IN THE SUPREME COURT OF THE STATE OF NEVADA

EBERTO BAUTISTA-EREDEA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55178

FILED

MAR 21 2012

TRACIE K. LINDEMAN
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ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping and sexual assault. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Although we affirm the judgment convicting appellant Eberto Bautista-Eredea of sexual assault, we reverse his conviction of first-degree kidnapping and remand for a new trial on that count.

I. Relevant facts and procedural history

A. Sexual assault and kidnapping

The issues presented by this appeal are heavily fact-dependent. The alleged victim of Bautista's assault was M.C., a 35-year-old mentally and physically handicapped woman who lived in Mesquite, Nevada, and used a scooter for transportation. One day, her scooter broke down on Mesquite Boulevard. Bautista was driving on Mesquite Boulevard, saw M.C. and her broken-down scooter, and pulled over to speak to her.

Bautista's and M.C.'s accounts of their roadside encounter differ. M.C. testified that Bautista forced her into his SUV; Bautista testified that M.C. voluntarily got in. Both agree that, at some point, Bautista loaded M.C.'s scooter into his SUV.

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M.C. testified that, instead of taking her to her home as she asked, Bautista drove her to an abandoned restaurant. Once there, he pulled down her pants and penetrated her anus with his penis. Bautista denies that the abandoned-restaurant encounter occurred, and the jury acquitted him of the sexual assault count based on it.

M.C. testified that, from the abandoned restaurant, Bautista drove her to a residential neighborhood, forced her to walk with him to a burned-out car parked on a dirt lot, and again anally penetrated her. The assault was interrupted when Bautista received a cell phone call. M.C. claims she tried to run away during the call, but Bautista stopped her. Bautista took M.C. back to his SUV and drove her to her home, where he unloaded the scooter and left.

Bautista admitted having sex with M.C. by the burned-out car but asserts it was consensual. He maintains that they were talking and kissing in the SUV and that M.C. voluntarily got out of Bautista's SUV and walked with him to the burned-out car. Bautista testified that he did not realize he entered her anus and thought it was her vagina.

When she finally reached home, M.C. took a bath, washed her clothes, and made several phone calls. She did not tell anyone that night about the sexual assault. The next day at work, however, she told her boss that she had been raped, and her employer called the police. M.C. showed the police where the alleged assaults occurred; the police then took her to a hospital for a rape examination. The sexual assault nurse observed lacerations and tearing of M.C.'s anus but did not look for semen because M.C. had already bathed. Other than the anal trauma, the nurse did not observe any bruising or scratching on M.C.

The abandoned-restaurant scene yielded no physical evidence. At the burned-out car scene, police found tire marks and fresh footprints in the dirt. They also detected dust displacement on the burned-out car, as if someone had put their hands on the vehicle, all of which they photographed.

B. <u>The Maverik store encounter</u>

Four months later, Bautista and M.C. crossed paths at a local Maverik convenience store. Bautista approached M.C. and asked her if she remembered him; thus prompted, she said she did. Bautista proceeded to rub her neck and kiss her. M.C. did not repel his advances. Eventually, she paid for her soda and left on her scooter, with Bautista following in his SUV. At trial, a store clerk testified that the two acted like "old friends" and that, from what she saw, she thought M.C. "had found herself a boyfriend."

Bautista acknowledges the Maverik store encounter. He testified that M.C. seemed happy to see him again and that she agreed to go to the Virgin River Casino with him. He testified that he followed her home so she could drop off her scooter and, when she did not come outside after ten minutes, that he went on to the casino without her. From inside her house, M.C. called the police.

C. <u>Bautista's arrest and investigation</u>

Acting on M.C.'s call, the police went to the Virgin River Casino and found Bautista, who gave them a false name, "Jose." They detained him while a detective drove M.C. to the casino. When M.C.

arrived, she identified Bautista as her assailant. Asked if he recognized M.C., Bautista said he had given her a ride several months earlier.[1]

Bautista was arrested, charged with kidnapping and two counts of sexual assault, and read his rights. Bautista was carrying false identification bearing his picture but the name Miguel Angel Avenivar. (Bautista denies first telling the detectives his name was Jose; he says he told them it was Miguel. His real first name is Eberto.)

