

IN THE SUPREME COURT OF THE STATE OF NEVADA

URLIN L. CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51715

FILED

ORDER OF AFFIRMANCE

MAY 18 2009
TRACIE 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 sexual assault and robbery. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

In this case, the victim, A.K., responded to a customer request for a female escort and was subsequently raped and robbed by the appellant, Urlin Clark. On appeal, Clark raises multiple challenges to his conviction of sexual assault and robbery. For the following reasons, we conclude that all of Clark'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.

Accusing witness' bad act evidence

Clark contends that the district court erred by rejecting his motion in limine to admit other bad acts of the victim, A.K., without granting him a Petrocelli hearing on the issue. We disagree and conclude that the district court did not abuse its discretion in excluding the evidence. See McKenna v State, 414 Nev 1044, 1052, 968 P.2d 739, 745 (1998) (reviewing a district court's decision to admit or deny prior bad act evidence for an abuse of discretion).

At trial, Clark's primary defense was that he and A.K. engaged in consensual sex for payment. In furthering his defense and

attempting to brand A.K. as a prostitute, Clark filed a motion in limine to have an evidentiary hearing and admit evidence that two months after Clark allegedly raped and robbed A.K., she was involved in another pay-for-sex dispute. The district court rejected Clark's motion, concluding that the subsequent dispute was not relevant, it would confuse the jury, and there was no requirement to hold an evidentiary hearing on the matter.¹

Clark's reliance on Petrocelli under the facts of this case is misplaced. A Petrocelli hearing is only required when the prosecution seeks to admit evidence of a defendant's bad acts. Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985). The reason we require a Petrocelli hearing when the State seeks to admit evidence of a defendant's prior bad acts is to protect a defendant's right to a fair trial, and this court has recognized that prior bad act evidence has the propensity to be irrelevant and unduly influential, resulting in the jury returning a guilty verdict merely because they believe that the accused is a bad person. See Armstrong v. State, 110 Nev. 1322, 1323, 885 P.2d 600, 600 (1994); Rhymes v. State, 121 Nev. 17, 21 107 P.3d 1278, 1280-81 (2004). These same concerns are not present when the defendant attempts to introduce bad act evidence of a witness. Therefore, the district court was not required to hold an evidentiary hearing regarding the admissibility of A.K.'s other bad acts.

Notably, as well, Nevada's rape shield laws are designed to protect rape victims from precisely this type of character assault, and

¹The district court did, however, recognize that Clark could cross-examine A.K. about the subsequent pay-for-sex dispute without the use of extrinsic evidence.

Clark did not attempt to follow the specific procedural guidelines for admitting evidence of A.K.'s subsequent pay-for-sex dispute.² See NRS 48.069; NRS 50.090. Since the subsequent dispute was not related to the incident in question and would likely confuse the jury by essentially creating a mini-trial on the issue, we conclude that the district court did not abuse its discretion in excluding the evidence.³

Character impeachment

Clark argues that the district court erred in permitting the State to impeach his two character witnesses, who testified as to his character for peacefulness. We disagree.

Once a criminal defendant presents evidence of his character trait, the prosecution may offer similar evidence in rebuttal and inquire into specific instances of conduct on cross-examination. NRS 48.045(1)(a); NRS 48.055(1). "However, before allowing inquiry into facts harmful to the defendant's character that are not otherwise in evidence, the trial court must determine, outside the presence of the jury, whether the

²Contrary to Clark's contention, there was little evidence that A.K. was involved in prostitution except for Clark's subjective belief. As a result, this case does not fall within any exception to Nevada's rape shield laws. See Drake v. State, 108 Nev. 523, 526-27, 836 P.2d 52, 54-55 (1992) (stating that a victim's arrest record for prostitution was admissible in a sexual assault case because Nevada's rape shield laws do not apply when there is concrete evidence that the victim has previously engaged in illegal acts of prostitution).

³Clark's argument that the district court's ruling violated his right to confront the witnesses against him is also without merit because A.K. testified at trial and Clark was able to cross-examine her regarding the subsequent pay-for-sex dispute. See Crawford v. Washington, 541 U.S. 36, 42-43 (2004).

prosecution has a reasonable, good-faith basis for its belief that the defendant committed the acts subject to the inquiry.” Daniel v. State, 119 Nev. 498, 513, 78 P.3d 890, 900 (2003).

Here, the State cross-examined Clark’s two character witnesses and asked them whether they were aware that Clark had “sucker punched” a fellow inmate while he resided at the Clark County Detention Center (CCDC). Prior to this inquiry, the State presented the district court with a CCDC report outside the presence of the jury indicating that Clark got into an argument with a fellow inmate, followed him outside to the recreation yard, then punched the other inmate from behind. Upon hearing this, the district court concluded that the State had a reasonable, good-faith basis in its belief that Clark had “sucker punched” a fellow inmate. Since the district court followed the protocol established in Daniel, we conclude that there was no error.⁴

Prosecutorial misconduct

Clark contends that the prosecutor engaged in prosecutorial misconduct that requires reversal by invoking a “golden rule” argument and calling Clark a “coward.” We conclude that the prosecutor’s conduct does not warrant reversal.

⁴Clark’s remaining argument that the State improperly tried to “prove up” the “sucker punch incident” when it asked a follow-up question to one of Clark’s character witnesses is equally without merit because the State’s follow-up question merely asked whether the witness’ opinion as to Clark’s peacefulness would change in light of the incident at CCDC. See McKee v. State, 112 Nev. 642, 647, 917 P.2d 940, 943 (1996) (“The prosecution is not allowed to prove up the conduct through extrinsic evidence.”).

With regard to the alleged “golden rule” violation, Clark argues that the prosecutor attempted to persuade the jury to align themselves with the complaining witness by questioning whether she deserved to be raped. While it is improper for a prosecutor to ask that a verdict be returned on behalf of a victim, see Howard v. State, 106 Nev. 713, 718-19, 800 P.2d 175, 178 (1990), in this case, the prosecutor’s statements did not rise to the level of improper argument.

Here, during closing argument, the prosecutor attempted to rebut Clark’s characterization that the complaining witness was a prostitute.⁵ Unlike instances where a prosecutor asks the jury to imagine what it would be like to be the victim, see, e.g. Doyle v. State, 104 Nev. 729, 734, 765 P.2d 1156, 1159 (1988) (where the prosecutor asked the jury, “[c]an you imagine the agony of having a knife plunged into the body that many times?”), here, the prosecutor’s comment came in rebuttal to the defense’s characterization of the complaining witness as a prostitute and did not ask the jury to put themselves in the victim’s shoes. Accordingly, we conclude that the prosecutor’s comment was not improper.

With regard to the comment that referred to Clark as a “coward,” we conclude that the prosecutor’s comment was improper. See, e.g., Pacheco v State, 82 Nev. 172, 180, 414 P.2d 100, 104 (1966) (referring to the prosecutor’s comment labeling the accused as a “mad dog,” this

⁵Specifically, the prosecutor made the following statements:

But because there’s a stereotype that is attached to young ladies that are involved in the escort service, she’s an automatic prostitute. And do you know what, does she deserve that? Does she deserve to be raped?

court stated that “[T]he prosecutor is to avoid the use of language that might deprive a defendant of a fair trial.”); Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (stating that “likening [the defendant] to a rabid animal was misconduct”). However, because the district court sustained Clark’s objection to the comment and there was overwhelming evidence he was guilty of rape and robbery, we conclude that the error was harmless. Smith v. State, 120 Nev. 944, 947-48, 102 P.3d 569, 572 (2004) (stating that in reviewing whether prosecutorial misconduct warrants reversal, this court considers the nature of the evidence against the defendant and whether the issue of guilt is close, and “where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error.”) (citation omitted).

For the reasons set forth above, we conclude that Clark's arguments on appeal, including his cumulative error argument, lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. David B. Barker, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk