

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE RENCHER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52355

FILED

NOV 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 nine counts of sexual assault of a child under fourteen years of age and six counts of lewdness with a child under fourteen years of age. Eighth Judicial District Court, Clark County; David B. Barker, Judge. The district court sentenced appellant Eddie Rencher, Jr., to sixteen terms of life in the Nevada State Prison, two of which were ordered to run consecutively and without the possibility of parole. The remaining terms of life without the possibility of parole were imposed concurrently.

On appeal, Rencher argues that the district court abused its discretion in admitting evidence of uncharged conduct and denying his motion to dismiss based on a violation of Brady v. Maryland, 373 U.S. 83 (1963). He further claims that the State committed prosecutorial misconduct. Lastly, he claims that cumulative error warrants reversal of his convictions. We conclude that these claims lack merit for the reasons discussed below.

Evidence of Uncharged Conduct

Rencher argues that the district court abused its discretion in admitting evidence of uncharged acts. He contends that the testimony from another molestation victim was overly prejudicial and did not fit within an exception to NRS 48.045(2).

“The decision to admit or exclude evidence rests within the trial court’s discretion, and this court will not overturn that decision absent manifest error.” Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000). Evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question. NRS 48.045(2). Nevertheless, NRS 48.045(2) also states that evidence of other bad acts may be admitted to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Prior to admitting such evidence, the district court must determine during an evidentiary hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is substantially outweighed by the danger of unfair prejudice. See e.g., Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

The record indicates that the district court admitted the prior bad act evidence after conducting a hearing and considering the factors set forth in Tinch. The district court did not abuse its discretion in determining that evidence of the uncharged molestation was relevant to Rencher’s motive to molest the victim in the instant case. See Ledbetter v. State, 122 Nev. 252, 262-63, 129 P.3d 671, 679 (2006) (providing that

evidence of sexual abuse against other young female relatives was admissible to show defendant's motive to sexually assault his stepdaughter).

Brady violation

Rencher argues that the district court abused its discretion when it denied his motion to dismiss the charges in which he asserted that the State failed to provide exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963). He asserted in the motion below that the State failed to provide evidence of an investigation into acts that Cortez Bowen committed against another child victim that were similar to those asserted in the instant case.

"Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment." Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). A claim that the State committed a Brady violation must show that: (1) "the evidence at issue is favorable to the accused;" (2) the State failed to disclose the evidence, either intentionally or inadvertently; and (3) "prejudice ensued, i.e., the evidence was material." Id. at 67, 993 P.2d at 37. The United States Court of Appeals for the Ninth Circuit has stated that "our precedents make clear that dismissal of an indictment is an appropriate sanction for a constitutional violation only where less drastic alternatives are not available." U.S. v. Kearns, 5 F.3d 1251, 1254 (9th Cir. 1993); see also California v. Trombetta, 467 U.S. 479, 486-87 (1984) ("In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced."); Mazzan v. Warden, 116 Nev. 48, 76, 993 P.2d 25, 42-43 (2000).

We conclude that the district court did not abuse its discretion in denying Rencher's motion to dismiss. Prior to trial, Rencher had requested discovery of police reports related to an alleged incident of abuse by Cortez Bowen against B.C., who lived in the same apartment complex as D.H. Rencher asserted that the description of the abuse in that report was similar to the reports by D.H. Thus, the evidence was arguably favorable to the defense as it pointed to another possible perpetrator or tended to show that the victim might have fabricated the report of abuse. However, on appeal, Rencher concedes that the requested reports were eventually turned over to the defense over one month prior to trial. While he contends that he was prejudiced by the late disclosure of the evidence, Rencher did not demonstrate that the dismissal of the prosecution was an appropriate sanction for the late disclosure of Brady material where less drastic measures were available.

Prosecutorial Misconduct

Rencher argues that the State committed prosecutorial misconduct. He asserts that, during the questioning of a witness and the closing arguments, the prosecutor improperly characterized him as a sexual deviant when questioning a witness, vouched for the victim's credibility during closing argument, gave his opinion in an attempt to inflame the jury, and shifted the burden of proof.

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Additionally, "[a] prosecutor's comments should be viewed in context, and a criminal conviction is not to be lightly overturned on the basis of a

prosecutor's comments standing alone.” Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)). Rencher objected to only one of the instances of which he complains.

Comment to which Rencher objected

Rencher argues that the prosecutor characterized him as a sex offender when examining a witness. Specifically, while the prosecutor examined a nurse practitioner who examined the victim, the prosecutor said, “And why is that, that with sex offenders and children you don’t—.” Rencher objected to the comment and the district court sustained the objection and instructed the prosecutor to rephrase its question.

We conclude that the comment does not warrant reversal of Rencher's conviction. The jury was properly instructed prior to trial that the statements of the attorneys were not evidence in the case and that the jury should only consider the testimony received and exhibits that are admitted during trial. Further, there was significant evidence of Rencher's guilt. The victim testified that Rencher repeatedly sexually assaulted and fondled her over the course of several years. Her testimony detailed several specific incidents and noted her age when the incident occurred, the room of the home in which it occurred, and the specific acts performed upon her. Additionally, the comment was brief and the district court sustained Rencher's objection to it. Therefore, although Rencher demonstrated error, based on the evidence supporting his guilt and the district court's instructions, we conclude that the comment did not so infect the proceedings with unfairness as to result in a denial of due process.

Unpreserved error

Rencher challenges a number of comments as constituting prosecutorial misconduct. However, he failed to object to these comments at trial. Generally, the failure to object to prosecutorial misconduct precludes appellate review. Gaxiola v. State, 121 Nev. 638, 653-54, 119 P.3d 1225, 1236 (2005). However, we “may consider sua sponte plain error which affects the defendant’s substantial rights, if the error 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.” Id. at 654, 119 P.3d at 1236 (quoting Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002)(quotation omitted)).

First, Rencher argues that the prosecutor stated that he was a sexual deviant during closing arguments. Specifically, the prosecutor stated, “What motivates someone to do this? The evidence of the abuse of [C.C.] was admitted simply to show the defendant’s sexual attraction to an obsession with young children. It explains why, his motive to sexually assault [D.H].”

We conclude that the prosecutor’s comments did not amount to misconduct. The prosecutor did not state that Rencher was a sexual deviant but merely commented on evidence that the district court admitted concerning the motive for the crime. Therefore, the prosecutor’s argument did not constitute plain error.

Second, Rencher argues that the prosecutor improperly vouched for the victim’s testimony with the following comments:

That’s where the credibility comes into issue. Doesn’t that make sense to you, that she’s relaying what happened to her, that’s a pretty accurate recollection?

You didn't hear her—that her story changed at all.

...

So to say that [D.H.] made this up for that reason doesn't make sense. . . .

And it has nothing to do with the fact that she would have made all of this up.

“It is improper for a prosecutor to vouch for the credibility of a government witness.” United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). Also, “prosecutors must not inject their personal beliefs and opinions into their arguments to the jury.” Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986).

We conclude that the prosecutor's comments were permissible argument on the victim's credibility and did not amount to improper vouching. The prosecutor's comments did not inject his personal beliefs but argued that the specificity and consistency of the victim's recollection militated a conclusion that she was telling the truth. Further, this court in Klein v. State, 105 Nev. 880, 784 P.2d 970 (1989), found that argument about a witness' motivation was permissible if it did not divert the jury's attention away from focusing on the facts in evidence which reflected on the credibility of the witnesses. See id. at 883-84, 784 P.2d at 972. In the instant case, the prosecutor merely argued that the defense's argument concerning the victim's motivation to lie did not make sense. We also note that the jury was properly instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel; and, the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Therefore, the prosecutor's argument did not constitute plain error.

Third, Rencher argues that the prosecutor improperly gave his opinion in an attempt to inflame the jury with the following remark, “Now

it's your choice. Your choice to hold him accountable. Your choice to tell him that behavior is not acceptable. Your choice to tell him what he did was a crime." We conclude that the prosecutor's comments did not amount to prosecutorial misconduct that sought to inflame the jury. The prosecutor did not state his opinion but merely argued that the jury should hold Rencher accountable for the charged crimes. Moreover, even if the alleged comment constituted error, we conclude that Rencher failed to demonstrate that these comments had a prejudicial impact on the verdict in the context of the trial as a whole in light of the substantial evidence of guilt discussed above. Further, as noted above the jury was properly instructed regarding the proper consideration of the statements of the attorneys and the appropriate evidence to consider. Therefore, the prosecutor's argument did not constitute plain error.

Fourth, Rencher argues that the prosecutor improperly gave his opinion in an attempt to inflame the jury when he stated that Rencher was "raping" the victim. We conclude that the prosecutor's comments did not state the prosecutor's opinion. The prosecutor merely argued that the evidence showed that Rencher repeatedly sexually assaulted the victim. See Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971) (noting that a prosecutor may make statements phrased as his opinion when those are conclusions from the evidence introduced at trial). Therefore, the prosecutor's argument did not constitute plain error.

Fifth, Rencher argues that the prosecutor improperly gave his opinion in an attempt to inflame the jury when he argued that the victim did not have any physical signs of abuse because Rencher avoided significant injuries to conceal and effectuate his repeated abuse of the victim. We conclude that the prosecutor's comments did not

impermissibly give his opinion in an attempt to inflame the jury. The statement was a proper comment on the evidence and response to the defense argument highlighting the lack of findings during the victim's physical exam. Therefore, the prosecutor's comment did not constitute plain error.

Sixth, Rencher argues that the prosecutor improperly gave his opinion in an attempt to inflame the jury when he stated, "[y]ou know that the defendant did this to her. You know because you can see it happening." We conclude that the prosecutor's statement did improperly give his opinion or attempt to inflame the jury. Considered in context, these comments reflect the prosecutor's focus on the specificity of the victim's account of the abuse to substantiate her credibility. Thus, it was a proper argument concerning the victim's credibility. Therefore, the prosecutor's comment did not constitute plain error.

Seventh, Rencher argues that the prosecutor improperly gave his opinion in an attempt to inflame the jury when he argued that the fact that C.C. told a previous lie did not mean that he lied in his trial testimony. We conclude that the comment did not amount to prosecutorial misconduct because it was a proper comment on the evidence concerning the credibility of a State witness. Therefore, Rencher failed to demonstrate plain error.

Eighth, Rencher argues that the prosecutor improperly shifted the burden of proof when he stated that the jury "did not hear about any other person that could have committed these crimes," as well as claimed that the victim's testimony was not impeached during trial or otherwise shown to be inconsistent. We conclude that the comments did not amount to prosecutorial misconduct or shift the burden of proof. The prosecutor's

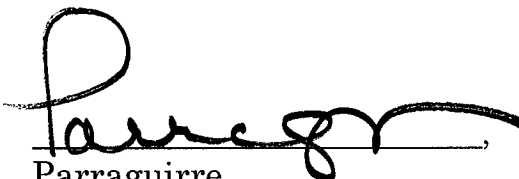
comment regarding other suspects did not shift the burden of proof but instead was a response to the defense's argument that other adults had the opportunity to molest the victim. And the prosecutor's statement about the lack of impeachment of the victim's testimony was proper argument concerning her credibility. Therefore, the prosecutor's comments did not constitute plain error.


Cumulative Error


Rencher argues that even if an error by the district court by itself is not enough to warrant reversal of his convictions, the cumulative effect of those errors warrants reversal of his convictions. Cumulative error results when an individual error, standing alone, is not enough to reverse but the cumulative effect prevents the defendant from receiving a fair trial. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). As we conclude that the State committed only one error, and that error was harmless, we conclude that there is no cumulative error.

Having considered Rencher's contentions and concluding they are without merit, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Hon. David B. Barker, District Judge
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Eighth District Court Clerk