IN THE SUPREME COURT OF THE STATE OF NEVADA

BADRU KAKUNGULU,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50114

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault. Eighth Judicial District Court, Clark County; Michael Villani, Judge. Appellant Badru Kakungulu was sentenced to life in prison with the possibility of parole after ten years.

In the early morning hours of July 4, 2004, appellant Badru Kakungulu received a knock on his door. On his doorstep were his friend, Samuel Beasley, and the victim, whom Beasley had met earlier in the morning at a local casino. Once in the apartment, the intoxicated victim told the two men that she needed to lie down as she was tired. Kakungulu and Beasley followed her into the bedroom, where they lay down on either side of her. The victim then felt someone remove her pants and underwear and digitally penetrate her. Kakungulu got on top of the victim and vaginally penetrated her while Beasley held her down. Kakungulu left the room, and Beasley vaginally penetrated the victim. After the assaults, Beasley drove the victim home.

Kakungulu was arrested and subsequently scheduled for trial on March 1, 2005. However, Kakungulu failed to appear at his February

24, 2005, calendar call. Kakungulu was apprehended almost a year later, on January 29, 2006, when he was found walking in an automobile tunnel near the airport. Kakungulu was subsequently convicted of sexual assault and sentenced to life in prison with the possibility of parole after ten years. This appeal followed.

On appeal, Kakungulu argues that the district court improperly: (1) instructed the jury regarding his consent defense; (2) provided the jury with a flight instruction; (3) admitted evidence seized from his bedroom; and (4) declined to give the jury an instruction on coercion.

Consent Instruction

First, relying on this court's holding in Carter v. State, Kakungulu argues that jury instruction 11 failed to properly instruct the jury regarding his reasonable and good faith belief that the victim consented to intercourse. 121 Nev. 759, 121 P.3d 592 (2005). Kakungulu did not object to this instruction at trial.

Failure to object during trial generally precludes appellate review of an issue; however, we may address an error *sua sponte* if it constitutes plain error. NRS 178.602; Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001). In conducting a plain error analysis, this court must consider whether error exists, whether the error was plain or clear, and whether the error affected the defendant's substantial rights. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

In Carter, this court reaffirmed its holding in Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002) overruled in part on other grounds

by Carter v. State, 121 Nev. at 764-65, 121 P.3d at 595-96, requiring district courts to allow "instructions in sexual assault cases stating that an alleged perpetrator's knowledge of lack of consent is an element of sexual assault and, assuming supporting evidence has been presented, that a reasonable mistaken belief as to consent is a defense to a sexual assault charge." 121 Nev. at 766, 121 P.3d at 596. The Carter court invalidated a jury instruction regarding Carter's theory of consensual sexual intercourse because the instruction "failed to indicate that a reasonable doubt as to whether the defendant acted under a reasonable but mistaken belief of consent . . . gave rise to a duty to acquit." Id. at 766, 121 P.3d at 597.

In this case, jury instruction 11 reads, in pertinent part:

> It is a defense to the charge of sexual assault that the defendant entertained a reasonable and good faith belief that the alleged victim consented to engage in the sexual intercourse. If you find such reasonable, good faith belief, even if mistaken, you must give the defendant the benefit of the doubt and find him not guilty of sexual assault.

Jury instruction 11 comports with Carter's requirement that an instruction indicate that a reasonable doubt regarding defendant's reasonable but mistaken belief of consent gives rise to a duty to acquit. Accordingly, we find that no plain error occurred with regard to the district court's consent instruction.

Flight Instruction

Kakungulu next complains that the district court erroneously provided the jury with a flight instruction. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford

v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). An instruction regarding flight is properly given if evidence of flight has been admitted. Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980). "Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest." Id. at 876, 619 P.2d at 1222. An instruction on flight will be carefully scrutinized to ensure that appellant's act "was not just a mere leaving" but was to avoid an arrest and showed a consciousness of guilt. Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981). Finally, an instruction on flight is proper where it can be inferred that the defendant fled to avoid prosecution. Rosky v. State, 121 Nev. 184, 199, 11 P.3d 690, 699-700 (2005).

Kakungulu concedes that he failed to appear in court prior to trial. However, there is no other evidence in the record to support an inference of flight to avoid prosecution or flight with consciousness of guilt. When he was approached by police, Kakungulu did not attempt to flee, and provided his correct name and date of birth. Moreover, Kakungulu was apprehended in the same city in which the crime took place. Accordingly, we agree that the trial court erred in giving a flight instruction.

However, the evidence of Kakungulu's guilt is substantial; the victim testified that he sexually assaulted her, Kakungulu's DNA was found on the victim's underwear, Kakungulu told his roommate that he and Beasley forced the victim to have sex with them even though she did not want to, and the victim had abrasions in her vagina consistent with non-consensual sexual intercourse. In light of this overwhelming

evidence, we conclude that the error is harmless. See Guy v. State, 108 Nev. 770, 777-78, 839 P.2d 578, 583 (1992).

Admission of evidence seized from Kakungulu's bedroom

Kakungulu also argues that the district court erred in admitting evidence seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Specifically, Kakungulu asserts that his roommate, Mohammed Kaweesi, did not have authority to consent to a search of Kakungulu's bedroom and that the bedspread seized in the warrantless search was thus inadmissible. Kakungulu did not object to the admission of the bedspread at trial.[1]

NRS 174.125 requires that all motions to suppress evidence be made before trial. As noted previously, the failure to make a pre-trial motion or to object at trial precludes appellate review of the issue. Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). However, when a claim is based on a constitutional question, this court must consider it on appeal. Id. Because Kakungulu failed to object to the introduction of the evidence, we review this claim under a plain error analysis. NRS 178.602.

No hearing regarding the admissibility of the bedspread was held below. The only evidence in the record regarding Kaweesi's authority to consent to the search of Kakungulu's bedroom is Kaweesi's testimony that the two shared the apartment but had separate rooms. The record is

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[1]In fact, the district court specifically asked Kakungulu's counsel if he had any objection to the admission of the bedspread, to which counsel replied, "No, no objection at all, Judge."

devoid of sufficient evidence to determine the appropriateness of the search and seizure. Thus, it is impossible for this court to determine whether error occurred. Even assuming that the trial court did commit plain error, Kakungulu has not shown that the admission of the evidence affected his substantial rights, as no incriminating evidence was found on the bedspread. Thus, this claim is without merit.

Failure to give a sexual coercion instruction

Finally, Kakungulu complains that the district court erred when it refused to give an instruction on sexual coercion because that offense is a lesser-included offense of sexual assault and evidence adduced at trial supported a finding of coercion.

A defendant is generally entitled to an instruction on a lesser-included offense; however, an instruction may be refused "if the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense." Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966) (emphasis omitted).

A lesser offense is necessarily included in the offense charged when "the offense charged cannot be committed without committing the lesser offense." Id. at 187, 414 P.2d at 594. Coercion is not a lesser included offense of sexual assault, as one can commit sexual assault without the intent to compel another to do or abstain from doing an act. NRS 200.366; NRS 207.190. Thus, Kakungulu is not entitled to an instruction on coercion as a lesser-included offense. Moreover, even if coercion is a lesser-included offense, refusal of the instruction was appropriate under Lisby as there was substantial evidence to prove the sexual assault offense and no evidence was presented at trial tending to

reduce that crime. Accordingly, the district court did not abuse its discretion in declining to give an instruction on coercion.

Having considered Kakungulu's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

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