ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

RENARD T. POLK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 39457

FILED

SEP 11 2002

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CLERK OF SUPREME COURT
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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

STATUTES

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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RENARD T. POLK, Appellant,	)	
vs.	)	
THE STATE OF NEVADA, Respondent.	)	Case No. 39457

STATEMENT OF ISSUES

1. WHETHER THE STATE IMPROPERLY ELICITED TESTIMONY OF PRIOR CRIMINAL ACTS OF POLK WITHOUT A MOTION OR EVIDENTIARY HEARING

2. WHETHER THE STATE IMPROPERLY INQUIRED CONCERNING POLK'S PLEA IN THE CASE

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STATEMENT OF THE CASE

RENARD T. POLK (hereinafter referred to as POLK) was charged in Clark County Justice Court by way of an Amended Criminal Complaint with three counts of Sexual Assault with a Minor Under Fourteen Years of Age (1 APP 1-2). Pursuant to negotiations, POLK waived his preliminary hearing and proceeded to District Court. At his initial arraignment in District Court, POLK changed his mind and wanted to proceed to trial, prompting his attorney to have him evaluated for competency (1 APP 5). POLK was sent to Lakes Crossing pursuant to NRS 178.425 on August 1, 2000 (1 APP 8). Thereafter on November 2, 2000, POLK was determined to be competent. (1 APP 8)

The case proceeded to trial on January 7, 2002 and concluded on January 9, 2002 (1 APP 17-19). On January 10, 2002 the jury returned verdicts of guilty on Count I of Attempt Sexual Assault with a Minor Under Fourteen, guilty of Count II of Sexual Assault With a Minor under Fourteen, and not guilty of Count III (1 APP 19). The Court on March 14, 2002 sentenced POLK to a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months on count I, and to life with the possibility of parole after twenty years on Count II and ordered the sentences to run consecutively. The Court further imposed Lifetime Supervision. (1 APP 19-20)

The Judgement of Conviction was entered on April 1, 2002 and the Notice of Appeal was therefore timely filed on April 3, 2002 (1 APP 3-4).

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STATEMENT OF FACTS

The three counts of sexual assault filed against POLK involved two alleged victims. Count I concerned an alleged incident of oral intercourse in January, 1999 upon Jahala Chatman. Count II was alleged to have occurred in 1998 involving anal intercourse. Count III involved an alleged incident of anal intercourse on March 12, 1999 upon Anna Polk.

At the time of trial Jahala Chatman was fifteen years old and in the tenth grade (2 APP 58). She had six siblings: Renard, Richard, Javan, Jamila, Anna and Gloria (2 APP 59). They lived together at 1325 Nay Court in Las Vegas (2 APP 62). When she was 12, she, Jamila, Javan and Anna were wrestling in the kitchen and POLK wrestled her all the way to the bathroom (2 APP 62-63). POLK laid her on the floor, covered her mouth and started taking off her clothes (2 APP 63). POLK took off his clothes and took his penis out and tried to stick it in her butt but it wouldn't go in and she kept moving his penis with her other hand (2 APP 64). It went in far enough to hurt her but she kept slapping it away (2 APP 65). At one point POLK licked her butt and then tried to put it in again (2 APP 67). POLK then sat on the toilet and told her to sit on it and she told him no and it was over (2 APP 66). A few weeks later POLK told her that he was sorry and wasn't going to do it any more (2 APP 69). The incident occurred in January, 1999 when she was twelve years old and Jahala did not tell anyone about the incident until after Anna complained to her Aunt Susan that

POLK was messing with her (2 APP 70-71; 85).

Anna Polk was thirteen years old when she testified (2 APP 87). When she was five or six years old she was undressed for a bath and POLK knocked on the door and said he had to go to the bathroom (2 APP 93). She was in the tub and he came in and did something that hurt her but she couldn't remember what he did (2 APP 93-94). After that he started doing it a lot (2 APP 96). The last time it happened they lived on Nay Court and POLK told her sisters to go to the store and wouldn't let her go and then brought her into his room (2 APP 96-97). He sat down on a chair and pulled down her pants and pulled her on top of him (2 APP 98). He put his penis into her butt and kept moving around (2 APP 99). He then pushed her onto the floor on her hands and knees and then again put his penis into her butt (2 APP 100). He put a pillow over her head and covered her mouth (2 APP 101).

