

IN THE SUPREME COURT OF THE STATE OF NEVADA

BISMARCK ANTONIO OBANDO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43090

FILED

NOV 04 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Roberts*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Bismark Antonio Obando to a prison term of life with the possibility of parole after serving 10 years.

Obando claims that there was insufficient evidence presented at trial to sustain his conviction for sexual assault because the evidence did not establish that he had sexual intercourse against the will of the victim. We disagree.

"The standard of review in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"<sup>1</sup> Moreover, "it is the function of the jury, not

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<sup>1</sup>See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

the appellate court, to weigh the evidence and pass upon the credibility of the witness."<sup>2</sup>

A person is guilty of sexual assault if he subjects someone to sexual penetration "against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct."<sup>3</sup> The use of overt physical force is not required to support a conviction under NRS 200.366, only penetration against the will of the victim.<sup>4</sup> Furthermore, this court has determined that even the uncorroborated testimony of a victim is sufficient to uphold a rape conviction.<sup>5</sup>

We conclude that any rational jury could have found Obando guilty of sexual assault. Various witnesses testified at trial, including Obando, the victim, the sexual assault examining nurse, and a forensic nurse specialist.

The victim, a 49-year-old virgin, testified that she and Obando had a romantic relationship for a few months and that on March 10, 1998, they went on a dinner date to the buffet at Baldini's Casino in Reno. After

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<sup>2</sup>See Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

<sup>3</sup>See NRS 200.366(1).

<sup>4</sup>See McNair, 108 Nev. at 57, 825 P.2d at 574.

<sup>5</sup>See Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

dinner, she and Obando sat in the car at the Baldini's parking lot and talked. She then asked Obando to take her home, he refused, and she became scared and cried. He parked his car at the house next to his house, and they sat and talked for about an hour. She testified that Obando began making disparaging remarks towards her and that he was becoming very upset and aggressive. She then attempted to exit the car twice, but Obando prevented her from leaving. The first time he stretched his arm over her holding the door shut. When she tried to exit the second time, she opened the car door, but Obando grabbed her left upper arm and pulled her back into the car. Obando then drove the car around the block and stopped in front of his house. While parked, two policemen drove by, but she did not attempt to obtain their attention. Obando then exited the vehicle and opened her door and told her to exit. She got out of the car, and they walked up to his house, entered, and walked upstairs to the bedroom he was renting. She testified that Obando told her not to yell because no one was home. Once in the bedroom, Obando locked the door and began removing his clothing. He then began to remove her clothing. She resisted by holding onto her clothing, but Obando succeeded in removing all of her clothing except her shirt. Obando then began touching her all over her body, and she attempted to push him away but could not. He then touched her "female area" "on the inside" with his hand and mouth. She testified that he then placed "his part" or "male organ" in her "private part." She stated she was crying during the whole episode. After their sexual encounter, she testified that she attempted to get up but that he pulled her down. She also testified that he again had sex with her the

next morning, after which she put on her clothes and went to the bathroom. Upon exiting the bathroom, she encountered a lady in the hallway, who was later identified as the manager of the house where Obando rented a room, but she did not speak to her. She and Obando then left the house, drove to McDonald's, and Obando then drove her home.

Obando testified that he and the victim had a romantic relationship, and on March 10, 1998, they went on a dinner date to the buffet at Baldini's. He testified that after eating at Baldini's, he drove the victim to his house and parked the car in the front, where they sat and talked because the manager of the house was home and awake and he did not want her to see the victim and "get the wrong idea" of the victim. Obando then drove a block away and parked the car. In the car they talked, hugged, and kissed. Noticing that it was late, Obando asked the victim if she wanted him to take her home or if they should return to his house. They eventually returned to Obando's house. He further testified that he never prevented the victim from leaving the car and that he never grabbed her or held her in the vehicle. Once at Obando's house, they walked up to the door together, entered, and then walked upstairs to the room that Obando was renting. While in the room, they hugged each other, the victim unbuttoned Obando's shirt, and he unbuttoned her shirt. They then took off their pants and "made love." He testified that she never told him to stop or gave him any reason to believe she was not willing. In fact, she told him that she was a virgin and not to "do it hard." He testified that they "made love" a second time a few hours later. The next morning the victim left Obando's room and went to the bathroom,

where she saw and spoke to the manager of the house. They then left the house and went to McDonald's for breakfast, and Obando then took her home.

The nurse who examined the victim hours after the incident testified that the victim was very upset, crying, and embarrassed. She had a couple of bruises on her left upper arm, swelling of her labia minora, labia majora, and vagina, a long and deep laceration in her vagina, and abrasions in the vaginal area, one of which was approximately 1-1/2 to 2 inches inside the vaginal opening and consistent with being caused by a fingernail. The nurse stated that she would not expect to see such injuries in a normal consenting adult female and concluded that the victim's injuries were consistent with the victim's account of the assault.

A forensic nurse specialist also testified that the examining nurse's factual findings seemed accurate; however, she concluded, based on those facts as well as her own experience, that these injuries could be consistent with consensual sex in a person who had not had previous intercourse.


When the testimony is conflicting, the jury determines the weight and credibility to give it.<sup>6</sup> In this case, the jury heard the conflicting testimony of the victim and Obando, as well as the conflicting testimony of the nurses. Because the jurors found Obando guilty of sexual assault, they determined that the victim's recitation of the facts was more credible than Obando's. In addition, it appears that the victim's


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<sup>6</sup>See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

allegations were corroborated by her physical injuries such as the bruises found on her arm, the abrasion found near the vaginal opening that resembled a fingernail cut, the swelling of the vagina, and the long and deep laceration. Therefore, in viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that Obando had unconsensual sex with the victim, and we decline to disturb the jury's finding.<sup>7</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Steven P. Elliott, District Judge  
Washoe County Public Defender  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>7</sup>See Walker, 91 Nev. at 726, 542 P.2d at 439.