IN THE SUPREME COURT OF THE STATE OF NEVADA

CORY MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45699

FILED

MAY 01 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of coercion and one count of open or gross lewdness. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Cory Miller to a prison term of 28 to 72 months for coercion and a consecutive jail term of 12 months for lewdness. The district court further ordered the sentences suspended and placed Miller on probation for a period not to exceed 36 months. Miller presents 8 issues for our review.

First, Miller contends that the North Las Vegas Police Department's policy of destroying the records of 911 calls after sixty days violates the state and federal constitutions by failing to preserve potentially exculpatory evidence. He claims that if a recording of the victim's 911 call had been available, he could have discredited her testimony that she told the dispatcher that she had been sexually assaulted.

"To establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed."[1]

Here, the North Las Vegas Police Department records custodian testified that the CD or tape used to record a 911 call is kept for 60 days before being reused, the radio dispatcher keeps an "as verbatim as possible" log of what a 911 caller has reported, and the 911 logs are frequently subpoenaed by the State or defendants. We note that the log for the victim's 911 call was entered into evidence during the trial and that Miller used this log during his cross-examination of the victim. We conclude that Miller has failed to demonstrate that the State acted in bad faith, that he was unduly prejudiced by the loss of the 911 recording, or that the exculpatory value of the recording was readily apparent.

Second, Miller contends that the district court erred by admitting the 911 dispatcher's log into evidence. Miller initially objected to the admission of the dispatcher's log on hearsay grounds. The State responded that the log complied with the business records exception to the hearsay rule, and the district court admitted the log into evidence without further objection. Miller now argues that the log notes themselves may comprise business records, but the statements therein were allegedly

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[1]State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

made by the victim and therefore must comply with a separate hearsay exception.[2]

"The decision to admit evidence is within the sound discretion of the district court and will not be disturbed unless it is manifestly wrong."[3] Here, Miller does not challenge the district court's decision to admit the dispatcher's log into evidence under the business record exception,[4] and we conclude that the district court did not abuse its discretion by admitting the log on separate hearsay grounds given that the statements it contains appear to fall within the "present sense impressions" and "excited utterances" exceptions to the hearsay rule.[5]

Third, Miller contends that the district court violated the Confrontation Clause by admitting the out-of-court statements contained in 911 dispatcher's log without making the dispatcher available for cross-examination. Miller specifically cites to Crawford v. Washington.[6] In Crawford, the Court held that out-of-court statements by witnesses that are testimonial in nature are barred under the Confrontation Clause

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[2]See NRS 51.067 ("Hearsay included within hearsay is not excluded . . . if each part of the combined statements conforms to an exception to the hearsay rule").

[3]Wesley v. State, 112 Nev. 503, 510, 916 P.2d 793, 798 (1996).

[4]See NRS 51.135.

[5]See NRS 51.085; NRS 51.095.

[6]541 U.S. 36 (2004).

unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witnesses.[7]

Here, the North Las Vegas Police Department records custodian testified that the radio dispatcher keeps an "as verbatim as possible" log of what a 911 caller has reported. Accordingly, we conclude that the statements in the dispatcher's log were not the statements of the dispatcher, but rather the statements made by the witness placing the 911 call. We further note that this witness testified and was cross-examined at trial. Based on these facts, we conclude that Miller's confrontation rights were not violated by the admission of the dispatcher's log.

Fourth, Miller contends that the evidence presented at trial was insufficient to support his convictions for coercion and open or gross lewdness. "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness."[8] Accordingly, the standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'"[9]

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[7]Id. at 68.

[8]Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

[9]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Here, the victim testified that Miller entered the apartment building laundry room where she was working. He told her that he had a knife and not to scream, he placed himself between her and the door, he pushed her against the wall, and he covered her mouth with his hand. The victim further testified that while Miller held her against the wall, he grabbed her breasts and touched her behind and inner thigh. We conclude that the jury could reasonable infer from this testimony that Miller was guilty of coercion and open or gross lewdness.[10]

Fifth, Miller contends that the State violated Brady v. Maryland[11] by failing to produce the victim's written statement until mid-trial. Miller further claims that he made a specific request for the statement. "[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."[12] "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome."[13]

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[10]See NRS 201.210; NRS 207.190; Ranson v. State, 99 Nev. 766, 670 P.2d 574 (1983) (defining "open or gross lewdness").

