IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LEE CHILDERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48889

FILED

DEC 19 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree kidnapping and ten counts of sexual assault. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The district court sentenced appellant Anthony Lee Childers to serve one count of life with the possibility of parole after a minimum of five years in the Nevada State Prison; three counts of life with the possibility of parole after a minimum of ten years, to run consecutively; and seven counts of life with the possibility of parole after a minimum of ten years, to run concurrently.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

On appeal, Childers argues that: (1) the district court erred in allowing the victim's underwear to be admitted into evidence, (2) there was insufficient evidence to support a conviction for first-degree kidnapping, (3) the district court erred in precluding Childers from cross-examining the victim about her sexual activity with her husband and her prior arrests for prostitution, (4) the admission of the 911 recording violated his rights under the Confrontation Clause, (5) he received ineffective assistance of counsel, (6) the nurse's testimony violated his

confrontation rights and was improper vouching testimony, and (7) the district court erred in admitting evidence of his prior bad acts. We conclude that each of these arguments lacks merit.

Admission of the victim's underwear

Childers argues that the district court erred in admitting the victim's underwear into evidence. According to Childers, the underwear had been illegally seized from his house. We conclude that the district court did not abuse its discretion in admitting the underwear into evidence.[1]

In Illinois v. Rodriguez, the United States Supreme Court held that a former cotenant who was not named on the lease, did not have an authorized key, and did not have any clothing on the premises did not have joint access and control and therefore did not have authority to consent to a warrantless search of the defendant's apartment.[2] Unlike the circumstances in Rodriguez, Childers' wife, from whom he was separated, had joint access and control over the house, was still on the lease, left much of her clothing at the house, and periodically came to the house. Based on these circumstances, Childers' wife had authority to search the house at the direction of the police.[3]

---

[1]See Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008) (holding that this court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion).

[2]497 U.S. 177, 182-83 (1990).

[3]See id.

Kidnapping conviction

Childers also argues that there was insufficient evidence to support a conviction for first-degree kidnapping because the kidnapping was incidental to the sexual assault. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[4]

In order to sustain convictions for kidnapping and an associated offense for which movement or restraint is inherent, the movement or restraint must "stand alone with independent significance from the [associated offense], create a risk of danger to the victim substantially exceeding that necessarily present in the [associated offense], or involve movement, seizure or restraint substantially in excess of that necessary to [the associated offense's] completion."[5] The record reveals that during the criminal incident, Childers forced the victim to move throughout his house. For example, after sexually assaulting the victim, Childers warned her that the doors were locked in such a way that no one could leave and that anyone entering would be shot, and he then compelled her to return upstairs with him so that he could watch her. A jury could determine that Childers' movement of the victim had

---

[4]See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307 (1979).

[5]Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

independent significance apart from the underlying sexual assault.[6] Therefore, we conclude that there was sufficient evidence presented in this case to sustain convictions for kidnapping and sexual assault.

Cross-examination of the victim

Childers argues the district court erred in precluding him from cross-examining the victim about her sexual activity with her husband and her prior arrests for prostitution and in so doing violated his constitutional rights. We conclude that any error was harmless.

Confrontation Clause errors are constitutional errors subject to harmless error analysis, that is, it must appear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[7]

Childers argues he should have been allowed to question the victim further about whether some of her injuries could have been caused by her husband. Although further questioning of the victim should have been allowed regarding intercourse with her husband, as this line of questioning directly related to the potential cause of her injuries, any error is harmless. It is clear beyond a reasonable doubt that the jury would have found Childers guilty absent the error as there was an abundance of evidence that Childers caused the victim's injuries.

Additionally, Childers argues that the district court erred in precluding him from questioning the victim about her prior arrests

---

[6]See Pascua v. State, 122 Nev. 1001, 1005, 145 P.3d 1031, 1033 (2006).

[7]Chapman v. California, 386 U.S. 18, 24 (1967).

relating to prostitution. Childers was able to corroborate his theory of the case by introducing evidence relating to the victim's prior arrests for solicitation and asking the victim whether she intended to solicit him for the purposes of prostitution. Therefore, we conclude that any error was harmless.

Admission of the 911 tape

Childers contends that admission of the 911 tape violated his confrontation rights. Childers argues that under Crawford v. Washington,[8] the introduction of the 911 tape amounted to testimonial hearsay, which was admitted in violation of the Confrontation Clause. We disagree.

Because defense counsel expressly stated at trial that he was not objecting to this evidence on confrontation grounds, we review this claim for plain error.[9] In this case, we conclude that there was no error. The 911 tape must be testimonial to be subject to the Confrontation Clause.[10] To be testimonial in nature, the primary purpose of the 911 call, when it was made, must be to establish or prove past events that were potentially relevant for criminal prosecution.[11] A review of the record reveals that the phone call which gave rise to the 911 call was made in

---

[8]541 U.S. 36 (2004).

