

IN THE SUPREME COURT OF THE STATE OF NEVADA

FOSTER GORDON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51032

FILED

MAY 06 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 sexual assault. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. On January 3, 2008, the district court sentenced appellant Foster Gordon to consecutive terms of life in prison with the possibility of parole after 10 years for each count.

Gordon argues two issues on appeal: Insufficient evidence supports the convictions and the State committed prosecutorial misconduct resulting in reversible error. We affirm the conviction.

Sufficiency of the evidence

Gordon argues that because the only evidence of sexual assault was the victim's statements and the victim's testimony was incredible, this court should reverse his convictions for insufficient evidence. The standard of review for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 727 (2008) (internal quotations and citations omitted). This court has long held that a person may be convicted of

sexual assault on only the testimony of the victim. See Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Furthermore, “[t]his court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.” Mitchell, 124 Nev. at ___, 192 P.3d at 727.

The evidence, when viewed in the light most favorable to the prosecution, shows that Gordon placed the victim’s penis in his mouth, he placed his penis in the victim’s mouth, and he did so when he should have known that the victim was mentally incapable of resisting or understanding the nature of Gordon’s acts. A rational trier of fact could therefore have found beyond a reasonable doubt that Gordon committed two acts of sexual assault on the victim.

While recognizing that this court defers on matters of witness credibility to the determination of the trier of fact, Gordon nevertheless urges this court to find the victim incredible as a matter of law. In support of his argument, he cites to cases that, either in dicta or dissent, refer to a hypothetical case where “other circumstances in evidence might, as a matter of law, be enough to destroy the credibility of the complaining witness.” State v. Diamond, 50 Nev. 433, 437, 264 P. 697, 698-99 (1928); see also Matter of T.R., 119 Nev. 646, 654, 80 P.3d 1276, 1281-82 (2003) (Leavitt, J., dissenting); Rembert v. State, 104 Nev. 680, 681-82, 766 P.2d 890, 891 (1988). In this case, Gordon points to the victim’s diminished mental capacity and the effect it had on his testimony as the “other circumstances” on which this court should rely. However, not only was the victim found competent to testify, but the State opened its case with an expert witness who explained to the jury in detail how the victim’s disability affected his ability to communicate. The jury heard evidence

from the expert that the victim could narrate events, although he struggled with chronology and was susceptible to suggestion. Moreover, the jury was able to weigh the victim's testimony by observing and listening to his testimony. Because sufficient evidence supports the convictions and matters of credibility rest with the jury, we conclude that Gordon's claim lacks merit.

Prosecutorial misconduct

Gordon also argues that his conviction should be reversed because the prosecutor committed misconduct during closing arguments by commenting on Gordon's failure to testify and by disparaging defense counsel. Because Gordon did not object to the prosecutor's comments at trial, we review this claim for plain error. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008). Under plain-error review, the burden is on the defendant to demonstrate first that "an error . . . is plain from a review of the record" and second "that the error affected his or her substantial rights[] by causing 'actual prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Absent such a showing, this court will not reverse Gordon's conviction.

Gordon first asserts that the prosecutor improperly referenced his decision not to testify. Direct comments on a defendant's decision not to testify violate his constitutional right against self-incrimination, while indirect references are permissible unless "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." Bridges v. State, 116 Nev. 752, 763-764, 6 P.3d 1000, 1008-09 (2000) (quoting Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)).

During closing arguments, the prosecutor made two statements that Gordon complains were improper comments on the exercise of his right not to testify. The first instance occurred during the prosecutor's closing argument:

What the state has to prove beyond a reasonable doubt in this case is that he, the defendant—how do you know it was the defendant? You had the direct sworn testimony of Charlie C. There were only two people in that room that night. Charlie C. testified under oath that the person that put his penis in Charlie C.'s mouth was the defendant.

The second challenged comment occurred during the prosecutor's rebuttal argument:

[T]wo people were in that room that night: Charlie C. and Foster Ralph Gordon. The beautiful thing about the truth, ladies and gentlemen, is there is only one version of the truth. You don't get multiple alterations of it. Charlie said these things happened to him and he told you what they were. The defendant says those things didn't happen.¹ What do we know for sure beyond any doubt? One of them is not telling the truth. Let's talk about Foster Ralph Gordon.

Gordon argues that, in both instances, the prosecutor improperly referenced his silence at trial by identifying both Gordon and the victim and then, in the first instance, stating what the victim testified to, thereby implying through silence that Gordon did not testify, and, in the second instance, stating what the victim "told the jury" versus what

¹Although Gordon did not testify at trial, the district court admitted taped police interviews of Gordon that were played for the jury. Gordon does not appeal the admission of these tapes into evidence.

Gordon "said" in tapes played at trial. Both statements are, at the most, indirect references to Gordon's decision not to testify at trial, and when read in context, neither is of such character that the jury would naturally and necessarily view them as comments on that decision.

The prosecutor's first reference was made during his summary of the elements and the evidence that supported each, with the clear purpose being to identify the defendant as the only other person in the room that night and, therefore, the perpetrator. The prosecutor's second reference, made during rebuttal argument, was simply an introduction to his explanation for why specific portions of Gordon's interview that were played for the jury meshed with the State's theory of the case. We conclude both statements were proper and therefore did not constitute error.

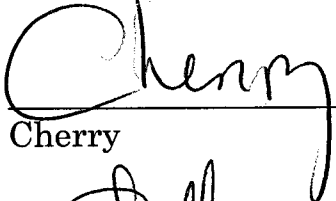
Gordon next asserts that the prosecutor improperly disparaged defense counsel by stating during rebuttal argument, "[T]he beauty about our system of justice is that defense attorneys do not get a vote as to whether or not we charge or what cases and what crimes we charge." This court has held that a prosecutor may not make disparaging remarks about defense counsel. Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991). We conclude that the challenged comment was not improper. After exhorting the jurors to decide based on the evidence and not on emotion, defense counsel stated in her closing argument, "What we are dealing with here, ladies and gentlemen, is the overwhelming power of the State against [Gordon.] I would submit to you that the State in this particular case has lost track of its role." The prosecutor's comment about the role that defense attorneys do not play in the charging process was in


direct response to defense counsel's closing argument and, therefore, was not error.


We conclude that none of the challenged comments were improper and, even if they were, do not warrant reversal considering the evidence adduced at trial.

Based on the foregoing, we hold that there was sufficient evidence to convict Gordon of two counts of sexual assault and that the prosecutor did not commit prosecutorial misconduct. We therefore,

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk