IN THE SUPREME COURT OF THE STATE OF NEVADA

YURIK MIKAYELYAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46583

FILED

NOV 13 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault. Second Judicial District Court, Washoe County; Peter I. Breen, Judge. The district court sentenced appellant Yurik Mikayelyan to serve a prison term of 10-20 years.

First, Mikayelyan contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, Mikayelyan claims that the State failed to prove the elements of penetration and lack of consent.[1] We disagree.

A review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[2] In particular, we note that the victim testified that a naked Mikayelyan approached her while she was in the shower; she covered herself with the shower curtain, cried out for him to stop, and tried to fend him off, but Mikayelyan forcibly penetrated her vagina with his fingers

[1]See NRS 200.366(1); NRS 200.364(2).

[2]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

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against her wishes. Photographs of the torn shower curtain were admitted at trial.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Mikayelyan committed the crime of sexual assault. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.[3] Moreover, we note that the uncorroborated testimony of a sexual assault victim is sufficient to sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to support the jury's verdict.

Second, Mikayelyan contends that the prosecutor committed misconduct during closing arguments. Specifically, Mikayelyan argues that the prosecutor impermissibly vouched for the credibility of the victim and belittled his defense. We disagree.

This court has stated that "it is . . . inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney."[5] Additionally, it is improper for a prosecutor to vouch for the credibility of a government witness.[6] Nevertheless, this court has stated that it is permissible for the

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[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[4]See Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (stating that circumstantial evidence alone may sustain a conviction).

[5]Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

[6]See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

prosecutor to argue evidence before the jurors and suggest reasonable inferences that might be drawn from it.[7] "To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[8] Additionally, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[9]

Initially, we note that Mikayelyan did not object to the prosecutor's comments until after the verdict was reached, and the failure to object to alleged prosecutorial misconduct during trial precludes appellate consideration absent plain error.[10] We conclude that Mikayelyan fails to demonstrate that the prosecutor's comments affected his substantial rights or prejudiced him in any way amounting to reversible plain error.[11] In fact, the prosecutor's statements were made in direct response to ongoing assertions made by defense counsel attacking

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[7]See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989).

[8]Anderson v. State, 121 Nev. ___, ___, 118 P.3d 184, 187 (2005).

[9]Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[10]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).

[11]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

the credibility of the victim. We further note that the jury was properly instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel. The jury was also instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Finally, even if the remarks were inappropriate, we conclude that the State presented substantial evidence of Mikayelyan's guilt, and "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."[12]

Third, Mikayelyan contends that the district court erred by providing the following jury instruction:

> A reasonable and good faith belief that a person consents to sexual penetration is a defense to the charge of sexual assault. If after a consideration of all of the evidence you have a reasonable doubt that at the time of the sexual penetration the defendant herein had a reasonable good faith belief that [the victim] consented to the sexual penetration, then you must find the defendant not guilty.

Citing to Carter v. State for support,[13] Mikayelyan claims that a "reasonable mistaken belief of consent" defense instruction must be given rather than the above "reasonable good faith belief" instruction. Unlike the defendant in Carter, however, Mikayelyan failed to proffer any instruction on the issue. Additionally, Mikayelyan failed to object to the instruction. This court has stated that the "[f]ailure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the

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[12]King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

[13]121 Nev. ___, 121 P.3d 592 (2005).

defendant's right to a fair trial."[14] Mikayelyan fails to demonstrate how he was prejudiced by the instruction, and we conclude that the district court did not commit plain error.

Fourth, Mikayelyan contends that the district court erred by failing to instruct the jury on attempted sexual assault. Contrary to his assertion in the fast track statement, Mikayelyan did not request or proffer an instruction on attempted sexual assault. Mikayelyan only requested the district court to instruct the jury on battery and/or assault as lesser offenses – and the request was denied. Accordingly, we conclude that the district court did not commit plain error by failing to sua sponte instruct the jury on attempted sexual assault.[15]

Fifth, Mikayelyan contends that the district court erred in denying his motion to suppress incriminating prearrest statements made to the investigating police officers. Specifically, Mikayelyan claims that he was in custody and improperly subjected to interrogation without Miranda warnings.[16] Mikayelyan also claims that the language barrier made his statements so unreliable that they should have been excluded. We disagree.[17]

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[14]McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998).

[15]See id.

[16]Miranda v. Arizona, 384 U.S. 436 (1966).

[17]Mikayelyan also contends that the district court erred by failing to suppress evidence obtained during a search of his hotel room. At the hearing on the motion, defense counsel informed the district court that after further discussions with Mikayelyan, they decided to withdraw the claim. Accordingly, Mikayelyan's abandonment of the issue precludes appellate review. See McKenna, 114 Nev. at 1054, 968 P.2d at 746

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The Fifth Amendment privilege against self-incrimination provides that statements made by a suspect during custodial interrogation are inadmissible unless the police first provide Miranda warnings.[18] "[A]n individual is deemed 'in custody' where there has been a formal arrest or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave."[19] "If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel 'at liberty to terminate the interrogation and leave.'"[20] "We review a district court's factual findings pertaining to the circumstances surrounding an interrogation for clear error and the district court's ultimate determination of whether a person is in custody de novo."[21]

We conclude that the district court did not err by denying Mikayelyan's motion to suppress. The district court conducted a hearing and found that Mikayelyan was not in custody when he made incriminating statements to police officers in the security office of John Ascuaga's Nugget in Sparks. Officer Ronald Dreher of the Sparks Police

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. . . continued
("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal.").

[18]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); see also Miranda, 384 U.S. at 478-79.

[19]Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[20]Rosky v. State, 121 Nev. 187, 191, 111 P.3d 690, 695 (2005) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)); see also Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996).

[21]Casteel v. State, 122 Nev. ___, ___, 131 P.3d 1, 4 (2006).

Department testified that he advised Mikayelyan several times that he did not have to speak with him and that he was free to leave at any time; Mikayelyan, however, stated that he wanted to stay and speak with the officers. Mikayelyan was not under arrest or in handcuffs, and he responded voluntarily to the officers' questions. Officer Dreher testified that although Mikayelyan had "a very thick accent," it was apparent that he understood the questions and was able to make himself understood. Mikayelyan was not formally arrested until after he voluntarily accompanied the officers to the police station. Therefore, we conclude that the district court properly admitted the incriminating statements Mikayelyan made prior to his arrest.

Accordingly, having considered Mikayelyan's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[22]

_____, J.
Gibbons

_____, J.
Maupin

_____, J.
Douglas

[22]We also reject Mikayelyan's claim that cumulative error denied him his right to a fair trial. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").

cc: Honorable Peter I. Breen, Senior Judge
Goodman & Chesnoff
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk