

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC SCOTT CINA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51366

FILED

ORDER OF AFFIRMANCE

JUN 03 2009
TRACEY K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault with a minor under 16 years of age. Eighth Judicial District Court, Clark County; Michael Villani, Judge. The district court sentenced appellant Eric Scott Cina to a prison term of 20 years to life.

Cina contends in his appeal that (1) the verdicts were inconsistent;¹ (2) there was insufficient evidence to support the conviction for sexual assault; and (3) the district court erred in admitting testimony of other bad acts. Cina also contends that cumulative error resulted in a violation of his constitutional rights.

First, Cina contends that the verdicts were inconsistent. Particularly, Cina contends that lack of consent was required for the jury to find him guilty of sexual assault, while the jury was instructed that

¹The jury convicted Cina of one count of sexual assault with a minor and one count of statutory sexual seduction. The district court dismissed the statutory sexual seduction count upon sentencing.

consent was an element of statutory sexual seduction, and because the jury found him guilty of both counts, this resulted in inconsistent verdicts.

NRS 200.364(3)(b) defines statutory sexual seduction as “sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.” Consent is not an element of statutory sexual seduction.²

NRS 200.366(1) defines sexual assault as sexual penetration “against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct.”

We conclude that the verdicts were not inconsistent. Even though the jury could have found that the 14-year-old victim in this case factually consented, she could not legally consent pursuant to NRS 200.364. Further, evidence was presented demonstrating that under the circumstances Cina knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of his conduct.

However, although the verdicts were not inconsistent, the verdicts were redundant and the district court correctly dismissed the statutory sexual seduction count. Point v. State, 102 Nev. 143, 147, 717

²Cina contends that the district court incorrectly instructed the jury that consent was an element of statutory sexual seduction. Although the instruction stated that statutory sexual seduction is committed by a person 18 years or older with a consenting person under the age of 16 years, the instruction later correctly stated that “it is no defense that the person may have consented.” Thus, the district court did not instruct the jury that consent was an element of statutory sexual seduction.

P.2d 38, 41 (1986) (holding that in circumstances where the elements of the greater offense are sufficiently established, the lesser offense should simply be reversed without affecting the conviction for the more serious crime), disapproved of on separate grounds by *Stowe v. State*, 109 Nev. 743, 857 P.2d 15 (1993).

Second, Cina contends that there was insufficient evidence presented to support his conviction for sexual assault because there was evidence presented demonstrating that the victim consented.

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. 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).

In particular, we note that Cina's friend, Kevin Kerrick, and the victim both testified that Cina participated in "vulgar" and "inappropriate" message texting and phone conversations with the victim, sometimes lasting as long as three or four hours daily, which supported the theory that Cina had participated in "grooming" the victim. The victim's mother testified that the victim had desperately wanted a relationship with her father and the victim testified that when she was 14-years-old, Cina digitally penetrated her. Although testimony from a victim of sexual assault need not be corroborated, *Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); *State v. Gomes*, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); *Washington v. State*, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996), here additional evidence was presented supporting the verdict of guilt. Cina's ex-girlfriend, Laura Callaghan,

testified that she witnessed the sexual assault and confronted Cina and the victim.

The jury could reasonably infer from the evidence presented that Cina subjected the victim to a sexual assault under conditions in which he knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of his conduct. NRS 200.366(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).³

Third, Cina contends that the district court erred in admitting evidence of prior bad acts. In Tinch v. State, this court concluded that prior bad act evidence is admissible under NRS 48.045(2) only if "the trial court . . . determine[s], outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). However, where the complaining party first questions a witness regarding otherwise

³Cina argues that because a 14-year-old juvenile offender can be tried as an adult when certain crimes are committed, we should find that the victim in this matter had the capacity to consent to a sexual encounter with him. The issue of whether Cina subjected the victim to sexual assault under conditions in which he knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of his conduct was determined by the jury. We decline to address it further.

inadmissible testimony, that party is barred from preventing the testimony's admission under the open door doctrine. See Taylor v. State, 109 Nev. 849, 851, 858 P.2d 843, 845 (1993). The doctrine provides that the introduction of inadmissible evidence by one party allows the other party, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission. U.S. v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988).

In the present case, defense counsel asked Callaghan if she engaged in sexual intercourse with Cina several days after she witnessed Cina sexually assaulting the victim. Callaghan replied that she had. In an attempt to rehabilitate Callaghan, the prosecutor asked her why she had engaged in sexual intercourse with Cina, and Callaghan replied that it was because she was afraid of Cina because of past domestic violence experiences with him. Because defense counsel had opened the door of Callaghan having sexual intercourse with Cina, it was proper for the district court to allow the prosecutor to question Callaghan on her motive for engaging in sexual relations with Cina.⁴ Taylor, 109 Nev. at 851, 858 P.2d at 845.

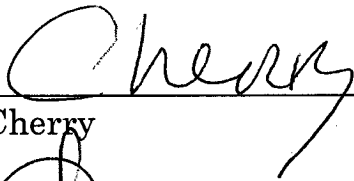
Fourth, Cina contends that cumulative error resulted in a violation of his constitutional rights. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). If the defendant's fair trial rights are violated


⁴The district court heard argument regarding the admission of this testimony outside the presence of the jury. The reference to the domestic violence was brief and nonspecific.

because of the cumulative effect of errors, this court will reverse the conviction. DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). Because there was no error, there was no cumulative error.

Having considered Cina's contentions and determined that they have no merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Karen A. Connolly, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk