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STATE OF NEBRASKA, APPELLEE, V. RUSSELL SUMMERVILLE, APPELLANT.

792 N.W.2d 901

Filed December 14, 2010. No. A-09-930.

1. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith.
2. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
3. **Rules of Evidence: Other Acts: Proof.** Before the State may offer prior bad acts evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), it must first prove to the trial court, outside the presence of the jury, by clear and convincing evidence, that the accused committed the prior crime, wrong, or act.
4. **Rules of Evidence: Other Acts.** The admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), must be determined upon the facts of each case and is within the discretion of the trial court.
5. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
6. **Motions for New Trial: Time.** The 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing.
7. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
8. ____: ____. The law is well established that an appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Russell Summerville appeals his convictions and sentences on counts of first degree sexual assault of a child, second offense, and third degree sexual assault of a child. On appeal, Summerville challenges the district court's admission of evidence, the court's denial of two motions for new trial, and the sentences imposed by the court. We find no merit to these assertions, and we affirm. We also modify a clerical error in the district court's sentencing order.

II. BACKGROUND

On October 22, 2008, Summerville was charged in an amended information with one count of first degree sexual assault of a child, second offense, and one count of third degree sexual assault of a child. In the amended information, the State alleged that Summerville, being over the age of 19 years, had subjected S.S., a child less than 12 years of age, to sexual penetration and sexual contact during the month of April 2006 and that Summerville had previously been convicted of first degree sexual assault on a child.

On October 6, 2008, the State filed notice of its intent to offer evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008). The State indicated that the evidence to be offered would be evidence of prior incidents of sexual misconduct perpetrated by Summerville between May and August 1997 upon two victims, K.G. and D.K., to demonstrate motive, intent, preparation, plan, and absence of mistake or accident. The State indicated that the evidence would consist of testimony, with Summerville having an opportunity to confront witnesses. After a hearing, the district court entered an order overruling Summerville's objection to the State's intent to offer this evidence, and the court found that "the evidence of prior acts is relevant evidence of [Summerville's] motive, intent, preparation, plan and absence of mistake or accident relative to the incidents alleged in the amended information."

At trial, the State adduced evidence that Summerville was born in 1958 and that S.S. was born in 1995. In April 2006, S.S.' mother was dating Summerville.

The evidence established that S.S. and her mother did not have a permanent residence in April 2006 and stayed at various places with friends. They stayed overnight with Summerville for several nights in April 2006. S.S. testified that when they spent the night with Summerville, they slept on the floor together, with S.S.' mother lying between Summerville and S.S.

S.S. testified that she spent time alone with Summerville in April 2006 and that Summerville took her to a park and bought her food and candy. Summerville also purchased an Easter outfit for S.S. consisting of a skirt and a shirt.

S.S. testified that on one occasion, her back hurt and her mother was giving her a massage and rubbing her back. When her mother indicated that her hand hurt, Summerville offered to give S.S. a massage and rub her back. S.S. testified that she was wearing nothing other than one of Summerville's T-shirts, because her clothes were being washed, and that Summerville massaged her lower back, near her tailbone. S.S. testified that she was not comfortable with Summerville massaging her because she did not know him very well. After the massage, the three went to sleep on the floor, again with S.S.' mother between her and Summerville. S.S. testified that early the next morning, she awoke to Summerville's touching her "inside [her] vagina" with "[h]is hands." S.S.' mother was still asleep. S.S. testified that she moved so that Summerville would pull away and that she then closed her legs tightly to prevent Summerville from repeating the act. She testified that Summerville "trie[d] to get back in" and that he "trie[d] to pull [her] legs apart." S.S. "silently cried [her]self to sleep."

After the occasion where S.S. awoke to Summerville's touching her, S.S. told her mother about the incident. S.S.' mother confronted Summerville, who denied touching S.S. After that, S.S.' mother continued to leave S.S. alone with Summerville. S.S. testified that she did not want to be around Summerville. Summerville continued to take S.S. to a park and

buy her food. Then, 2 or 3 days after the incident, S.S. was at a park with Summerville when police officers arrived and spoke to S.S. S.S. informed the police officers that Summerville had touched her.

S.S. was interviewed by a police officer, and she initially stated that Summerville had touched her. S.S. later indicated to the officer that "it must have been a dream." S.S. testified at trial that she had told the officer that it might have been a dream because she was scared and thought the officer, like her mother, would not believe her. The officer testified that it was possible that S.S. was "minimizing things due to what her mother had told her" and indicated that S.S. had spent some time with her mother prior to being interviewed. According to the officer, S.S.' mother was "very angry" when speaking to the officer, "was basically defending" Summerville, and also indicated to the officer that S.S. must have been dreaming.

Summerville was also interviewed by the officer. Summerville was asked if he had touched S.S.' vaginal area, and "[h]e advised numerous times throughout the interview that if he did it, that it was not consciously, that he would have been sleeping if that happened."

At trial, the State also presented evidence of Summerville's prior bad acts involving K.G. and D.K. in 1997. K.G.'s and D.K.'s testimony established that Summerville had been a friend of K.G.'s stepfather when K.G. and D.K. were 10 and 11 years old, respectively. K.G. testified that in the summer of 1997, Summerville would often come to K.G.'s house when her mother was at work and would sometimes baby-sit K.G. and her siblings. K.G. testified that at one point, Summerville began giving K.G. shoulder and back massages. K.G. testified that Summerville came into her bedroom at night while she was in bed and rubbed her vaginal area underneath her clothing. Later in the summer, Summerville began taking K.G. places like a library or bookstore and bought her food. Summerville would take K.G. to his apartment and perform oral sex on her. Summerville purchased a "see-through" black dress for K.G. that he had her model for him without wearing any clothes underneath.

On one occasion, K.G.'s friend D.K. went with K.G. to Summerville's apartment. Summerville offered to perform oral sex on D.K., but she declined. At a pretrial hearing, the State presented evidence establishing that Summerville was convicted in 1998 following a bench trial of first degree sexual assault on a child and was sentenced to 2 to 5 years' imprisonment.

Prior to testimony being received from K.G. and D.K., and again in the posttrial jury instructions, the district court gave the jury a detailed limiting instruction concerning the evidence of Summerville's prior bad acts. In the limiting instruction, the court informed the jury that the evidence was admissible and could be considered for only the limited purpose of determining Summerville's intent or motive to commit the crime of third degree sexual assault of a child or for determining whether Summerville had made a preparation or plan or that the sexual contact in this case was not a mistake or accident when determining whether Summerville committed first degree sexual assault of a child or third degree sexual assault of a child. The court also instructed the jury that the testimony was not properly used to determine Summerville's character or to determine his propensity to act in conformity with the prior sexual allegations.

The jury returned a verdict of guilty on both counts. Summerville filed two separate motions for new trial, both of which were overruled. The court found the conviction for first degree sexual assault of a child to be a second offense and sentenced Summerville to consecutive terms of 35 to 35 years' imprisonment for first degree sexual assault of a child and 5 to 5 years' imprisonment for third degree sexual assault of a child. This appeal followed.

III. ASSIGNMENTS OF ERROR

Summerville has assigned four errors on appeal, which we consolidate for discussion to three. First, Summerville asserts that the district court erred in admitting the prior bad acts evidence. Second, Summerville asserts that the court erred in overruling his motions for new trial. Third, Summerville asserts that the court erred in imposing excessive sentences.

IV. ANALYSIS

1. Prior Bad Acts Evidence

Summerville first challenges the district court's allowing testimony concerning his prior bad acts involving K.G. and D.K. Summerville asserts the court erred in allowing the testimony because the State failed to adduce sufficient evidence to establish by clear and convincing evidence that the prior bad acts had actually occurred and that Summerville was responsible for them. Summerville also asserts the court erred in allowing the testimony because the evidence was adduced solely to establish his propensity to commit sexual assault of a child. We find no merit to either assertion.

[1-4] Rule 404(2) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith. Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See *id.* Before the State may offer prior bad acts evidence under rule 404(2), it must first prove to the trial court, outside the presence of the jury, by clear and convincing evidence, that the accused committed the prior crime, wrong, or act. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). The admissibility of other crimes evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *Id.*

Summerville argues that the prior bad acts evidence was not admissible because the State failed to adduce sufficient evidence to establish by clear and convincing evidence that the prior bad acts occurred and that Summerville was responsible for them. We disagree.

At the pretrial hearing on this matter, both K.G. and D.K. testified about the prior acts occurring during the summer of 1997. The State adduced evidence that those events led to Summerville's being convicted in 1998 on a charge of first degree sexual assault on a child. Although K.G. acknowledged some discrepancies between her testimony in the present case and her statements to law enforcement when investigating the

1997 events, those discrepancies do not prevent the State's evidence from failing to clearly and convincingly establish that the prior bad acts actually occurred or that Summerville was responsible for them. This argument is without merit.

In *State v. Sanchez, supra*, the Nebraska Supreme Court held that the proponent of evidence offered pursuant to rule 404(2) must, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court must similarly state the purpose or purposes for which the evidence is received. In the present case, the State indicated on the record that it was requesting the prior bad acts evidence be admitted for purposes of proving intent, motive, plan and preparation, and absence of mistake or accident. In ruling that the evidence would be admissible, the district court held that it was relevant evidence of Summerville's motive, intent, preparation and plan, and absence of mistake or accident relative to the incidents alleged in the amended information.

In the present case, Summerville argues that the evidence adduced by the State was not relevant for any of those purposes and that, rather, it was admitted solely to demonstrate his propensity to commit sexual assault of a child. We disagree.

First, the prior bad acts evidence was relevant in the present case to prove Summerville's intent and motive. Although Summerville cites this court to *State v. Sanchez, supra*, for the proposition that prior bad acts evidence is not admissible to prove intent when intent is not an element of the charged offense, the State in the present case charged Summerville with both first degree sexual assault of a child, for which intent is not an element, and third degree sexual assault of a child, for which intent is an element. Despite Summerville's arguments that the third degree sexual assault of a child charge was made solely to allow admission of the prior bad acts evidence, the State adduced sufficient testimony at trial to prove that Summerville committed third degree sexual assault of a child and the charge was properly supported by the evidence. We will not speculate about the State's underlying motives for bringing a supportable and proper charge based on Summerville's conduct. The district court also instructed

the jury that the prior bad acts evidence was admissible with respect to intent and motive concerning the third degree sexual assault of a child charge and not the first degree sexual assault of a child charge.

Additionally, we agree with the State that the evidence was properly admissible to show absence of mistake or accident. Summerville argues that he did not raise mistake or accident as a defense and that, accordingly, absence of mistake or accident was not a proper reason for admitting the evidence. The record establishes, however, that when Summerville was interviewed by law enforcement, he indicated on multiple occasions that he was "not aware" of having touched S.S.' vaginal area and had not done so "consciously" or that if he did do so, it happened while he was asleep. As such, the issue of mistake or accident was raised by Summerville's responses to law enforcement questioning, and the prior bad acts evidence was properly relevant on the issue of absence of mistake or accident.

We conclude that the prior bad acts evidence was properly admissible for reasons other than to show propensity and that Summerville's arguments to the contrary are without merit.

2. Motions for New Trial

Summerville next asserts that the district court erred in denying his two motions for new trial. He asserts that his first motion should have been granted because of evidence a member of the jury pool intentionally tainted the pool during jury selection and that his second motion should have been granted because the State listed the wrong statute number in the charging document. We find no merit to these assertions.

(a) First Motion for New Trial

[5] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). To be effective, the motion must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with

reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *overruled in part on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

Summerville's first motion for new trial was based on an assertion that one of the members of the jury pool intentionally tainted the jury pool with comments made during questioning by counsel as part of jury selection. There is no evidence that the jury pool was tainted as a result of any comments made by the potential juror, and during the hearing on the motion for new trial, the prospective juror testified and explained that he had not intended to taint the jury pool. We note that the prospective juror was not selected to serve as a juror on this case and that Summerville passed the panel of prospective jurors for cause and without objection to the prospective juror's comments. See *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972) (no challenge for cause overruled and panel passed for cause). We find no abuse of discretion by the district court in denying this motion for new trial.

(b) Second Motion for New Trial

[6] The 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing. *State v. McCormick and Hall, supra.* If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions stated above. *Id.*

The district court entered an order on the jury's verdict of guilty on November 6, 2008. Summerville filed a second motion for new trial and requested a hearing on May 19, 2009. As such, Summerville's second motion for new trial was filed outside the 10-day period set forth in Neb. Rev. Stat. § 29-2103 (Reissue 2008).