Anna complained after the others went to the store and she remained behind with POLK and when Jahala got back from the store, Anna was crying (2 APP 70-71). They called Aunt Susan and she came over and after talking to Anna, told their grandmother and then called the police (2 APP 73). Jahala had been suspicious that something was going on with Anna (2 APP 76).

Anna's cousins Darrell and Dorian had also hurt her butt by inserting their fingers (2 APP 112; 117; 124). This would occur when she would sleep at their house and took place

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regularly over a period of months until the grandmother found out and would not let them go over any more (2 APP 126).

Jamila Chatman was sixteen years old at the time of trial (2 APP 145). She recalled the incident where she and Jahala went to the store and when they came back Anna was in her room crying (2 APP 151-152). Anna told Jahala that " he did it again" (2 APP 154). Jamila then called and told Aunt Susan and she said she was coming right over (2 APP 156). After Susan talked to them and the grandmother they waited for Renard to come home and the grandma talked to Renard in front of all of them (2 APP 157). POLK and Susan got into a big argument because POLK insisted that it was not true (2 APP 158). Susan threatened to call the police and POLK ran out the door (2 APP 158).

Detective David Dunn was dispatched to 1325 Nay Court on March 12, 1999 at about 3:30 AM (2 APP 44-45). He was investigating the alleged sexual assault of a ten year old girl and learned that the child was at Sunrise Hospital and responded to the hospital (2 APP 45). He took a statement from the child, Anna Polk (2 APP 47). He also interviewed Jahala Chatman and Jamila Chatman on March 15, 1999 (2 APP 50). Anna Polk was sent to Sunrise Hospital so she could be examined by the sexual abuse investigative team (2 APP 53). Jahala was taken and examined at a later date (2 APP 54). Dunn submitted the case to the screening office for the District Attorney on March 16, 1999 (2 APP 54).

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Board certified family and pediatric nurse practitioner Phyllis Suiter did the sexual abuse examination on Jahala Chatman on March 15, 1999 (2 APP 191). Jahala stated that her brother did her in her "bootie" (2 APP 195), and further specified that he had put his dick inside both her vagina and bootie (2 APP 196). The exam itself was normal for both the anal and vaginal area (2 APP 201). It is not unusual to not see any findings in instances of long term anal abuse (2 APP 209).

Dr. Mark O'Connor was qualified as an expert in pediatric medicine (2 APP 225). He examined Anna Polk on March 13, 1999 (2 APP 226). Upon examination he found a scarring in the rectal area at six o'clock with the patient on her back (2 APP 227). He could not date the scar, it could have been a week old or years old (2 APP 228). The doctor could not determine what mechanism caused the injury and resulting scar (2 APP 229-230). Other than the rectal scar nothing was found out of the ordinary (2 APP 232).

Susan Sims was the aunt of POLK (2 APP 248). She received a call from Jamila in March, 1999 which prompted her to go over to their house to see what had happened (2 APP 250). When she got there all of her nieces were crying and the youngest told her what had happened so Sims told her mother (2 APP 250). Anna told her that POLK had messed with her and did it to her (2 APP 252). They waited for POLK to return and when Anna said what happened he told them that the kids were lying on him (2

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APP 254). Sims told POLK that she was going to take Anna to the hospital and POLK went downstairs and ran out the front door (2 APP 254).

Police officer David Newton received a call on August 14, 1999 at about three o'clock in the morning that someone thought they had a sexual assault warrant and wanted to turn themselves in to the police (2 APP 261). POLK told him that he was ashamed of what he had done that he had sexually assaulted his sister six months earlier and he wanted to turn himself in (2 APP 262). POLK was taken into custody (2 APP 263).

Detective Timothy Moniot interviewed POLK at the Clark County Juvenile Hall (2 APP 266). The tape of the interview was played for the jury. (2 APP 276-277) There was no active warrant and POLK was later released.

Officer John Schutt was dispatched to the area of St. Louis and Gateway on February 23, 2000 on report that someone had been maced and possibly injured (2 APP 243). He and his partner came in contact with POLK who gave his name as Renard Alli (2 APP 245). POLK had no identification and a computer search came up negative on the name and date of birth (2 APP 245). A person passing by gave the officers the correct name of Renard Polk and they were able to verify the identity through their computer (2 APP 246). The computer check came back with an active arrest warrant for POLK for sexual assault (2 APP 247).

