

IN THE SUPREME COURT OF THE STATE OF NEVADA

HECTOR LEONARD JARDINE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48736

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Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48737

FILED

DEC 19 2008

TRACE K. LINDHMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon, burglary, first-degree kidnapping with the use of a deadly weapon causing substantial bodily harm, and sexual assault with the use of a deadly weapon, and from an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

In May 2001, appellant Hector Jardine and Carrie Rose entered into an intimate relationship while they were both receiving training as emergency medical technicians in the United States Navy. This relationship continued on and off for five years. Sometime prior to April 2002, Rose found out that Jardine was married and had a child with his wife. Rose confronted Jardine about his marriage, and Jardine told Rose that he was separated from his wife, Elizabeth. Rose was deployed to Japan for the next three years, during which she and Jardine maintained a long distance relationship, with the exception of a six-month period. Rose returned to the Las Vegas area from Japan in July 2005.

Jardine continually promised Rose that he would divorce Elizabeth, and the romantic relationship between Jardine and Rose continued.

In March 2006, Rose went on vacation to Florida for spring break. While Rose was gone, Jardine invited Elizabeth and his child to stay in the apartment. After finding out that Jardine invited Elizabeth to stay in their apartment, and that Elizabeth was pregnant with the couple's second child, Rose ended their relationship and moved out of the apartment she shared with Jardine. After Rose moved out of their apartment, Jardine repeatedly called Rose and they saw each other several times in the apartment complex. Jardine continued to contact Rose by knocking on her door, calling her, and throwing pebbles at the window of her new apartment. Rose eventually sought and obtained a temporary protective order (TPO) against Jardine.

Jardine testified that he knew Rose's schedule. After leaving around 6:00 a.m., Rose would not return to the apartment until 9:30 p.m., unless she decided to come home for lunch between 11:30 a.m. and 1:30 p.m. On May 3, 2006, Rose was leaving the apartment complex and saw Jardine standing at the gate. Rose testified that Jardine attempted to talk to her and she refused to talk to him. According to Jardine, Rose waived at him, rolled down the window to her car, told him he looked sick, and then drove off. Rose further testified that, while she was out that day, Jardine repeatedly called her. Jardine testified that Rose called him to set up a time to meet and talk because she was tired of him showing up everywhere. Jardine received her call at 10:08 a.m.

At this point, Jardine decided to enter Rose's apartment without her permission. Jardine acknowledged the TPO, but testified that he went inside Rose's apartment through the balcony doors intending to

talk to Rose and take his own life with a knife, which he had in his pocket. Jardine was rummaging through Rose's hall closet, next to the front door, looking for any photographs or mementos when he unexpectedly heard the door being unlocked and jumped inside the closet. Rose returned to the apartment at 10:20 a.m., only to be startled as Jardine jumped out of the closet.

Rose testified that Jardine had a knife, which he put to her throat, and forced her upstairs to the bedroom. In the bedroom, Rose claimed that Jardine used the knife to cut off her bra and blouse, he took off her pants, and penetrated her with a dildo and his penis. During this incident, Rose testified that Jardine grabbed her neck, choking her, but he stopped when she begged for her life. After the sexual conduct, Jardine and Rose discussed their relationship and fell asleep.

Jardine testified that when he jumped out of the closet, he assured Rose that he was not there to hurt her. Jardine contended that he did not have the knife in his hand at this point. Still, Rose was startled and fell down the stairs. Jardine further testified that he and Rose went to the bedroom where Rose took off her shoes and laid on the bed. Jardine sat on the bed and they kissed, but when Rose hesitated from doing anything further Jardine took out the knife and suggested he would cut his wrists. Rose begged Jardine not to kill himself. Rose kissed Jardine, and he cut off her bra and blouse with the knife. When Rose objected to the knife, Jardine put the knife under the bed.

According to Jardine's testimony, Rose took off her pants, took off his pants and they kissed and had sex. Jardine never used a dildo as Rose testified. Rose and Jardine had sex twice and she told him that she loved him. Jardine told Rose that he wanted to get back together, and

Rose refused. Jardine again grabbed the knife, threatening to slice his wrist and actually made several small cuts which resulted in scars. Jardine and Rose dressed and slept for an hour.

Rose then asked Jardine to leave, telling him that if he did not leave she would. When Jardine refused to leave, Rose picked up a metal curtain rod lying on the floor and broke her bedroom window. Rose testified that Jardine was angry at this, and grabbed her and told her that she was going to pay. According to Rose, Jardine stood over her with the knife in his hand and plunged it into her throat. Rose tried to get up and Jardine told her that she was not going anywhere. Rose pretended to die so Jardine would leave.

Jardine testified that upon seeing Rose break the window, he grabbed Rose and they both fell onto the broken glass. Jardine saw that she was bleeding from the neck and she whispered his name. When Rose tried to get up, she fell twice. Jardine believed Rose had died.

Rose testified that she managed to get to the leasing office of her apartment complex before collapsing and losing consciousness. The apartment manager called 911, stopped the bleeding, and drove Rose to the hospital.

Jardine testified that he was distraught and, in a panic, had left the apartment to call and tell his mother and sister that he may have killed Rose. According to the testimony of his mother and sister, he was hysterical.

Rose and Jardine both testified that on May 3, 2006, at the time of the incident, Jardine was distraught and frequently suggested that he was going to use the knife to commit suicide.

Jardine was arrested in May of 2006 and charged with attempted murder with use of a deadly weapon, burglary, first-degree kidnapping with use of a deadly weapon causing substantial bodily harm, and two counts of sexual assault with the use of a deadly weapon arising out of the incident at Rose's apartment.

A jury acquitted Jardine of one count of sexual assault with the use of a deadly weapon and convicted him of the remaining counts. He was sentenced to serve multiple concurrent and consecutive prison terms totaling a minimum of 50 years and maximum of life.

Jardine appeals, alleging the following errors by the district court: (1) improperly denying Jardine's motion for discovery, implicating a Brady¹ violation, (2) improperly allowing the State to cross-examine Jardine regarding the veracity of its witnesses, and (3) improperly admitting bad act evidence.² We conclude that the district court did not abuse its discretion in partially denying Jardine's motion for discovery. Moreover, we conclude that the State's cross-examination of Jardine did not rise to the level of plain error. Finally, we conclude that the district court's error in admitting the TPO evidence without conducting a Petrocelli hearing and giving a Tavares instruction was harmless.

¹Brady v. Maryland, 373 U.S. 83 (1963).

²Jardine also alleges that the district court erred in (1) failing to properly canvass Jardine regarding his counsel's strategy to admit to some of the crimes charged, (2) abusing its discretion by denying Jardine's motion for a new trial, and (3) abusing its discretion in sentencing. We conclude that these arguments lack merit.

Motion for discovery

On September 11, 2006, Jardine filed a discovery motion asking the court to order the State to turn over:

1. Any and all Department of Defense and/or Department of the Navy records involving Rose including:

(a) those containing any disciplinary action taken by the Navy against Rose;

(b) those concerning charges of sexual harassment and/or sexual misconduct in which Rose is the accuser occurring at MCB Camp Le Jeune, North Carolina;

(c) Rose's "DD-214" and any other discharge summary documentation.

The district court denied the motion, in part. However, at the hearing on the motion, the district court agreed to sign an order telling the Department of Defense or Navy to give the requested documents to Jardine. Although the district court directed Jardine to prepare the order, no order was ever prepared or filed.

Subsequently, the State filed a motion asking the court to preclude Jardine from bringing forth evidence of any prior false sexual allegations Rose made while in the Navy. The district court granted the State's motion after a hearing on October 10, 2006. Specifically, the court order "admonish[ed] [Jardine] not to question the victim or any witness regarding her military time as it related to any cases in the military or any prior sexual history, other than that of the victim and the defendant." Jardine also renewed his prior motion for discovery at the October 20, 2006, hearing asking the court to order Rose to sign a release form so Jardine could receive her records. The district court denied the request.

We review a district court's decision to deny a pretrial discovery motion for an abuse of discretion.³

Jardine alleges that that the district court abused its discretion by denying his motion for discovery. We disagree.

We conclude that it was incumbent on Jardine to file an order, as agreed to by the district court, for the request of Rose's records. Jardine's failure to file such an order was inadequate investigation. Jardine should have filed an order for the district court to sign and then requested an in camera hearing for the district court to review the personnel files before determining whether to disclose the files to the defense.⁴

To the extent that Jardine claims that there was a Brady violation, we conclude that it was not within the authority of the district court to order Rose to turn over her military records. Moreover, we conclude that the State did not have actual or constructive possession of Rose's military records, and the State did not have the authority to force Rose to turn over her military records. As such, we conclude that Brady was not implicated.⁵

³Sonner v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707, 715-16 (1996); see also Riddle v. State, 96 Nev. 589, 590, 613 P.2d 1031, 1032-33 (1980).