Bautista's girlfriend gave police permission to search her home, which turned up a pair of men's shoes. A forensic expert determined that the shoes' soles resembled the footprints in the dust by the burned-out car. However, the photographs of the footprints were not clear enough to make a definitive match.

D. M.C.'s theft report

Roughly four months after Bautista's arrest and eight months after the charged assaults and kidnapping, police were again summoned to the Virgin River Casino, this time to process a theft report by M.C. to casino security. M.C. complained that her wallet and camera had been stolen. Police first spoke to the security officer, who related that M.C. had been seen at the casino bar alone and then left with an unidentified Hispanic male. The security officer also told police that, in reporting the theft, M.C. said that the man had forced her into the shower in his hotel room and that, while she was in the shower, the man had stolen her wallet and camera. The police then spoke to M.C. directly.

M.C. appeared mentally handicapped and intoxicated, according to the police report. The report states that M.C. initially told

[1]Bautista does not challenge his detention or pre-Miranda questioning.

police that she did not enter the man's hotel room. Rather, she stated that she had been standing outside a hotel room door when a Hispanic man reached into her purse and took her wallet and camera. She explained that she did not scream or call for help because "I was afraid of what he could do to me." After further questioning, M.C. told police that she did go into the hotel room voluntarily, where she had sex with the man in his room for $20. She admitted that the man did not force her into the room or the shower. She stood firm in her theft complaint, stating that when she got out of the shower she found the man gone, along with her wallet and camera.

No arrests or charges came of this episode. The theft allegation was validated several hours later, though, when the police received a call from authorities in a nearby Utah town. The Utah authorities advised that they had arrested two Hispanic men on unrelated local charges and found them in possession of a camera and a wallet containing M.C.'s identification.

E. Pretrial, trial, and post-trial proceedings

Bautista was indicted by grand jury on one count of first-degree kidnapping and two counts of sexual assault.

1. State's motion in limine concerning M.C.'s theft report

Before trial, the State filed a motion in limine to exclude evidence concerning M.C.'s theft report, especially that pertaining to her prostitution, as irrelevant, prejudicial, and inadmissible under Nevada's rape shield statute, NRS 50.090.[2] The motion was briefed and argued.

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[2]NRS 50.090 reads:

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or

During argument, defense counsel stated that "I kind of don't care if the prostitution comes in . . . because I understand that's prejudicial [and a]s it talks about prostitution, of course, for rape shield purposes, . . . I would be perfectly fine, Your Honor, if you don't want the jury prejudiced that we don't go into this factor [of her engaging in sex] for 20 bucks." However, he argued that M.C.'s false reports of coercion by Hispanic male strangers bore on her credibility, bias, and motive to lie, and also rebutted the implication she was a guileless innocent, and thus should be admitted. Thereafter, the court issued a split ruling: Bautista could question M.C. about having made false statements to the police on another occasion but could not get into the underlying factual details. Thus, on cross-examination, M.C. was asked if, and admitted that, some months after her encounters with Bautista, she told the police she had been the victim of another crime; that, in reporting the crime, she "gave some statements to the police that were false;" that she "lied to them;" and that she knew the statements were false. No further details were elicited.

2. Comment on Bautista's post-Miranda silence

Trial took four days. During opening statement, defense counsel stated that, "Mr. Bautista has never had a chance to tell his story about what happened, but he is going to tell it to you in court, and he will

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> conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

tell you his side of the story." Defense counsel also cross-examined the detectives the State called and had them confirm that they did not ask Bautista questions beyond those related above concerning Bautista being acquainted with M.C. and his name and identification.

Bautista testified at trial. Before he did, the State made a record, outside the presence of the jury, of its agreement with defense counsel that it could question Bautista about his post-arrest silence:

> Based on [defense counsel's] opening that the Defendant was not given the opportunity to tell his side of the story until today, based on the questioning of [the detectives] about him not being questioned, it's the State's position that no longer is the State restricted in its comments upon post arrest silence, and I spoke to [defense counsel] about that, and he is in agreement that that is going to be subject to fair cross-examination and fair comment at closing.