POLK testified on his own behalf. POLK was born on

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October 14, 1980 and had moved back and forth between Las Vegas and Mississippi (2 APP 287). He called the police because his aunt wanted him to do so (2 APP 281). He could not answer whether he had sexually assaulted Anna because he had been hospitalized for mental instability and he could not remember (2 APP 282). He had been hospitalized because he had tried to commit suicide (2 APP 286). Likewise he could not remember if he had attempted to penetrate Jahala or if he had touched Jamila (2 APP 282-283). He did not believe that he had done the acts but his relatives had told him that he had (2 APP 283). He ran away because his family appeared to be angry with him (2 APP 284).

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ARGUMENT

I.

THE STATE IMPROPERLY ELICITED TESTIMONY OF PRIOR CRIMINAL ACTS OF POLK WITHOUT A MOTION OR EVIDENTIARY HEARING

During the cross-examination of POLK the State elicited the following testimony:

"Q Do you remember talking to a Dr. Paglini?

A Yes.

Q Do you recall telling him that you lost your passion to learn when you began using drugs in the 9th grade?

A I suppose so, yeah.

Q And that you said you had tried acid infrequently, as well as crystal, but your primary drug of choice was marijuana?

A Yeah.

Q Is that true?

A Yeah" (2 APP 291).

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."

"Evidence of other crimes committed by a defendant must be determined to be admissible pursuant to NRS 48.045(2). While such evidence usually does not come in the form of statements or confessions made by the defendant, we see no reason to make an exception to this statutory requirement for prior bad act evidence disclosed in a defendant's confession."

Walker v. State, 112 Nev. 819, 921 P.2d 923 (1996).

It is hornbook law that evidence of other criminal conduct is not admissible to show that a defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633 P.2d 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Colo. 1987); State v. Castro, 756 P.2d 1033 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may be admissible under the exceptions cited in NRS 48.045(2), the determination whether to admit or exclude evidence of separate and independent criminal acts rests within the sound discretion of the trial court, and it is the duty of that court to strike a balance between the probative value of the evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974).

The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that the accused committed the charged crime because of a trait of character. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966). Even where relevancy under an exception to the general rule may be found, evidence of other criminal acts may not be admitted if its probative value is outweighed by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer

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from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972). In a majority of jurisdiction improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

In the instant case no reason existed to put before the jury that POLK had used illegal controlled substances starting in the 9th grade, except to prejudice POLK in the eyes of the jurors. There were no allegations that drug usage was involved in any of the incidents by either POLK or the alleged victims. If the State desired to admit such evidence they should have filed the appropriate motion to admit other bad acts and established that the probative value outweighed the prejudicial impact. POLK was denied a fair trial and due process of law under the Fourteenth Amendment when this testimony was elicited.

Trial counsel failed to tender a contemporaneous objection, however, POLK herein urges that the testimony was plain error and is therefore subject to review by this Court. It is the position of POLK that the error was plain error and that the proper course of action on appeal is to raise any

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plain error which appears in the record and have the issue decided on its merits. In Gaines v. State, 78 Nev. 366, 374 P.2d 525 (1962) this court noted:

> "As a general rule, the failure to object, assign misconduct, or request an instruction, will preclude appellate consideration [citation omitted]. However, where the errors are patently prejudicial and inevitably inflame or excite the passion of the jurors against the accused, the general rule does not apply. The errors here involved are of that kind. An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and prosecutor to see that he gets it."

The improper testimony elicited by the State should have been the subject of objection and sua sponte intervention by the trial court. It is respectfully urged that POLK be granted a new trial.

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II.

THE STATE IMPROPERLY INQUIRED
CONCERNING POLK'S PLEA IN THE CASE

During the cross-examination of POLK the prosecutor insisted on asking questions concerning POLK'S plea and the tactical defense decisions made by the attorney and client. Specifically the questioning was as follows:

"Q You have not entered a not guilty plea by reason of insanity, is that also correct?

A No.

Q No, it's not correct?

A As of right now?

Q Right.

MR. ORAM: Judge, if there could be some clarification.

MS. HOLTHUS: Too many negatives.

Did you enter a plea of not guilty by reason of insanity?

A That was my lawyer's choice.

Q Have you entered a plea of not guilty by reason of insanity.

A As of right now?

Q As of right now.

A It was just a not guilty plea." (2 APP 292-293).

The later on re-cross:

"Q In preparation for trial did you talk to other doctors about presenting an insanity defense?

MR. ORAM: Your Honor, I would just object to the phrasing of the question did you talk. That sounds

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like he went to doctors and -- almost like what would be my job.

THE COURT: Maybe you could rephrase it.

"Q In preparation for trial after your release from Lake's Crossing, you were released from Lake's Crossing?

A Okay.

Q Found competent, a panel of doctors determined that you were in fact competent?

A Yeah.

Q Set for trial. After they found you competent did you talk to other doctors?

A Yeah, at the beginning, Paglini, or whatever.

Q From the time that you were released from Lake's Crossing until yesterday's trial date you spoke with other doctors?

A Yeah.

Q And yet you've never entered a plea of not guilty by reason of insanity? It's a yes or no?

A I don't think so." (2 APP 305-306)

The next day POLK moved for a mistrial based on the above questioning by the prosecutor on the grounds that the questions shifted the burden of proof to POLK that he should have raised an insanity defense (2 APP 315). The Court denied the request for a mistrial on the grounds that the attorney for POLK had brought it up and opened the door to the questioning on the insanity defense (2 APP 316). Contrary to the Court's ruling none of the questions on direct examination referred to the insanity defense as opposed to inquiring concerning POLK'S lack of memory of certain events in his past.

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It is generally outside the bounds of proper argument to comment on a defendant's failure to call a witness or present a certain defense. Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982). This can be viewed as impermissibly shifting the burden of proof to the defense. Barren v. State, 105 Nev. 767, 778, 783 P.2d 444, 4561 (1989). Such shifting is improper because "[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence or why a certain defense was not presented. This implication is clearly inaccurate. Barren, 105 at 778. See also, Ross v. State, 106 Nev. 924, 803 P.2d 1104 (1990); In re: Winship, 397 U.S. 358 (1970).

The questioning by the prosecutor also violated the attorney-client privilege by inquiring into defense strategy decisions. NRS 48.095 sets forth the general rule of privilege between attorney and client and states that:

> "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
>
> 1. Between himself or his representative and his lawyer or his lawyer's representative.
>
> 2. Between his lawyer and the lawyer's representative.
>
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest."

NRS 49.115 sets forth a list of exceptions to the privilege, none of which apply to the situation at hand.

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The situation in the case at bar is no different than asking a defendant about an abandoned notice of alibi. In People v. Malone, 447 N.W.2d 157 (MI. 1989), the Court allowed the State to cross-examine the defendant concerning his notice of alibi for purpose of impeaching his trial testimony under the theory of prior inconsistent statements. Similarly in Megnon v. State, 505 N.W.2d 157 (MI 1989) and Thomas v. Commonwealth, 484 S.E.2d 607 (Va. 1997) the State was allowed to use a pretrial statement of counsel, and notice of alibi, respectively to impeach the testimony of the defendant at trial with the prior inconsistent nature of the documents. POLK presented no testimony, asked no question, and made no statement to the jury indicating that an insanity defense existed or would be put forward during the trial, and as such the State should not have been allowed to ask about a plea of not guilty by reason of insanity.

The situation in the case at bar is similar to that presented to this court in Manley v. State, 115 Nev. 114, 979 P.2d 703 (1999). In Manley the State elicited testimony from a witness concerning an alibi notice that Manley's attorney had filed, but effectively abandoned. The Court only found the questioning proper because the alibi notice had not been formally withdrawn. POLK had not pursued an insanity defense in this case and it was improper to question him concerning such a defense.

It was an abuse of discretion for the trial court to have

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denied POLK'S motion for mistrial and this Court must, based thereon, reverse his conviction and remand the case for further proceedings.

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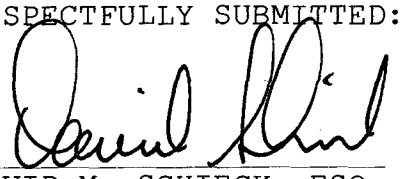
CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of RENARD T. POLK and remand the matter to District Court for a new trial.

Dated this 9 day of September, 2002.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate 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 Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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: Sept. 9, 2002

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 9 day of September, 2002, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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