[11]373 U.S. 83 (1963).

[12]Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

[13]Id. at 66, 993 P.2d at 36.

Here, the record reveals that the State provided a copy of the victim's written statement during the trial, the district court allowed defense counsel time to review the statement, defense counsel concluded that it did not contain exculpatory material, and defense counsel used the statement during his cross-examination of the victim. Based on these facts, we conclude Miller did not sustain any prejudice.

Sixth, Miller contends that the district court violated the state and federal constitutions by refusing to grant his motions to dismiss the counts of first degree kidnapping and battery with intent to commit a crime because there was no evidence to support these counts. Miller made two motions to dismiss; one prior to trial and the other after the State rested. In denying each motion, the district court concluded that the issue should be addressed in jury instructions. Miller did not request an advisory instruction to acquit.[14] Nonetheless, he was acquitted of the counts of first-degree kidnapping and battery with intent to commit a crime. We conclude that Miller has failed to demonstrate that the district erred as a matter of law or that he sustained prejudice.[15]

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[14]See NRS 175.381(1) ("If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice." (emphasis added)).

[15]See State v. Wilson, 104 Nev. 405, 407, 760 P.2d 129, 130 (1988) ("it was error for the trial court to take the case from the jury by dismissing the action at the close of the prosecution's case in lieu of giving an advisory instruction to acquit because of insufficient evidence"); see also State v. Combs, 116 Nev. 1178, 14 P.3d 520 (2000).

Seventh, Miller contends that the district court erred by admitting prejudicial and irrelevant evidence of the effect that the crime had on the victim. We note that Miller failed to object to this testimony. Generally, the failure to raise an objection during trial will preclude appellate review of the issue.[16] Nonetheless, this court may address plain error sua sponte.[17] In reviewing the record on appeal, we conclude that admission of this testimony did not have "a prejudicial impact on the verdict when viewed in the context of the trial as a whole."[18] Accordingly, we conclude that plain error was not present and therefore the issue was not preserved for appellate review.

Eighth, Miller contends that the district court violated the state and federal constitutions by admitting a prejudicial photographic line-up into evidence. Miller did not object to the admission of this photograph and we conclude that he has failed to demonstrate that the photograph was patently prejudicial.[19]

Having considered Miller's contentions and concluded that they are without merit, we affirm the judgment of the district court. However, our review of the judgment of conviction reveals a clerical error.

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[16]Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993).

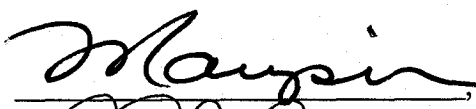
[17]Id.; see also NRS 178.602 ("Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[18]Libby, 109 Nev. at 911, 859 P.2d at 1054.

[19]Id.

The judgment of conviction incorrectly states that Miller was convicted pursuant to a guilty plea. The judgment of conviction states that Miller was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.



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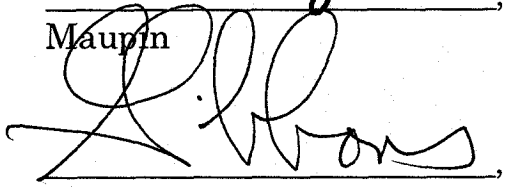

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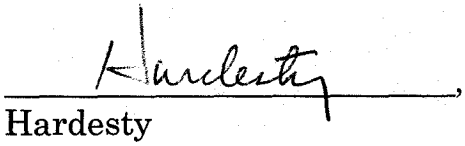

_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[20]See Ledbetter v. State, 122 Nev. ___, ___, 129 P.3d 671, 680-81 (2006) (the purpose of district judge's signature on the judgment of conviction is to ensure accuracy of the information that it contains).