

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY P. PROCTOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52633

FILED

NOV 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND

REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree kidnapping and one count of open or gross lewdness. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Gary P. Proctor to a prison term of eight years to life for first-degree kidnapping and a concurrent term of one year for open or gross lewdness.¹

On appeal, Proctor contends that (1) the State presented insufficient evidence to support the jury's verdict of first-degree kidnapping and (2) the district court abused its discretion in precluding the defense from raising the issue or questioning the victim about her prior sexual history.

¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Sufficiency of the evidence

Proctor contends that the State presented insufficient evidence to support the jury's verdict of first-degree kidnapping. The State alleged in the charging document and argued at trial that Proctor enticed the minor victim to his apartment with the prospect of a babysitting job with the intent to commit sexual assault or coercion.²

Our standard of review in determining the 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.” Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)), cert. denied, ___ U.S. ___, 129 S. Ct. 95 (2008).

In the present case, Proctor, apparently a friend of the victim's family, asked the 17-year-old victim if she would be interested in babysitting, for which he would pay her. After she agreed, he transported her from Las Vegas to his apartment in Henderson. Upon entering the apartment, the victim observed that there were no children present. Proctor informed her that the children would arrive shortly. Testimony was presented demonstrating that Proctor was separated from his girlfriend, the children's mother, and that the children were not expected at Proctor's apartment.

²The parties did not provide copies of the jury instructions to this court.

Proctor asked the victim twice to engage in sexual activity in exchange for money. The victim told him “no” and informed him that his request was making her feel uncomfortable. She asked Proctor to take her home, and he stated that he would shortly. Following each rejection, Proctor left the kitchen where the victim was sitting and went into his back bedroom for 10 or 15 minutes. At one point, Proctor touched the victim on the side of her ribcage and breast. Eventually, Proctor’s ex-girlfriend entered the apartment to pick up some of her belongings and, following an argument, Proctor left.³

To sustain a conviction for kidnapping, the State must prove that the victim was a minor and that Proctor led, took, enticed or carried her away with the intent to perpetrate an unlawful act. NRS 200.310. The jury instructions were not included in the record before this court, but during closing arguments the State argued that it was Proctor’s intent to commit sexual assault or coercion on the minor victim.

We conclude that it is not apparent from the record that Proctor had the intent to perpetrate sexual assault upon the victim. Both times after Proctor asked the victim to engage in sexual conduct and she refused, he left the room for several minutes. The victim testified that just prior to the ex-girlfriend’s arrival, Proctor sat on the living room floor to watch a movie.

³The ex-girlfriend testified that she only entered the apartment because she believed that Proctor was not present.

Further, the evidence does not show that Proctor attempted to coerce the victim. NRS 207.190 defines coercion as unlawfully compelling another “to do or abstain from doing an act [which the] other person has a right to do or abstain from doing” with the use of violence, infliction of injury or threat of such, or by depriving “the person of any tool, implement or clothing, or hinder him in the use thereof,” or to “[a]ttempt to intimidate the person by threats or force.” Where threats or force is not used, then the offense is a misdemeanor. The offense of coercion implies some level of intimidation, even without the use of physical force. The State presented no evidence that Proctor threatened the victim or used physical force or that he hindered the victim from exiting the apartment. Asking a person to engage in a sexual activity for money, without more, is not coercion.

Thus, insufficient evidence was presented to support a first-degree kidnapping conviction based on the State’s theory that Proctor took the minor victim to his apartment with the intent to commit sexual assault or coercion. Consequently, we conclude that Proctor’s conviction for first-degree kidnapping must be reversed.

Victim’s sexual history

Proctor contends that the district court abused its discretion in precluding the defense from raising the issue or questioning the victim regarding her prior sexual history. The State moved prior to trial to preclude the defense from engaging in such questioning under the rape shield law. The district court denied the State’s motion because Proctor was not charged with an offense that would preclude such questioning, but determined that the probative value of the information sought was

outweighed by unfair prejudice and precluded the defense from questioning the victim about her sexual history.

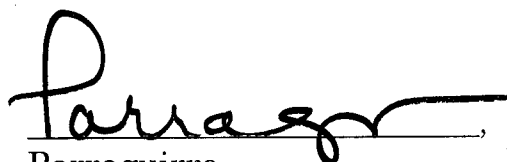
The trial court has “considerable discretion in determining the relevance and admissibility of evidence.” Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) (quoting Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds as stated in Bejarano v. State, 122 Nev. 1066, 1076, 146 P.2d 265, 272 (2006)). As such, this court will not disturb the trial court’s ruling “absent a clear abuse of that discretion.” Id. (quoting Atkins, 112 Nev. at 1127, 146 P.3d at 1123). Criminal defendants have a due process right “to a fair opportunity to defend against the State’s accusations.” Brown v. State, 107 Nev. 164, 167, 807 P.2d 1379, 1381 (1991) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)). However, a defendant’s rights are still subject “to the same evidentiary rules as all other evidence.” Id. at 168, 807 P.2d at 1382 (quoting State v. Blue, 592 P.2d 897, 901 (Kan. 1979)). Thus, a criminal “defendant’s right to present witnesses in his own defense is subject to the rule of relevance and ‘does not require that the defendant be permitted to present every piece of evidence he wishes.’” Id. at 167, 807 P.2d at 1381 (quoting State v. Cassidy, 489 A.2d 386, 391 (Conn. App. Ct. 1985)). Even where evidence is relevant, it is still not admissible if “its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 48.035(1).

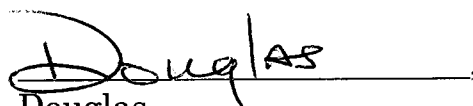
In the instant case, Proctor alleged that the victim was discussing her sexual history with him while she was at his apartment. Proctor claims that the evidence was relevant but does not explain why.

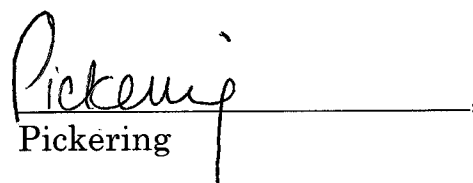
We conclude that the probative value of the information was weak while the prejudicial effect was high because it tended to attack the victim's character without any real potential of demonstrating whether Proctor committed the alleged acts. Thus, we conclude that the district court did not abuse its discretion by finding this evidence inadmissible.

Having considered Proctor's claims and concluded that insufficient evidence supports the first-degree kidnapping conviction, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court to correct the judgment consistent with this order.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Jackie Glass, District Judge
Benjamin C. Durham
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk