in violation of the Fourth Amendment or Statements of the accused taken in violation of Fifth Amendment. Clearly then, there must be a built in understanding in the interpretation of NRS 62D.420(1) that the evidence must otherwise be admissible.

This Court has already rule that bad act evidence is presumptively inadmissible. *Rhymes v. State*, 121 Nev. 17, 21, 107 P.3d 1278, 1280-81 (2005).

Further this Court has already ruled that

> We have often held that the use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often irrelevant and prejudicial and force the accused to defend

> against vague and unsubstantiated charges. The principal concern with admitting such acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person.
>
> It is also well established that evidence of uncharged bad acts may be admitted for limited purposes other than showing a defendant's bad character so long as certain procedural requirements are satisfied and certain substantive criteria met. NRS 48.045(2) lists several of the purposes for which uncharged bad act evidence is admissible, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." [731] We emphasize, however, that NRS 48.045(2) is merely an exception to the general presumption that uncharged bad acts are inadmissible.

Tavares v. State, 117 Nev. 725, 730-731 (2001).

Given this court's clear directive in *Tavaras* that NRS 48.045(2) was an exception to a general presumption of inadmissibility and no such provision exists in Chapter 62 of the NRS, one can only conclude that the juvenile court was not given an exception such as NRS 48.045. Therefore, uncharged bad acts would not be admissible in juvenile court.

Finally, to the extent this court finds ambiguity in NRS 62.420 as to whether or not bad act evidence is allowed it must find in favor of the juvenile. Specifically this court has found that:

> The rule of lenity teaches that, "Ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Antonin Scalia &

> Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 296 (Thomson/West 2012); *Lucero*, 127 Nev. at , 249 P.3d at 1230 (the "'rule of lenity demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor'" (quoting *Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006))); see *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008) ("[t]his venerable rule . . . vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed"). At least one state has passed legislation expressly subjecting detained juveniles to the enhanced penalties applicable to prisoners who commit assaultive crimes. See Utah Code Ann. § 76-5-202(1)(a) (LexisNexis 2008), discussed in *State v. Gardner*, 947 P.2d 630 (Utah 1997).

State v. Javier C., 128 Nev. Adv. Rep 50, 289 P.3d 1194 (2012).

Based on the above, this Court should find that no uncharged bad act evidence may be presented in juvenile court because the juvenile court lacks an exception to the presumptive inadmissibility of uncharged bad act evidence such as 48.045(2). Therefore, the admission of bad acts in this case was a violation of due process and this court should find the admission of uncharged bad act evidence as outlined below warrants reversal and a new adjudicatory hearing in this matter.

B. Alternatively if this Court does not agree that bad acts are completely inadmissible in a juvenile hearing then this court should grant juveniles the same

constitutional and procedural safeguards with respect to adult defendants when such bad act evidence is admitted.

If the Court is disinclined to adopt the legal analysis in section A, the Court should at least mandate the same or similar procedural safeguards as are required with adults. This court has already held that with regard to admitting bad acts evidence in adult cases, a prosecutor must:

> In order to overcome the presumption of inadmissibility, the prosecutor has the burden of requesting admission of the evidence and establishing at a hearing outside the jury's presence that: "(1) the incident is relevant to the crime charged; (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." A prosecutor seeking admission of this volatile evidence must do so in the pursuit of justice and as a servant of the law, "the twofold aim of which is that guilt shall not escape or innocence suffer." Thus, "it is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Because the prosecutor is the one who must seek admission of uncharged bad act evidence and because the prosecutor must do so in his capacity as a servant to the law, we conclude that the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence. Moreover, when the prosecutor fails to request the instruction, the district court should raise the issue sua sponte. We recognize that in unusual circumstances, the defense may not wish a limiting instruction to be given for strategic reasons. In those circumstances, the desire of the defendant should be recognized as he is the intended beneficiary of the

> instruction and is in the best position to evaluate its consequence.

Tavares v. State, 117 Nev. 725, 730-731 (2001).

In analyzing the propriety of admitting evidence of prior bad acts, we have instructed trial courts to follow the parameters of NRS 48.045(2), such evidence is not admissible to prove the character of a person in order to show that he acted in conformity therewith but may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting evidence of prior bad acts, the district court must, outside the presence of the jury, determine whether: (1) the evidence is relevant, (2) the prior bad act is proven by clear and convincing evidence, and (3) the danger of unfair prejudice substantially outweighs the evidence's probative value. *Meek v. State*, 112 Nev. 1288, 1292-93, 930 P.2d 1104, 1107 (1996).