[9]See Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 161 (2008) ("'Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error sua sponte.'" (quoting Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992))).

[10]Davis v. Washington, 547 U.S. 813, 822 (2006).

[11]Id.

response to an ongoing emergency. Therefore, the 911 call was not testimonial and the district court did not commit plain error in allowing the State to introduce it.

Ineffective assistance of counsel

Childers argues that his counsel was ineffective because he informed the jury that Childers was in custody during trial. This court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be unnecessary.[12] Neither of these exceptions exist here. Therefore, we decline to address this claim.

Testimony of the sexual assault nurse

Childers contends that his confrontation rights were violated when the sexual assault nurse testified about her conversation with the victim.[13] We disagree. As the Supreme Court observed in Crawford, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [the declarant's] prior testimonial statements."[14] Because the victim here was available and testified at trial and Childers therefore was afforded the opportunity to cross-examine the victim, we conclude that there was no violation of the Confrontation Clause.

---

[12]Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

[13]Medina v. State, 122 Nev. 346, 354-55, 143 P.3d 471, 476 (2006).

[14]541 U.S. at 60 n.9; see also Nolan v. State, 122 Nev. 363, 132 P.3d 564 (2006).

Childers further argues that the nurse improperly vouched for the victim's credibility when she testified that the victim's injuries were consistent with forced rather than consensual sex and that the victim did not have a difficult time recounting what happened. Because Childers did not object to the testimony on these grounds, we review this claim for plain error.[15]

This court has recognized that a qualified expert witness may render an opinion on whether a particular person has been the victim of a sexual assault, so long as the evidence is relevant and more probative than prejudicial.[16] Such testimony is admissible even when it goes to an ultimate issue in the case.[17] However, in the giving of such testimony, it is improper for an expert witness to bolster the victim's credibility, veracity, or otherwise identify a particular person as the assailant.[18]

The nurse's opinion on whether the victim's injuries were consistent with forced rather than consensual sex was well within the proper scope of her testimony. Additionally, nothing in the nurse's statement that the victim in this case did not have a difficult time recounting what happened to her can be reasonably construed as bolstering the victim's credibility or veracity. Rather, the nurse's

---

[15]See Grey, 124 Nev. at ___, 178 P.3d at 161.

[16]See Shannon v. State, 105 Nev. 782, 787-88, 783 P.2d 942, 945 (1989); Townsend v. State, 103 Nev. 113, 116-18, 734 P.2d 705, 707-08 (1987); see also NRS 48.035; NRS 50.345.

[17]Id.; NRS 50.295.

[18]See Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 826-27 (1992); Townsend, 103 Nev. at 118, 734 P.2d at 708.

testimony is most reasonably construed as her observations of the victim's behavior and mental condition. Therefore, we conclude that the district court did not commit plain error in admitting the nurse's testimony into evidence.

Prior bad acts

Finally, Childers argues that the district court erred in admitting evidence of his prior bad acts, namely that he had been arrested prior to the underlying criminal incident, was known by the police, was a drug user, and had forced his ex-wife to smoke cocaine and made her participate in aberrant sexual behavior. We conclude that this claim also lacks merit.

As to the evidence relating to Childers' drug use and his ex-wife's testimony about his prior conduct, Childers failed to demonstrate that the district court abused its discretion because the prior bad acts were admissible as evidence of a common scheme or plan.[19] As to the testimony that Childers was known to the officer from a previous incarceration, defense counsel failed to object to the testimony and we conclude that the district court did not commit plain error in allowing it.[20] As to the evidence relating to Childers being in jail prior to the criminal incident, defense counsel opened the door to this evidence and thus Childers cannot argue that any error as to the admission of this evidence

---

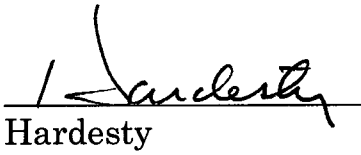
[19]See Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

[20]See Grey, 124 Nev. at ___, 178 P.3d at 161.

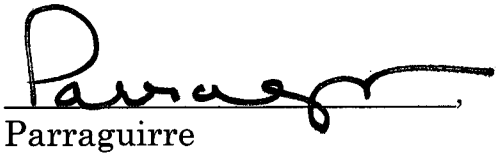
was an abuse of discretion.[21] Consequently, we conclude that Childers' arguments as to the admission of the prior bad acts evidence is without merit.

Having considered Childers' claims and concluded that they lack merit, resulted in harmless error, or are not appropriate for review on direct appeal, we

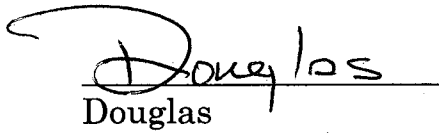
ORDER the judgment of conviction AFFIRMED.



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

---

[21]See Taylor v. State, 109 Nev. 849, 857 n.1, 858 P.2d 843, 848 n.1 (1993) (Shearing, J., concurring in part and dissenting in part).