

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN O'NEIL JACKSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34890

FILED

FEB 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict on one count each of burglary, battery with the intent to commit a crime, first-degree kidnapping with the use of a deadly weapon, and two counts of sexual assault with the use of a deadly weapon.

The district court sentenced appellant Calvin O'Neil Jackson to a term of ten years in prison on the burglary count, a term of fifteen years in prison on the battery count, and a term of life in prison with the possibility of parole on the kidnapping count, plus a consecutive term of life for the deadly weapon enhancement. The district court further sentenced Jackson to terms of life in prison with the possibility of parole for each of the two counts of sexual assault, together with two additional terms of life in prison for the deadly weapon enhancement on each count. The district court ordered all of the sentences to run consecutively.

Jackson first contends that the admission of the victim's testimony concerning an uncharged prior rape involving Jackson and the victim was reversible error.

"[B]efore evidence of a prior bad act can be admitted, the state must show, by plain, clear and convincing evidence that the defendant committed the offense."

Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985). This court has established the following three prerequisites to the introduction of evidence of other bad acts: "(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." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Additionally, when prior sexual behavior is introduced as an exception to the inadmissibility of prior bad act evidence, there must be some similarity to the sexual conduct at issue at trial. Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 696-97 (1979).

We conclude that the prior bad acts evidence was properly admitted at trial in this case. The evidence of the prior rape and the two prior knife incidents was relevant to the sexual assault charges and the issue of consent, and the victim testified with specificity at the Petrocelli hearing concerning these prior bad acts. Although the evidence was clearly prejudicial, the district court issued a contemporaneous limiting instruction to the jury. Jackson "opened the door" to the testimony by placing the victim's state of mind in issue and impeaching her credibility on cross-examination. Thus, the victim's testimony concerning the prior bad acts was proper rebuttal evidence. Accordingly, we conclude that Jackson's contention lacks merit.

Jackson also contends that the district court violated his due process rights by prohibiting him from presenting his theory of the case at trial. Jackson's theory was that the victim lied and she had a history of making false accusations. Specifically, Jackson argues that the district

court should have allowed him to present police officers' testimony to "explore alternate reasons" why the victim may have been reluctant to testify at trial or to show that the victim had filed false police reports in the past.

Although the right to present witnesses to establish a defense is a fundamental element of due process of law, it is not an unqualified right. See *Washington v. State*, 388 U.S. 14, 18-19 (1967). In general, a witness must be physically and mentally capable of testifying to events that he personally observed, and his testimony must be relevant and material to the defense. See NRS 50.015 (general rule of competency); NRS 51.025 (lack of personal knowledge); NRS 51.065 (general hearsay rule); see also NRS 48.025 (relevant evidence admissible).

In addition, Nevada does not permit the use of extrinsic evidence to attack the credibility of a witness. See NRS 50.085(3). As an exception, this court has held that in a sexual assault case defense counsel may cross-examine a complaining witness about previous fabricated sexual assault accusations and, if the witness denies making the allegations, may introduce extrinsic evidence to prove that fabricated charges were made by that witness in the past. See *Miller v. State*, 105 Nev. 497, 501, 779 P.2d 87, 88-89 (1989). As a prerequisite to admitting a complaining witness' prior sexual assault accusations and corroborative extrinsic evidence proving the falsity thereof, the defendant must file written notice of his intent and the district court must order a hearing to establish both the fact of the accusations and the falsity thereof even before defense counsel launches into cross-examination. See *id.* at 502, 779 P.2d at 90.

We conclude that the district court did not err by refusing to allow Jackson to procure the testimony of police officers to show that the victim in this case had allegedly filed false police reports in the past. To the extent that any alleged prior false accusations involved sexual assault or sexual abuse, Jackson does not allege, nor does the record reveal, that he filed written notice of his intent to inquire of the victim about prior false accusations or that he requested a Miller hearing to determine the propriety of such questioning and the admissibility of corroborative evidence. In the absence of any such request, we conclude that it was proper for the district court to deny the presentation of extrinsic evidence.

Additionally, to the extent that the alleged prior false accusations involved prior stabbing or domestic violence incidents, the record reveals that Jackson sought to present police officers' testimony to show that "there was no corroboration to back up the allegations that [the victim] made to police on these prior occasions." However, testimony showing a lack of corroboration would not establish that the prior allegations were false. Therefore, such testimony was not proper impeachment or rebuttal evidence because the victim did not suggest that there was any corroboration for her other allegations, and the district court did not abuse its discretion by refusing to allow Jackson to present the police officers' testimony.

Having considered Jackson's contentions and concluded that they lack merit, we affirm the judgment of conviction.¹

Young J.
Young

Rose J.
Rose

Becker J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Calvin O'Neil Jackson
Clark County Clerk

¹Jackson also assigns error to the district court's refusal to grant a mistrial, to redact Jackson's statement to police, or to admit evidence of the victim's prior arrest record, as well as the admission of out-of-court statements, the jury instructions and the sufficiency of the evidence. We have considered all of Jackson's contentions and conclude that they are without merit.