The hearing itself must be conducted on the record and outside the presence of the jury. *Armstrong v. State*, 110 Nev. 1322 (1994). The District Court must state its findings of facts and conclusions of law thereon. *Id.* Additionally, if the Court finds that the acts are admissible at trial, the Court must give a limiting

instruction before the introduction of evidence to the jury as well as in the jury instructions. *Tavares v. State*, 117 Nev. 725 (2001).

To deny juveniles these same safeguards with regard to bad act evidence as adults is a violation of due process. Further, it prejudices the right to fair trial because this highly prejudicial evidence would infect juvenile delinquency proceedings increasing the danger that the juvenile would be convicted on bad act evidence and not the actual evidence. This Court has already rule that bad act evidence is presumptively inadmissible. *Rhymes v. State*, 121 Nev. 17, 21, 107 P.3d 1278, 1280-81 (2005). Therefore, why would this court give license to prosecutors to use it without safeguards in juvenile proceedings?

C. Uncharged Bad Acts were improperly admitted by the District Court in this Case in violation of due process, sufficient notice of the charges against her and the right to a fair trial.

In the matter, Ms. Johnson was charged with a count of battery, the manner and means described as punching her in the temple. AA at 001. There is no mention in the petition of any spitting on the victim, which would constitute a separate battery. *Id*. The Court over the objection of defense counsel admitted evidence that Ms. Johnson allegedly tried to fight the victim several hours before the alleged battery took place. AA at 30. The court ruled it was res gestae. Later the prosecutor elicited evidence that Ms. Johnson spit on the victim. AA 37-38.

Defense counsel objected to evidence. *Id.* The Court overruled the objection without explanation. *Id.* Both of these incidents were prior bad acts because the challenging to fight would at least be disturbing the peace and as noted above an additional battery. The court with regard to the first incident found that it was res gestae. The Court erred in this regard.

In Allan v. State, 92 Nev. 318, 549 P.2d 1402 (1976), this court explained the res gestae doctrine.

> When several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme.

Id. at 321, 549 P.2d at 1404 (citing People v. Thomas, 3 Cal. App. 3d 859, 83 Cal. Rptr. 879 (Ct. App. 1970)).

In this case there is no way that the two events formed an indivisible transaction. The facts were clear that the alleged challenge to fight occurred earlier in the evening at Oats Park while the battery took place hours later in a wooded area behind Wal-Mart. AA at 10-14; AA at 29-31. These two incidents occurred at separate times and separate locations, so any belief by the court that they were an indivisible transaction was error. The prosecutor could have certainly show evidence of the alleged battery without evidence of the alleged challenge to fight.

Therefore, res gestae doctrine was inapplicable. Therefore, evidence could have only been admitted as a bad act. As noted above, even assuming bad acts are admissible in juvenile proceedings which Ms. Johnson does not concede, no safeguards were in place to force the State to prove the bad act by clear and convincing evidence nor did the court perform a prejudice vs probative value test. Therefore, the evidence should be stricken and a new adjudicatory hearing granted.

Furthermore, the evidence of supposedly spitting on the alleged victim was even more prejudicial. The court did not make a finding of res gestae with regard to this incident. It simply admitted evidence without explanation. AA at 37-38; AA at 41. There was no ruling as to why the act was admissible in either case. *Id*.

The admission of this highly prejudicial bad act evidence resulted in Ms. Johnson being convicted of a batter with little to no evidence based on evidence of a second battery that was not charged by the State. Furthermore it violated Ms. Johnson's Sixth Amendment right to notice of the charges against her.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." The Fourteenth Amendment prohibits the State from depriving a person of "life, liberty, or property, without due process of law." Accordingly, the United States Supreme Court has held:

> The object of the indictment is, first, to furnish the accused with such a description of the charge against him

> as will enable him to make his defen[s]e, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so [4] that it may decide whether they are sufficient in law to support a conviction, if one should be had . . .. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

United States v. Cruikshank, 92 U.S. 542, 558, 23 L. Ed. 588 (1875) (emphasis added).

Additionally, NRS 173.075 requires that an indictment or information contain "a plain, concise and definite written statement of the essential facts" of the charged offense. Ms. Johnson was never given notice that the spitting evidence would be admitted nor that it would be presented by the State. It was never charged in any fashion by the State, but was presented by the prosecutor and admitted by the court over objection and without explanation. This evidence was incredibly prejudicial and clearly infected the proceedings to the point that in was mentioned specifically by the Court in making its

decision in that the Court made the finding that Ms. Johnson had committed the battery charged, but also the uncharged battery. AA at 128.

In making this decision the Court appears to have aided the prosecutor in obtaining a conviction on an incredibly weak case by allowing uncharged acts to come into evidence. As outlined below, the evidence was not sufficient to convict.

Even if the court disagrees with that analysis, the evidence was far from overwhelming and significantly aided by the uncharged bad act evidence. The entire proceeding was infected by this bad act evidence. Ms. Johnson's rights to due process and a fair trial were violated. This Court should reverse this matter and grant a new adjudicatory hearing.

II. INSUFFICENT EVIDENCE WAS PRESENTED TO CONVICT MS. JOHNSON OF BATTERY.

There was insufficient evidence to convict Ms. Johnson in violation of *Jackson v. Virginia*, 443 U.S. 307 (1979). The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.". *Id.* at 315.

In this case the fact presented at trial were as follows:

Several juveniles including the alleged victim and Ms. Johnson were together at Oats Park in Fallon. AA at 010-011. The juveniles proceeded to a wooded area behind Walmart. AA at 014. Tiara McQueen and Ms. Johnson were angry at the alleged victim and were yelling at her. AA at 15. Raymond Wilkes filmed the confrontation with his cell phone. AA at 15-16. The video was a fair and accurate representation of the incident. AA at 24. The video does not show Ms. Johnson striking the alleged victim in anyway, nor did

Raymond Wilkes see Ms. Johnson strike the alleged victim in anyway.

The alleged victim originally claimed that Ms. Johnson punched her in the temple (AA at 37), but later admitted the video did not show Ms. Johnson strike her in anyway. AA at 48. The alleged victim told Tierra McQueen that Ms. Johnson did not do anything wrong, but it was not her choice to press charges. AA at 51-53. Ms. McQueen is on the video attacking and battering the alleged victim several times hitting and kicking the alleged victim. AA at 48. Witness Kate Wiesman testified that Ms. Johnson did not hit the alleged victim. AA at 68. Witness Tierra McQueen said she did not see Ms. Johnson hit the victim. AA at 74. Witness Ruben Gutierrez stated that he did not see Ms. Johnson hit the victim. AA at 84.

The victim was further impeached in that she denied that the altercation had nothing to do with her pursuing McQueen and Ms. Johnson's boyfriends. AA at 46-47. The other witnesses separately confirmed that the alleged victim pursing McQueen's boyfriend was exactly what started the altercation. AA at 67-69; AA at 88. The alleged victim never included evidence of the alleged challenge to fight or spitting by Ms. Johnson in her statement, yet testified to those facts over objection of counsel as outlined above. AA at 44-45; AA at 50-51.

Additionally, the alleged victim was impeached because she originally

testified that Ms. Johnson hit her before the camera was turned on, but wrote in her statement that she was battered by Ms. Johnson after the camera was turned off. AA at 50-51. The alleged agreed that the video captured the whole incident and that Ms. Johnson was not shown on the video striking her. AA at 48.

Based on the above, no reasonable trier of fact would have found Ms. Johnson delinquent. Every witness, save and except the alleged victim indicated that Ms. Johnson had struck the alleged victim with her fist (punched). Given the extreme contradictions, the recantation to Tierra McQueen stating Ms. Johnson did nothing wrong and the lack of any corroborating evidence such as marks, bruises or other evidence of injury to the temple where the alleged punch was to have landed, there was insufficient evidence to prove the case beyond a reasonable doubt. Therefore, this court should reverse this adjudication and remand the matter to the District Court.

CONCLUSION

Based on the above this court should reverse and remand the matter to the District Court.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this opening brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages

3. Finally, I hereby certify that I have read this opening brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure including NRAP 28(e)(1), which every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd Day of September, 2016

/S/ TROY JORDAN
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CERTIFICATE OF SERVICE

I hereby certify that I, Troy Jordan, on the 2nd Day of September, 2016, served the foregoing Opening Brief by electronically filing the document with notice to:

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