⁴See Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (1994) (approving of procedure in which district court conducts in camera review of documents that are subject to a Brady claim), overruled on other grounds by Foster v. State, 116 Nev. 1088, 13 P.3d 61 (2000).

⁵Under Brady, a prosecutor has an affirmative duty to disclose evidence that is: (1) material, (2) favorable to the defense, (3) relevant to
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Consequently, we conclude that the district court did not abuse its discretion in denying Jardine's pretrial discovery motion.

Cross-examination

Jardine also argues that the district court erred in failing to remedy prosecutorial misconduct when the prosecutor asked Jardine to testify regarding the veracity of the State's witnesses by asking him during cross-examination if they were lying.

Generally, prosecutors are prohibited from asking a defendant whether other witnesses have lied and "from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses."⁶

Initially, we note that Jardine failed to object to the prosecutor's questioning at trial. Generally, the failure to object to prosecutorial misconduct precludes appellate review.⁷ However, we may consider plain error that affects a defendant's substantial rights.⁸

While we conclude that it was prosecutorial misconduct for the State to repeatedly question Jardine on the veracity of its witnesses rather

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guilt or punishment, and (4) within the actual or constructive knowledge or possession of a person acting on behalf of the government. Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000), citing Strickler v. Greene, 527 U.S. 263 (1999); see also Brady v. Maryland, 373 U.S. 83, 87 (1963).

⁶Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003).

⁷Gaxiola v. State, 121 Nev. 638, 653-54, 119 P.3d 1225, 1236 (2005).

⁸NRS 178.602; Gaxiola, 121 Nev. at 654, 119 P.3d at 1236.

than point out inconsistencies in Jardine's own testimony, the prosecutorial misconduct did not affect Jardine's substantial rights in light of the overwhelming evidence of his guilt. Because the prosecutorial misconduct did not amount to plain error, we conclude that no relief is warranted on this basis.

Bad act evidence

Finally, Jardine argues that the district court abused its discretion in admitting the bad act evidence regarding his TPO and that the district court's failure to give a limiting instruction constitutes reversible error. We disagree.

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error."⁹

Before admitting evidence of a defendant's prior bad acts, the district court must conduct a hearing outside the presence of the jury and make the following three determinations on the record: (1) whether the evidence is relevant, (2) whether the prior bad act is proven by clear and convincing evidence, and (3) whether the danger of unfair prejudice substantially outweighs the evidence's probative value.¹⁰ Failure to conduct a Petrocelli hearing is reversible error, unless "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2)

⁹Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

¹⁰Tinch v. State, 113 Nev. 1170, 1176, 9446 P.2d 1061, 1065 (1997); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

where the result would have been the same if the trial court had not admitted the evidence.”¹¹

Once evidence of prior bad acts is admitted, we have concluded that the prosecutor has a duty to request that the jury be instructed on the limited use of the evidence.¹² Further, the district court should raise the issue sua sponte when the prosecutor fails to request the instruction.¹³ The failure of the district court to issue a limiting instruction will be reviewed for harmlessness under NRS 178.598.¹⁴

Here, the district court failed to conduct a Petrocelli hearing and failed to give a limiting instruction on the use of the prior bad act evidence. Nevertheless, we conclude that the errors were harmless because the TPO evidence was admissible under Tinch and failure to instruct in this case did not substantially affect the verdict given the overwhelming evidence of guilt.

Conclusion

We conclude that the district court did not abuse its discretion in denying Jardine’s motion for discovery. Moreover, we conclude that the State’s cross-examination of Jardine did not amount to plain error. Finally, we conclude that the district court’s error in admitting the TPO

¹¹Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

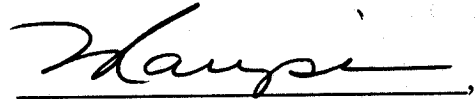
¹²Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

¹³Id.

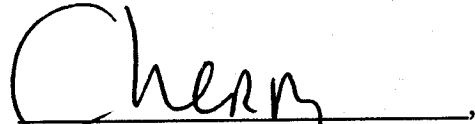
¹⁴Id. at 731-32, 30 P.3d at 1132.

evidence without conducting a Petrocelli hearing and giving a Tavares instruction was harmless. Accordingly, we

ORDER the judgment of conviction and order denying the motion for a new trial AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk