IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN H. ROSKY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47407

FILED

JAN 24 2008

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault of a minor under the age of fourteen. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant John H. Rosky to a prison term of life with the possibility of parole after twenty years.

Rosky claims that the district court committed several reversible errors. First, Rosky contends that the district court erred by excluding an audio tape of a telephone conversation he had with the alleged victim: a recording made without her consent. Rosky argues that the tape should have been admitted so that he could impeach the victim's testimony about her knowledge of sex. The district court excluded the tape because the victim had not consented to it. Further, the victim testified that she did not remember having the conversation.

We agree with the district court. The trial court has broad discretion in deciding whether to admit or exclude evidence, and its decision "will not be reversed absent manifest error."[1] In Nevada, recordings of telephone calls, made without the consent of all parties and

[1]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

08-01866

not otherwise subject to statutory exception, are inadmissible for any purpose.[2] Outside the presence of the jury, Rosky failed in his attempt to establish that the victim recalled the conversation and thus could not show that she consented to the recording. Therefore, we conclude that the district court did not abuse its discretion by excluding all testimony and evidence of the illegally obtained recording.

Rosky claims the district court erred by admitting the following evidence or statements: (1) the prosecutor's comment during rebuttal argument concerning statutory sexual seduction; (2) Detective Thomas Reid's testimony that a minor cannot consent to a sexual act; (3) Detective Michael Tone's opinion testimony about Rosky's honesty at the time of the pre-arrest interview; and (4) the bad act evidence without a "Petrocelli hearing."[3] Rosky failed to preserve these four claims by objecting during trial, which normally precludes appellate review.[4] However, this court may address the claims for plain error or constitutional error sua sponte.[5] Under plain error review, this court

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[2]See NRS 200.620; see also Lane v. Allstate Ins. Co., 114 Nev. 1176, 1179-80, 969 P.2d 938, 940-41 (1998) (holding inadmissible a defendant's recording of his own phone conversation without the consent to the recording by the other party to the call).

[3]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[4]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[5]Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002); see also NRS 178.602.

examines whether an error occurred, whether it was plain, and whether it affected the defendant's rights.[6] We review each claim in turn.

Rosky contends that the district court erred by allowing a comment made by the prosecutor during rebuttal argument. The prosecutor stated that the State charges the crime of statutory sexual seduction "when a 19-year-old guy gets his 15-year-old girlfriend pregnant, or her parents catch them having sex." Specifically, Rosky argues that it was misleading to the jury because the jury might have inferred from the comment that the only time the State charges statutory sexual seduction was in the examples provided by the prosecutor. We disagree.

"A prosecutor's comments should be viewed in context,"[7] and jury instructions can cure prejudice resulting form a prosecutor's comment.[8] The comment was not a misstatement of law, but a hypothetical example of a statutory sexual seduction charge. During her rebuttal, the prosecutor also explained the elements of the crime. Further, Jury Instruction No. 29 provided in detail the elements of sexual statutory seduction. This instruction, in combination with the instructions regarding sexual assault, addressed any possible inference from the prosecutor's comment. We conclude that the district court did not err by allowing the prosecutor's comment during her rebuttal argument.

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[6]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2005).

[7]Knight v. State, 116 Nev. 140, 144, 993 P.2d 67, 71 (2000).

[8]See Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980); Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).

Rosky also contends that the district court erred by allowing Detective Reid's testimony that a minor cannot give consent for a sexual act. Rosky argues that the testimony was a misstatement of the law, thus, should be excluded. Although we agree the testimony was a misstatement of the law, we conclude the error was harmless.

The State concedes the error, thus we need only review whether the misstatement was harmful. "'A jury is presumed to follow its instructions.'"[9] We conclude that the error in admitting Detective Reid's testimony with the misstatement of law did not affect Rosky's rights. As Rosky conceded, the jury had accurate instructions on the relevant law which cured the error.

Rosky further contends that the district court erred by admitting Detective Tone's testimony that Rosky was being "evasive," "dishonest" and making "a lot of contradictions in his statements" during Rosky's pre-arrest interview. Specifically, Rosky argues that the detective impermissibly commented on the credibility of Rosky's statement and the "heart of [his] defense,"[10] that the victim consented. Thus, Rosky claims that the testimony should have been excluded. We disagree.

The detective did not "implicate the ultimate question of guilt or innocence" that might sway the jury.[11] Neither did the detective opine as to whether Rosky was guilty of the charged crime. Further, the

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[9]Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

[10]See DeChant v. State, 116 Nev. 918, 922-23, 925-26, 10 P.3d 108, 111-13 (2000).

[11]Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000).

detective's testimony was substantiated by the videotape of the interview. We conclude that while the detective should not have opined as to Rosky's dishonesty, the comment did not affect Rosky's rights, and thus, the district court did not commit plain error in admitting the testimony.

Rosky also contends that the district court erred by allowing bad act evidence without conducting a hearing outside the presence of the jury.[12] Specifically, Rosky claims that the victim should not have been allowed to testify about Rosky's acts subsequent to the alleged sexual assault: that Rosky made threats against her boyfriend and dog if she stopped seeing Rosky and that Rosky continued to give her alcohol and cigarettes. We disagree.

Otherwise inadmissible evidence, such as bad act evidence, may be introduced by the State under the "open-door" doctrine to rebut any false impression[13] resulting from the misleading testimony offered by the defense.[14] During cross-examination of the victim, defense counsel elicited testimony regarding the victim's behavior after the alleged sexual assault that could have led the jury to believe the victim and Rosky had a relationship and she thus consented to the sexual act. Therefore, we conclude that Rosky "opened the door" for the State to refute the defense's

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[12]Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985).

[13]See U.S. v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988).

[14]State v. Crawford, 619 S.W.2d 735, 740 (Mo. 1981) (noting that "it is proper to examine a witness on any matters which tend to refute, weaken or remove inferences, impressions, implications or suggestions which may have resulted from his testimony on cross examination, notwithstanding the facts elicited may be prejudicial to the defendant").

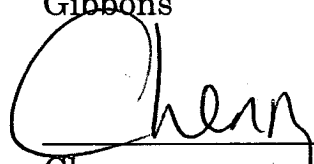
inference that the sex was consensual. We conclude that the district court did not err in admitting the testimony.

Lastly, Rosky contends that the cumulative effect of his assignments of error deprived him of his right to a fair trial. "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."[15] Admitting Detective Reid's testimony was the only error, and we have determined that that error was harmless. Accordingly, Rosky was not deprived of his right to a fair trial.

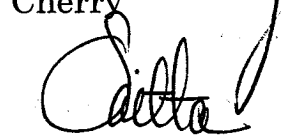
Having considered Rosky's contentions and concluded that he has not demonstrated any reversible error, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Cherry



_____, J.
Saitta

cc: Hon. Steven P. Elliott, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[15]Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).