

IN THE SUPREME COURT OF THE STATE OF NEVADA

GORDON JOSEPH LAWES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52571

GORDON JOSEPH LAWES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54304

FILED

FEB 03 2011

ORDER OF REVERSAL AND REMAND

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

These are consolidated appeals from a judgment of conviction pursuant to a jury verdict, of two counts of sexual assault and from an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

After a night of drinking and partying, twenty-one-year-old appellant Gordon Lawes returned home with his wife and his wife's sixteen-year-old sister, J.A. J.A., who was intoxicated, went to sleep on the couch. During the night, Lawes and J.A. had a sexual encounter. The next day, J.A. confided in her best friend that Lawes had raped her. After his arrest and during an interrogation by police, Lawes confessed to the sexual encounter, but denied raping J.A. The State charged Lawes with two counts of sexual assault under NRS 200.366—which 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 or her conduct.” NRS 200.366(1).

After a four day trial, the jury found Lawes guilty on both counts of sexual assault, and the district court sentenced Lawes to life in prison with the possibility of parole in ten years. Lawes now appeals arguing that: (1) the State committed misconduct in its closing argument by commenting on his silence, (2) the State prejudiced him by asking a guilt-assuming hypothetical to his character witness, (3) the district court erred by giving a jury instruction regarding flight, and (4) cumulative error requires reversal.

We conclude that the State committed error when it commented on Lawes' silence and failure to testify in its closing argument, and when it asked a guilt-assuming hypothetical of Lawes' character witness. The district court erred by giving a flight instruction to the jury. We conclude that these three errors constitute cumulative error which requires reversal of Lawes' conviction. Consequently, we remand Lawes' case to the district court for further proceedings. The parties are familiar with the facts and the procedural history of the case and we do not recount them further except as necessary for our disposition.¹

¹Lawes also argues that: (1) the State failed to produce sufficient evidence to sustain his conviction, (2) the State improperly impeached his character witness by introducing bad acts, (3) the district court violated his confrontation and due process rights when it excluded evidence of J.A.'s abortion, (4) the State violated its duty to produce exculpatory evidence when it withheld J.A.'s medical records, (5) the district court violated his rights under due process and Miranda v. Arizona by refusing to suppress his statements after arrest, (6) the district court erred by failing to admonish a witness not to discuss her testimony with anyone when it called a recess during testimony, (7) the State violated his due process rights by failing to preserve evidence, (8) the district court erred by not giving a jury instruction regarding the missing evidence, (9) the
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DISCUSSION

Prosecutor's comment on Lawes' silence

Lawes argues that the State impermissibly commented on his right to remain silent, requiring reversal of his conviction. We agree.

In closing argument, the prosecutor remarked that during the testimony of several State witnesses, Lawes slumped down in his chair so that they could not see him. Lawes objected to these remarks and the district court sustained his objection. Then the prosecutor said that "there are moral wrongs and there are criminal wrongs. Use your common sense. If you only committed a moral wrong and you're charged with a criminal wrong, you say something about it. You don't wait four years to say something about it." There was no objection to this statement by Lawes.

This court has stated that a reference to a defendant's right to remain silent, without more, does not require automatic reversal, but should be considered in the context of the entire trial. Edwards v. State, 90 Nev. 255, 263, 524 P.2d 328, 334 (1974). While the State contends this is only a comment on the evidence, the context of the prosecutor's remarks reveals otherwise. The initial comments referred to Lawes' demeanor during trial and, after the district court sustained the defense objection,

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district court erred by not giving a jury instruction stating that only one sexual encounter occurred, (10) the district court erred by giving jury instructions that guaranteed Lawes would be found guilty, (11) the district court erred by allowing the jury to return a verdict at 1:13 a.m., and (12) the district court erred by not granting a new trial on the basis of newly discovered evidence. We conclude that these arguments lack merit and we do not address them further in this order.

the prosecutor addressed Lawes' silence since interrogation. The prosecutor commented on Lawes' theory of the consensual sexual encounter as a "moral wrong" and stated "you say something about it. You don't wait four years to say something about it." These remarks imply that because Lawes had remained silent in the four years since his arrest, he is guilty of more than a moral wrong.

These remarks are also an indirect reference to Lawes' decision not to testify. We determine whether a prosecutor's comment constitutes an impermissible reference to the defendant's failure to testify by examining whether the jury would naturally take such language to be a comment on the defendant's failure to testify. Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). If the prosecutor did make an impermissible reference, this court determines whether the remarks are harmless beyond a reasonable doubt. Id. Here, the jury would have taken the prosecutor's comments to be a reference to Lawes' silence. The prosecutor asked the jurors to "[u]se your common sense," and said that if Lawes had only committed a moral wrong, "you say something about it." The prosecutor also contrasted Lawes' statement made while in detention with J.A.'s testimony on the stand, further emphasizing to the jury the fact that the victim testified but the accused remained silent since his interrogation statement.

Because Lawes did not object to the State's question, we review for plain error. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 477 (2008). An error is plain if it is clear or obvious, and requires reversal if the defendant can demonstrate that the error affected his substantial rights, causing actual prejudice or a miscarriage of justice. Id. We are not certain that the comments by the prosecutor regarding Lawes'

acknowledgment that he committed a “moral wrong” represent clear error. Nor do we discern actual prejudice or a miscarriage of justice. The prosecutor’s comments appear to be harmless error and not a plain error. However, harmless error may still be considered as part of a cumulative error analysis.

Guilt-assuming hypothetical

Lawes produced a character witness, Nevada state senator Dennis Nolan, who testified that he had known Lawes for ten years and that Lawes was a non-violent person. At the end of its questioning, the State asked Nolan whether he would change his mind regarding Lawes’ good character “if you knew that he admitted walking downstairs naked and having sex with his wife’s passed-out drunk 16-year-old sister?” Lawes argues that this question destroyed his presumption of innocence, denying him due process. We agree.

A guilt-assuming hypothetical asks a witness to assume the defendant’s guilt of the exact acts for which he is on trial. U.S. v. Shwayder, 312 F.3d 1109, 1120 (9th Cir. 2002). These types of questions have negligible probative value on the issue of guilt. Id. The use of such hypotheticals undermines the presumption of innocence and violates the defendant’s right to due process. Id. at 1121.

The State argues that it used the neutral term “having sex” rather than a term that emphasized the non-consensual nature of the encounter between Lawes and J.A.. But, the second prong of NRS 200.366 makes “having sex” sexual assault if the defendant knew or should have known that the victim could not resist or understand the conduct. In its question, the State described J.A. as “passed-out drunk,” which undermines the State’s argument that the statement characterized the

encounter neutrally. Instead, this description of J.A.'s state implicates Lawes under the second prong of NRS 200.366.

When a prosecutor asked a similar hypothetical to witnesses in Shwayder, the witnesses at first declined to answer the question, and then expressed disbelief that Shwayder would commit such acts. 312 F.3d at 1121. The United States Court of Appeals for the Ninth Circuit concluded that such statements of disbelief served to bolster rather than detract from the witnesses' positive opinions, and thus did not affect the defendant's substantial rights. Id. at 1121-22. Here, Nolan did not directly answer the question at first, and then stated that he did not know under what circumstances Lawes would have admitted to having sex with J.A. Finally, Nolan admitted that he thought it would change his opinion of Lawes. Unlike the witnesses in Schwayder, Nolan's final admission that his good opinion of Lawes would change did not bolster his positive character opinion testimony. We therefore conclude that the state's question constituted error, but that this error is harmless because it did not affect Lawes substantial rights. See Schwayder, 312 F.3d at 1121-22. Nevertheless, it can be considered part of the cumulative error analysis.

Flight instruction

Lawes argues that the district court erroneously gave an instruction regarding flight. We agree that the district court erred in giving a flight instruction, but standing alone, the error is also harmless.

Giving the jury a flight instruction is not error if there is admitted evidence of flight. Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980). Flight is more than merely leaving the scene of the crime, the defendant must flee with "consciousness of guilt and for the purpose of avoiding arrest." Id. at 876, 619 P.2d at 1222. An error in giving a flight instruction requires reversal only if the record indicates a

miscarriage of justice or prejudice to the defendant's substantial rights. Id. at 876, 619 P.2d at 1223.

Here, Lawes' wife gave the most detailed testimony regarding Lawes' actions the day after the sexual encounter. Lawes' wife stated that he drove up in his truck and asked her to come and pick up their daughter. Another witness testified that she did not call the police until after Lawes drove off in his truck. Lawes and his wife went to a park for about an hour to discuss J.A.'s accusations and the marriage. Lawes' wife kept in touch with other witnesses while she was with Lawes, and after they knew the police had been called, Lawes wanted to turn himself in.

The evidence does not demonstrate that Lawes left the house with consciousness of guilt and to avoid arrest. No one called the police until after Lawes drove away in his truck. Lawes' wife never hid their whereabouts or the fact that they were together. She testified that after they knew the police were called, Lawes desired to turn himself in, from which it is not reasonable to infer that Lawes sought to avoid arrest. We conclude that the district court erred in giving this instruction, but the error is harmless because we do not discern from the record a miscarriage of justice or prejudice. See Potter, 96 Nev. at 876, 619 P.2d at 1222-23. However, it can be considered part of the cumulative error analysis.

Cumulative error


Lawes argues that cumulative error requires reversal. We agree. We conclude that the following errors occurred: (1) the prosecutor improperly commented on Lawes' right to remain silent for the four years between his arrest and the trial, and also indirectly commented on his failure to testify; (2) the prosecutor asked Dennis Nolan a guilt-assuming hypothetical; and (3) the district court erred by giving a jury instruction regarding flight when there was no evidence of flight.


The cumulative effect of otherwise harmless errors may violate a defendant's right to a fair trial. Valdez v. State, 124 Nev. at 1195, 196 P.3d at 481. When evaluating a cumulative error claim, we consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-855 (2000)).


The issue of Lawes' guilt is close. The evidence reveals that sixteen-year-old J.A. was intoxicated on the night of the encounter, but that she was also conscious and functioned well enough to check in with her parents and change into pajamas before going to sleep. J.A. identified Lawes during the encounter, but never told him to stop and did not protest. The State's sexual assault expert testified that the abrasions to J.A.'s vagina could be the result of non-consensual sex, while Lawes' expert testified that the injuries could be the result of consensual sex. We conclude that the evidence to convict Lawes is insufficient under the first prong of NRS 200.366 which requires penetration against the victim's will, given that J.A. testified to being conscious, recognizing Lawes, and not protesting throughout the encounter. However, we conclude that the evidence is sufficient to support Lawes' conviction under the second prong, given J.A.'s age and state of intoxication. The State conflated the two prongs of NRS 200.366 in its theory of the case, so it remains unclear whether the jury convicted Lawes for sexually penetrating J.A. against her will, or for doing so under conditions in which he knew or should have known she could not resist or understand.

These three errors work to deny Lawes his right to a fair trial. Given the closeness of the sufficiency of the evidence, we conclude that Lawes requires a new trial.

Accordingly, we ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk