THE SUPREME COURT OF THE STATE OF NEVADA

SARAH HAMLIN MCGEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50696

FILED

MAY 05 2009

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 two counts of DUI causing substantial bodily harm. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Sarah McGee argues that (1) the district court should have admitted evidence that she may have been sexually assaulted immediately prior to the accident, (2) the prosecutor improperly referred to the alleged sexual assault after the district court excluded the evidence, and (3) there was insufficient evidence that she was the proximate cause of the victims' injuries. For the following reasons, we conclude that all of McGee'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.

The district court's exclusionary ruling of the alleged sexual assault

McGee contends that the district court should have admitted evidence that she was sexually assaulted immediately prior to the accident to demonstrate that she was unable to "willfully" drive her vehicle, as alleged in the indictment.[1] We disagree.

[1]As an initial matter, we take this opportunity to note that the element of driving "willfully" does not appear anywhere in NRS

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According to Dr. Thomas Bittker, McGee's psychiatric expert, a possibility existed that McGee was administered a date-rape drug at some point in the evening and then sexually assaulted in the Nugget parking lot. As a result, McGee may have suffered post-traumatic stress, giving rise to an immediate panic response, which would have diminished her decision-making ability and prevented her from fully anticipating the consequences of her actions.

Nevertheless, the district court excluded this evidence of the alleged sexual assault for two reasons. Specifically, the court concluded that (1) "[t]he panic response mentioned by Dr. Bittker is speculation" and even if a panic response occurred, "McGee would still have made a willful and voluntary decision to drive"; and, (2) the relevance of this evidence is outweighed by unfair prejudice "due to the sympathy such evidence would generate for . . . McGee."

Reviewing this ruling for an abuse of discretion, see Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005), the district court did not improperly exclude this evidence. Nothing indicated that McGee was the victim of a sexual assault that evening[2] or that she suffered some sort of

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484.379(1), Nevada's DUI statute, nor—contrary to both parties assumptions—did we import that element into our recent decision, Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). However, the State somewhat inexplicably charged McGee with "willfully" driving her vehicle in violation of NRS 484.379(1) and therefore purported to add a nonexistent element to the DUI offense.

[2]Although Nurse Engle documented that there was physical evidence that McGee had engaged in sexual intercourse at some point

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post-traumatic stress that rendered her incapable of willfully driving her vehicle. Thus, Dr. Bittker's opinion was based on speculation and admitting it into evidence may have risked creating undue sympathy for McGee. Accordingly, the district court was within its discretion to exclude evidence of the alleged sexual assault. See NRS 48.035.

Alleged prosecutorial misconduct

Although these comments passed without objection, McGee asserts that the prosecutor repeatedly violated the district court's pretrial order excluding reference to the alleged sexual assault by suggesting that she had fabricated the date-rape story and had behaved promiscuously on the night of the accident. We disagree.

Absent an objection at trial, prosecutorial misconduct is reviewed for plain error. See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995). Prosecutorial misconduct constitutes plain error when it either "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (internal quotation marks omitted).

While the district court instructed the parties to refrain from mentioning the alleged sexual assault, and both sides orally agreed that neither would discuss anything related to the sexual assault, the district court's order did not technically preclude mention of the date-rape drug

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prior to being examined, there was no indication when the sexual activity took place or that it was nonconsensual.

evidence. Thus, the State was free to present witness testimony that McGee did not have any trace of a date-rape drug in her system and to cross-examine her regarding that fact. Furthermore, the mere suggestion that McGee may have behaved promiscuously does not suggest that McGee was the victim of a sexual assault. Accordingly, none of the prosecutor's comments amounted to plain error.

Sufficiency of the evidence—causation

McGee argues that there was insufficient evidence that she was the proximate cause of the victims' injuries because the second accident was unforeseeable—i.e., the driver of the second vehicle was grossly negligent. We disagree.

To establish causation, a defendant's conduct must be a substantial factor in causing the resulting harm. See Lay v. State, 110 Nev. 1189, 1192-93, 886 P.2d 448, 450 (1994). In situations where a third party contributes to the harm, a defendant's conduct will still be regarded as the proximate cause, unless an intervening act of a third party supersedes the conduct of the defendant—i.e., the intervening act is unforeseeable. See Bostic v. State, 104 Nev. 367, 370, 760 P.2d 1241, 1243 (1988); People v. Shaefer, 703 N.W.2d 774, 786 (Mich. 2005) (noting that "gross negligence or intentional misconduct [by] . . . a third party will generally be considered a superseding cause, [however] ordinary negligence . . . will not be . . . a superseding cause because . . . [it] is reasonably foreseeable" (emphasis added)).

Here, there is nothing to suggest that the second driver was grossly negligent. Although the second driver's blood alcohol content registered .049, he was well below the legal limit and was not visibly impaired. Moreover, since the accident occurred late at night as the second driver was maneuvering around a bend in the road and the car

that McGee initially struck was protruding into the second driver's lane of traffic, the subsequent accident was foreseeable. Therefore, given the second driver's sobriety and the conditions created by the first accident, we conclude that a rational juror could have found that McGee was the proximate cause of the victims' injuries. See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

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

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Pickering

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[3]McGee also alleges that (1) the district court erred in rejecting her proposed jury instruction restating NRS 194.010(5), which discusses what classes of persons are incapable of forming the requisite criminal intent and are therefore not criminally liable; and (2) that the prosecutor improperly instructed grand jurors against drawing inferences from McGee's decision not to testify. Having carefully reviewed these separate challenges, we conclude that (1) the district court did not err in rejecting McGee's proffered instruction; and (2) that even though the prosecutor usurped the district court's role in instructing the grand jurors, the instruction was a correct statement of the law. Therefore, reversal is unwarranted.

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