Defense counsel acknowledged that this was their agreement. He also stated: "And we are going to comment on it as well."

Under direct examination, Bautista testified that his conversations with the detectives confused him because they were conducted in English, not Spanish, his native tongue, and that neither detective asked him questions about his relationship with M.C. The State cross-examined Bautista extensively. It established that he did not volunteer his version of the events to the detectives; it also had him confirm that he did not testify before the grand jury or say anything at arraignment beyond "not guilty." When asked about not giving his side of the story to the detectives while in jail, Bautista stated, "[N]o one came to talk to me. No one came to talk to me except my attorneys." The State then asked:

> STATE: Okay. Did you tell your attorneys you want to talk to these detectives and explain?
>
> DEFENDANT: With the detectives?
>
> STATE: Yes.
>
> DEFENDANT: If they would have given me the chance. They never asked me how it was, what happened, what I did. They told me—they told me I am charged with sexual assault, a nd you are going to prison.

Defense counsel made no objection to these questions until, at the very end, he interposed an "asked and answered" objection.

3. <u>The sexual assault nurse's vouching</u>

During direct examination of the sexual assault nurse, the State asked if the nurse could tell whether M.C.'s anal injuries were consistent with nonconsensual sex. The nurse responded that the injuries "were consistent with what [M.C.] was telling me." Bautista objected and the district court interceded, questioning the nurse so as to establish that the anal injuries were consistent with <u>either</u> consensual <u>or</u> nonconsensual sex. Outside the presence of the jury, Bautista argued that the nurse had impermissibly vouched for M.C.'s veracity. The district court overruled the objection.

4. <u>Bautista's false identification</u>

The arresting officer testified on direct examination to Bautista initially saying his name was "Jose." Defense counsel objected to this as prior bad act evidence, inadmissible because it was not vetted pretrial in a <u>Petrocelli</u> hearing. The court overruled the objection. Later, without objection, evidence was introduced as to the false identification card found on Bautista in the name "Miguel Angel Avenivar."

5. "Victim" references and jury instructions

Without objection from Bautista, the State and one of its witnesses, the arresting detective, repeatedly referred to M.C. as "the victim." Jury instructions 5, 6, 7, and 10 also referred to "the victim" or "a victim." In addition, jury instruction 10 stated that a victim's testimony, even if uncorroborated, can sustain a guilty verdict. Finally, jury instruction 13 stated: "The defendant is presumed innocent until the contrary is proved." (Emphasis added.) Bautista made no objection to any of these instructions except jury instruction 10, and only to the language regarding corroboration. The district court overruled the objection.

6. State's closing argument

During closing, the prosecutor argued that Bautista "gets the benefit of twisting the absence of evidence." She also commented on Bautista reintroducing himself to M.C. at the gas station as a "bonehead maneuver," stating that such "stupidity" is not uncommon and "is job security" for prosecutors. Bautista did not object to these statements.

7. Post-verdict motions and sentencing

The jury found Bautista guilty of first-degree kidnapping and one count of sexual assault. Bautista timely moved for acquittal or, in the alternative, a new trial. The district court denied the motion. It sentenced Bautista to consecutive sentences of life with eligibility for parole after five years for kidnapping and life with eligibility for parole after ten years for sexual assault.

II. Discussion

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (citing Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006)). If there is an abuse of discretion,

harmless error review applies. Knipes v. State, 124 Nev. 927, 933-34, 192 P.3d 1178, 1182-83 (2008). For nonconstitutional errors, evidentiary or otherwise, an error is harmless unless there was a "'substantial and injurious effect or influence in determining the jury's verdict.'" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). However, if there is no objection to the admission or exclusion of evidence, appellate review is precluded unless the district court committed plain error. Mclellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

A constitutional claim is also reviewed for harmless error. Chapman v. California, 386 U.S. 18, 21-24 (1967). However, the harmless error standard varies for constitutional claims, which require reversal "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Valdez v. State, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). If the defendant fails to preserve the error by proper objection, plain error review applies. Id. at 1190, 196 P.3d at 477 (citing United States v. Olano, 507 U.S. 725, 731-32 (1993)). Plain error affects substantial rights and requires "actual prejudice or a miscarriage of justice." Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Finally, waiver occurs when a defendant intentionally relinquishes a known right. Waiver of a right extinguishes any error and precludes appellate review. See United States v. Olano, 507 U.S. 725, 733 (1993).

A. Theft report

Bautista challenges the district court's refusal to allow him to question M.C. about the circumstances giving rise to her theft report as both constitutional and evidentiary error. First, he contends that the

district court's ruling deprived him of his due process right to present evidence tending to prove his theory of the case and to confront M.C. fully. See Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980). Second, he argues that under Drake v. State, 108 Nev. 523, 836 P.2d 52 (1992), and Cox v. State, 102 Nev. 253, 721 P.2d 358 (1986), this evidence was admissible despite the rape shield statutes. While we conclude that the rape shield statutes support the district court's split ruling as to the sexual assault charges, the exclusion of the details underlying the theft report deprived Bautista of the right to present evidence directly relevant to his defense of the kidnapping charge. We therefore uphold the district court's handling of the theft report evidence as to the sexual assault charge but reverse and remand for retrial on the kidnapping count.

Our analysis begins with the relevant statutes. As Bautista emphasizes, Nevada law permits the admission of "[e]vidence of the character or a trait of character of the victim of the crime offered by an accused." NRS 48.045(1)(b). However, such evidence is subject to Nevada's rape shield statute, which provides that, in "any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime," NRS 50.090, the victim's previous sexual conduct is not admissible to challenge the victim's credibility or to prove consent to the sexual encounter (unless the court has already admitted evidence about such conduct from the victim or the State). Id.; see NRS 48.045(1)(b), (c). Notably, NRS 50.090 does not address use of such evidence in other types of cases, such as kidnapping. Cf. State v. Wyatt, 84 Nev. 731, 734, 448, P.2d 827, 829 (1968) ("The mention of one thing implies the exclusion of another."). Finally, even when character or

a trait of character is admissible, NRS 48.055 and NRS 50.085 restrict the methods of proving it.

The legal and logical relevance of the theft report evidence to the sexual assault charges is attenuated, at best. Nothing in the theft report suggests that M.C.'s allegation of having been the victim of a theft at the Virgin River Hotel and Casino was false. On the contrary, that part of M.C.'s report appears truthful. The district judge allowed Bautista to establish that M.C. had lied to the police on a prior occasion. The only remaining relevance of the theft report incident to the sexual assault charges was to support an inference that, having consented to sex as a prostitute on another occasion, M.C. likely consented to the sexual encounter(s) between her and Bautista at the abandoned restaurant and burned-out car. This use of that evidence, however, is flatly interdicted by NRS 50.090 as, indeed, Bautista conceded in the district court.[3] Thus, we find no legal error or abuse of discretion as to the limitations the district

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[3]Drake contains broad language to the effect that Nevada's rape shield statutes do not apply when evidence relates to a victim's prostitution. 108 Nev. at 526, 836 P.2d at 54 (stating that an arrest record for prostitution showing "a long-standing pattern of criminal dishonesty and sexual crimes" falls outside NRS 48.069 and NRS 50.090). Bautista's concession that he did not seek to admit evidence of M.C.'s admitted act of prostitution at the Virgin River Casino distinguishes Drake. Also distinguishable is Cox, where the victim applied for an escort license after the alleged assault, and this court reversed the district court's exclusion of that evidence, reasoning that the evidence was offered not to prove consent, but to show that the victim invented the charge of rape after the defendant refused to pay her the money she demanded of him. 102 Nev. at 255-56, 721 P.2d 359-60. No similar facts or arguments were made as to the sexual assault charges in this case.

court placed on Bautista's use of the theft report evidence in defense of the sexual assault charges.[4]

The same analysis does not apply to the kidnapping charge. While the rape shield statute prohibits use of M.C.'s prostitution activity to establish consent to the sexual encounter at the burned-out car scene, the fact M.C. allegedly invented the abduction to explain how she came to be at the burned-out car scene has parallels to her admitted lie about being unexpectedly accosted outside and/or forced into a stranger's room at the Virgin River Casino that cannot be ignored. M.C.'s willingness to accompany a stranger alone into an isolated situation and thereafter, when she was victimized, to lie about the voluntariness of her decision to go with the stranger, in order to bolster her victim's report, went to the heart of Bautista's defense to the kidnapping charge. In Bautista's view, this evidence was relevant and admissible, even crucial, because it demonstrated M.C.'s motive to lie, see NRS 48.045(2) (prior bad act evidence may not be used to demonstrate propensity but is admissible to prove motive), because it cast doubt on the credibility of her kidnapping allegation, see NRS 48.055(2) (allowing inquiry into specific acts on direct or cross-examination when character or a trait of character is "an essential element of a . . . defense"), and because it refuted the false impression that M.C. was a naïf, whose impairment and distress had been taken

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[4]Although Bautista argued otherwise in his opening brief, the record does not support the claim that M.C. had previously made false accusations of rape, as Bautista acknowledged in reply. Miller v. State, 105 Nev. 497, 500, 501, 779 P.2d 87, 89 (1989), therefore, does not assist him on his appeal of his sexual assault conviction because, unlike Miller, the complainant does not have a history of making false sexual assault allegations.

advantage of, against her will, by Bautista, NRS 48.045(1)(b), (c); NRS 50.085(3). We agree.

Bautista wanted to bring out M.C.'s lie about being forced into the hotel room and its shower to show that she would lie about being abducted, the better to press a criminal charge, and that this was why she falsely accused him of forcing her into his SUV. Such nonpropensity use of prior specific-instances evidence to show motive is proper under NRS 48.045(2). See also Sussman v. Jenkins, 636 F.3d 329, 357 (7th Cir. 2011) (allowing specific-instance evidence because it "expose[d] a motive to fabricate a specific kind of lie under a specific set of circumstances"); Redmond v. Kingston, 240 F.3d 590, 591 (7th Cir. 2001) (prior false allegation of rape to get attention should have been admitted as proof of motive to accuse the defendant falsely).

The false charge i mbedded in M.C.'s prior theft report did more than raise a generalized question about her credibility. The jury reasonably could have analogized M.C.'s motive to lie about being forced into a hotel room to take a shower to her motive to lie about being forced into Bautista's SUV and driven, against her will, to the abandoned restaurant and burned-out car sites. These details of the theft report incident had distinct probative value to Bautista because the kidnapping charge depended completely on M.C.'s word against Bautista's. See Sussman, 636 F.3d at 356-57 (specific-instances evidence should have been allowed to be inquired into where the point was not simply to expose prior untruthfulness, generically, but to reveal "'possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand'" (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974))); State v. Miller, 921 A.2d 942, 948-49 (N.H. 2007)

(analyzing the use of specific-instances evidence in fabricated-charge cases); see generally 28 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6118 at 94-97 (1993) (noting that the factors involved in assessing the propriety of specific-instances evidence under the federal counterpart to NRS 50.085 include "whether the testimony of the witness in question is crucial or unimportant, the extent to which the evidence is probative of truthfulness or untruthfulness, the extent to which the evidence is also probative of other relevant matters, the extent to which the circumstances surrounding the specific instances of conduct are similar to the circumstances surrounding the giving of the witness's testimony, the nearness or remoteness in time of the specific instances to trial, the likelihood that the alleged specific-instances of conduct in fact occurred, the extent to which specific-instances evidence is cumulative or unnecessary in light of other evidence already received on credibility, and whether specific-instances evidence is needed to rebut other evidence concerning credibility").

State v. Martin, 44 P.3d 805 (Utah 2002) is analogous. In Martin, the court allowed evidence that a victim had previously accepted a ride from a stranger and accompanied the stranger to his home, despite the rule against character propensity evidence. Id. at 815. There, the principal evidence introduced at Martin's trial for kidnapping, rape, and forcible sodomy were the conflicting accounts given by Martin and his alleged victim, Lorraine Egan. Id. at 806. Naturally, the parties' accounts varied considerably. Id. at 806-09. While Martin testified that Egan voluntarily rode with him in his truck and consented to engage in sexual acts, id. at 808-09, Egan claimed she was handcuffed, forced into the truck, and made to perform sexual acts against her will. Id. at 806-08.

The court explained that the evidence Egan accompanied a stranger was relevant because "[i]t is reasonable to believe that a person who has accepted a ride from a stranger in the past may do so again." Id. at 812. The court continued that the evidence did not constitute impermissible character propensity evidence, because it rebutted the State's evidence of Egan's dependability and the State's "'common sense'" argument that Egan's testimony constituted the correct version of the events. Id. at 812-13. Given that credibility was a crucial issue in the case, the court concluded that the evidence may have "constitute[d] the difference between conviction and acquittal." Id. at 817.

A question as to the admissibility of evidence can be either a question of discretion, which we review for abuse, or a question of law, which we review for correctness. While we find no error or abuse as to the district court's handling of the theft report evidence as it pertained to the sexual assault charges, we do find error as to the use of that evidence as it pertained to the kidnapping charge.[5] Given the closeness of the evidence as to the kidnapping charge, the error cannot be said to be harmless.

B. Comment on post-Miranda silence

Bautista next contends that the State violated his Fifth Amendment rights by questioning him regarding his post-Miranda silence. At trial, the State may not question the defendant's choice to remain silent after receiving Miranda warnings. Gaxiola v. State, 121 Nev. 638, 655,

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[5]We recognize that the joinder of kidnapping and sexual assault charges complicated the evidentiary decisions facing the district court. As Bautista urged, however, the district court could and should have allowed him to develop the facts underlying the theft report without going into the prostitution issue, the irrelevance and inadmissibility of which he conceded.

119 P.3d 1225, 1237 (2005). Such questioning is not harmless error when the case rests on the word of the defendant versus the word of the victim. Id. However, under the curative admissibility doctrine, if the defendant brings up inadmissible evidence, the prosecutor can then offer inadmissible evidence in response. Taylor v. State, 109 Nev. 849, 856-57 n.1, 858 P.2d 843, 848 n.1 (1993).

Comment on post-Miranda silence is typically intended "to prejudice the defendant by attempting to create an inference of guilt in the jury's mind." United States v. Wycoff, 545 F.2d 679, 681 (9th Cir. 1976). Therefore, the potential for prejudice to the defendant is high. In addition, when "the government's comments are far broader than a mere response to defense questioning, the error in commenting on post-Miranda silence is not invited." United States v. Lopez, 500 F.3d 840, 844 n.3 (9th Cir. 2006).

The problem in applying these precepts to this case is that defense counsel agreed on the record that the State could comment on Bautista's post-Miranda silence, confirmed that the decision was strategic, and did not interpose any relevant objection when the State appeared to exceed the bounds of fair comment, including its elicitation of Bautista's conversations with his attorneys and its unfair question about Bautista not speaking up at arraignment to give an account of what truly occurred. Bautista's failure to object in the face of this cross-examination—especially given the agreement between the defense and the State concerning comment on Bautista's post-Miranda silence—establishes the breadth of the agreement, not a violation of its terms. This constitutes waiver of the objection, not mere negligence to which plain error review might apply.

Eliciting matters protected by the attorney-client privilege, however, exceeded the agreement represented on the record. This privilege is statutory, not constitutional, although government intrusion into the attorney-client relationship may violate a defendant's Sixth Amendment rights. Manley v. State, 115 Nev. 114, 121, 979 P.2d 703, 707 (1999). Substantial prejudice is required to implicate the Sixth Amendment. Id. at 122, 979 P.2d at 707. Here, Bautista's response about his exchanges with his attorneys was ambiguous, arguably not solicited by the question he was asked, and quite brief. In addition, Bautista failed to object or to move for a mistrial. On their own, the State's questions about exchanges between Bautista and his attorneys do not amount to plain error or result in substantial prejudice.

C. Vouching

Vouching is not allowed because it invades the province of the jury. Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987). The district court averted the sexual assault nurse's near-vouching by taking over the questioning to clarify that the anal lacerations she observed neither established nor disproved consent. We therefore reject Bautista's argument that the sexual assault nurse impermissibly vouched for M.C.