Further, we find no abuse of discretion by the district court in denying the second motion for new trial. The second motion for new trial was based on Summerville's challenge to the State's amended information charging him with having violated Neb. Rev. Stat. § 28-319.01(1) (Reissue 2008), which was

not in effect at the time of Summerville's actions related to S.S. The statute in effect at the time of Summerville's actions related to first degree sexual assault on a child was Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), which stated that the crime was committed by any person who subjects another person to sexual penetration when the actor is 19 years of age or older and the victim is less than 16 years of age. Section 28-319.01(1) stated that the crime was committed by any person who subjects another person to sexual penetration when the actor is 19 years of age or older and the victim is under 12 years of age.

In the present case, the amended information specifically alleged that Summerville had subjected S.S. to sexual penetration when Summerville was 19 years of age or older and when S.S. was less than 12 years of age. There is no dispute in the record that S.S. was 10 years of age at the time of the events in this case. Although the amended information incorrectly referenced § 28-319.01(1), the allegations against Summerville also properly alleged violation of § 28-319(1)(c), the statute in effect at the time of the crime; informed Summerville with reasonable certainty of the crime charged so that he could prepare a defense; and allowed Summerville to plead the judgment of conviction as a bar to a later prosecution for the same offense. See *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). Further, as discussed below, the district court properly used the penalty classifications of § 28-319(1)(c) when sentencing Summerville. There was no abuse of discretion in denying this second motion for new trial.

3. Excessive Sentences

Summerville also challenges the sentences imposed by the district court. Summerville argues that the sentences, while within statutory limits, are excessive because of his age, history of employment, and criminal history. We find no merit to these assertions.

[7,8] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as

any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). The law is well established that an appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009), *reversed in part* 279 Neb. 499, 779 N.W.2d 335 (2010).

In the present case, there is no dispute that the sentences imposed were within the statutory limits. The district court sentenced Summerville to 35 to 35 years' imprisonment on the first degree sexual assault of a child, second offense, conviction and to 5 to 5 years' imprisonment on the third degree sexual assault of a child conviction. The court ordered the two sentences to be served consecutively. Neither Summerville's age at the time of sentencing—he was approximately 51 years old—nor his personal history and the nature of the offense demonstrate an abuse of discretion.

The record indicates that Summerville sexually assaulted the 10-year-old daughter of a woman he was dating by digitally penetrating the girl while she was asleep. This is Summerville's second conviction for sexually assaulting a 10-year-old girl. The sentences imposed were well within the statutory limits permissible for these offenses, and we find no abuse of discretion.

The State notes on appeal that the district court, in the written sentencing order, indicated that the conviction for first degree sexual assault of a child, second offense, was a Class IB felony offense. The offense was actually a Class II felony offense under the statute in effect at the time the crime was committed. See § 28-319(2). Despite the indication in the written sentencing order that the offense was a Class IB felony offense, the district court sentenced Summerville for conviction of a Class II felony offense. The imposed sentence was properly within the limits for a Class II felony offense, and the court was sentencing him for a Class II felony offense, notwithstanding the clerical error referencing a Class IB felony offense in the written sentencing order. We amend the sentencing order to indicate that the conviction for first degree sexual assault of

a child, second offense, was a Class II felony offense, not a Class IB felony offense.

Finally, Summerville also asserts that the district court erred in crediting his time served on the third degree sexual assault of a child conviction instead of on the first degree sexual assault of a child conviction. Summerville has not demonstrated why it was an abuse of discretion for the court to order his credit applicable to the third degree sexual assault of a child conviction. We find no merit to this argument.

V. CONCLUSION

We find no merit to the assertions raised by Summerville on appeal. The district court did not commit reversible error in admitting prior bad acts evidence, did not abuse its discretion in overruling Summerville's motions for new trial, and did not impose excessive sentences. We amend the sentencing order to remedy a clerical error concerning the proper classification of Summerville's conviction for first degree sexual assault of a child, second offense.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
BRAD CARNICLE, APPELLANT.
792 N.W.2d 893

Filed December 14, 2010. No. A-10-074.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. **Investigative Stops: Appeal and Error.** The ultimate determination of reasonable suspicion to conduct an investigatory stop is reviewed de novo.
3. **Motor Vehicles.** Under Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), any motor vehicle may be equipped with not to exceed two auxiliary driving lights mounted on the front at a height not less than 12 inches nor more than 42 inches above the level surface on which the vehicle stands, and every such auxiliary driving light shall meet the requirements and limitations set forth in Neb. Rev. Stat. § 60-6,221 (Reissue 2004).