IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN MICHAEL SHELTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50001

FILED

JAN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree kidnapping, sexual assault of a minor under 16 years of age, battery with the intent to commit sexual assault of a minor under 16 years of age, and the use of a minor in the production of pornography. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. In this case, appellant Shawn Shelton—posing as a police officer—coaxed the victim O.C. into his vehicle where he was handcuffed and forced to perform oral sex. Shelton now raises multiple challenges to his conviction. For the following reasons, we conclude that Shelton's arguments fail and, therefore, affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Evidentiary issues

Shelton alleges that the district court abused its discretion in permitting the State to question him about his HIV status and admitting evidence of his false identification and O.C.'s receipt for skateboard grip tape. For the following reasons, we conclude that the district court did not abuse its discretion. See Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006).

HIV status

Shelton argues that, by denying his motion to preclude the State from inquiring about his HIV status, the district court effectively deprived him of his right to testify. We disagree.

Shelton intended to testify at trial that he and O.C. had engaged in mutual and consensual sexual contact. However, before taking the stand, Shelton requested that the district court preclude the State from inquiring about his HIV status because it was not relevant and unduly prejudicial. In rebuking Shelton's request, the district court ruled that if Shelton testified that the sexual contact was consensual, Shelton's HIV status would be relevant as to whether O.C. consented to unprotected sex.

Although a criminal defendant has a constitutional right to testify, that right does not confer into a right to be free from impeachment. Accordingly, we conclude that the district court's ruling did not deprive Shelton of his right to testify.

False identification

Shelton alleges that the district court improperly admitted a false driver's license found in his pocket at the time of his arrest because it was hearsay and unduly prejudicial. We disagree.

Shelton's false identification was found in his pocket bearing his picture, but was in the name of Johnny Wade and indicated a height of 5'11 and a weight of 211 pounds. Notably, O.C. told police that his perpetrator introduced himself as "Johnny" and was approximately 6 feet tall and weighed approximately 200 pounds. Because the identification was found on Shelton's person, the district court concluded that the evidence was admissible to show Shelton's identity and to corroborate O.C.'s testimony.

Here, Shelton fails to offer a persuasive argument why the false identification found in his pocket at the time of his arrest was inadmissible hearsay. Furthermore, although Shelton argues that the jury would prejudicially infer that Shelton committed other crimes because he carried a false identification, we disagree that admitting the identification was prejudicial as the jury could not have rationally concluded that because Shelton carried a false identification, he must have sexually assaulted O.C. Accordingly, we conclude that the district court did not improperly admit evidence of Shelton's false identification.

Store receipt

Finally, Shelton argues that the district court erred in admitting O.C.'s receipt from Copeland Sports because the State did not disclose the evidence until the second day of trial, thus impacting Shelton's ability to impeach O.C. However, this argument is unpersuasive.

O.C. initially told police that he had purchased grip tape for his skateboard at the Boulevard Mall. However, at trial, O.C. testified that he bought the grip tape at Copeland Sports store, adjacent to the mall. Officer Blasko then testified that he had obtained a receipt from Copeland Sports which indicated that a person had purchased grip tape at the store around the same time as O.C. had.

Although Shelton intended to impeach O.C. in a different manner—i.e., by highlighting the fact that the mall was closed at the time that O.C. stated he made the purchase—nothing precluded Shelton from attacking O.C.'s inconsistent statements. Therefore, even though Shelton learned about the existence of the receipt on the second day of trial, he

was fully capable of impeaching O.C.'s testimony. Accordingly, we conclude that Shelton's argument fails.[1]

Nighttime search

Shelton contends that his DNA evidence obtained from his person should have been suppressed because it was the result of an improper nighttime search under California law. We disagree.

After Shelton sexually assaulted and kidnapped O.C., he fled from Nevada to California. With the assistance of the Corona, California police department, Shelton was arrested on May 27, 2007. The next day, two Las Vegas police officers drove to Corona to search Shelton's black Hummer and obtain DNA evidence from his person. The officers obtained a search warrant at 6:50 p.m. and immediately proceeded to search Shelton's impounded vehicle. After thoroughly processing the vehicle, the officers arrived at the county jail where Shelton was being held at approximately 10:30 p.m., where they photographed Shelton and took a buccal swab for DNA.[2]

California law prohibits nighttime searches after 10 p.m. unless specifically authorized by a magistrate judge. Cal. Penal Code § 1533 (West 2000). However, "a search warrant is not invalidly executed pursuant to section 1533 when its execution is a part of one continuous

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[1]We disagree with Shelton's characterization that this was a Brady violation and note that the store receipt does not appear to constitute exculpatory evidence.

[2]Notably, the DNA evidence obtained from Shelton was a positive match at the statistical rate of one in six hundred billion to the DNA obtained from the shirt O.C. used to swab out his mouth after fleeing from Shelton.

transaction which begins before 10 p.m. and continues after that hour." People v. Zepeda, 162 Cal. Rptr. 143, 147 (Ct. App. 1980).

Here, although the officers took the buccal swabs at approximately 10:30 p.m., the search of Shelton's person was part of one continuous transaction that began at 6:50 p.m. when they initiated the search of Shelton's vehicle. See id. at 145-46 (concluding that a search that began at 8:30 p.m. and ended sometime after 10 p.m. was part of a continuous transaction even though officers searched multiple separate locations). Therefore, the challenged nighttime search was not in violation of California law. Accordingly, we conclude that the district court did not abuse its discretion in denying Shelton's motion to suppress the DNA evidence obtained during a lawful search.

Production of pornography—insufficient evidence

Shelton alleges that there was insufficient evidence to support his use of a minor in the production of pornography conviction because it was based on circumstantial evidence. See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006). We disagree.

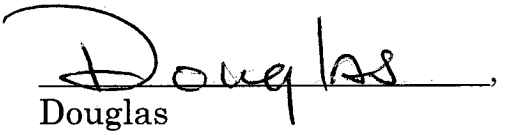
NRS 200.710 criminalizes the act of knowingly coercing a minor to be the subject of a sexual portrayal. At trial, O.C. testified that while he was forced to perform oral sex, Shelton told O.C. that he was going to take a picture. O.C. then saw a flash go off and Shelton told O.C. that he had just taken a picture of him performing oral sex. Although no pictures of O.C. were ever found, a polaroid camera was recovered from Shelton's vehicle. Albeit circumstantial, we conclude that a rational juror could have concluded from this evidence that Shelton knowingly coerced O.C. to be a subject of a sexual portrayal. Accordingly, we decline to disturb Shelton's conviction of the use of a minor in the production of pornography.

Conclusion

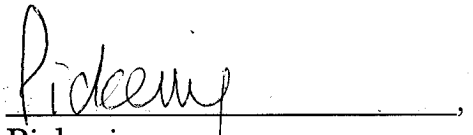
For the reasons set forth above, we conclude that Shelton's arguments on appeal lack merit.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Carmine J. Colucci & Associates
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[3]Since we perceive no errors in these proceedings, Shelton's cumulative error argument is without merit.