D. Bautista's identification

Bautista contends that the State should have requested, and the district court should have held, a Petrocelli hearing before allowing testimony about Bautista falsely identifying himself as "Jose." See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), superseded in part by statute on other grounds as recognized in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004). Although Bautista made a Petrocelli objection to this testimony, which was overruled, he did not object to the later introduction of evidence concerning the false identification he carried. The

false-name testimony did not require a Petrocelli hearing; it evidenced evasiveness consistent with consciousness of guilt and was a party admission. The false-identification evidence arguably constituted a separate offense under NRS 205.465(1) that, had objection been interposed, could have required a Petrocelli hearing. However, the error, if any, is not plain. The potential prejudice arising from Bautista's possessing false identification is minimal compared to the seriousness of the crimes charged in this case. Bautista testified on direct examination that he possessed the false identification because he was an illegal immigrant and needed the identification to work, not for more nefarious purposes.

Nor do we credit Bautista's argument that the lack of a Petrocelli hearing violated his due process rights. Admission of prior bad acts does not violate due process unless it results in an actual miscarriage of justice. Alberni v. McDaniel, 458 F.3d 860, 863-64 (9th Cir. 2006); see also Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995) (a federal court "cannot disturb on due process grounds a state court's decision to admit prior bad acts evidence unless the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair").

E. "Victim" references

Bautista complains that the references to M.C. as "the victim" improperly injected the prosecutor's personal beliefs into the case and that the district court compounded the error by giving jury instructions that referred to M.C. as "the victim." Bautista made no objection to either at trial.

This precise issue has not been addressed by this court. Other courts disagree on this issue. See, e.g., Carie v. State, 761 N.E.2d 385, 385 (Ind. 2002) (Dickson, J., dissenting) (referring to an accuser as "the

victim," at least in jury instructions, "invades the province of the jury" and constitutes error); State v. Nomura, 903 P.2d 718, 722-23 (Haw. App. 1995) (finding the jury instructions "inaccurate and misleading" but ultimately determining that the error was harmless). However, this court has upheld jury instructions which use "the victim" language without specifically addressing the issue of whether the term "victim" is inappropriate. Gaxiola, 121 Nev. at 647-48, 119 P.3d 1231-32; see also Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) ("Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect a defendant's right to a fair trial.").

Because Bautista failed to object, plain error review applies. Given Gaxiola, 121 Nev. at 647-48, 119 P.3d at 1231-32, plain error does not appear.

F. Instructional error

Bautista also asserts error in two other jury instructions: the "no corroboration" jury instruction, which allows the victim's testimony to be sufficient to convict, and the use of word "until" instead of "unless" in the reasonable doubt instruction. This court has upheld the precise language of both these jury instructions in the past. Gaxiola, 121 Nev. at 647-49, 119 P.3d at 1231-33; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

G. Prosecutorial misconduct

Bautista accuses the State of misconduct in closing argument. A two-step analysis applies. First, this court considers whether the conduct in question was improper. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. Second, if the conduct was improper, the court then considers whether the conduct merits reversal. Id. The conviction will not

be reversed if it is harmless error. Id. However, harmless-error review does not apply when the defendant fails to object at trial. Id. at 1190, 196 P.3d at 477. If the defendant fails to object, this court reviews for plain error, which requires "'actual prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Bautista did not object at trial to the statements he complains about on appeal. A prosecutor can make opinion statements if those statements are based on the evidence at trial. Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001); Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971). In addition, as in Randolph, the district court instructed the jury that "[s]tatements, arguments and opinions of counsel are not evidence in the case." Randolph, 117 Nev. at 984, 36 P.3d at 433. We conclude that the statements by the State in closing argument did not produce the prejudice or miscarriage of justice required for Bautista to demonstrate plain error.

H. Sufficiency of the evidence

Bautista argues that the State failed to present sufficient evidence to convict. This court will not reweigh the evidence or evaluate the credibility of witnesses because the jury is entrusted with those responsibilities. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Physical evidence and M.C.'s testimony support Bautista's conviction of sexual assault. This was sufficient to convict.

I. Cumulative error

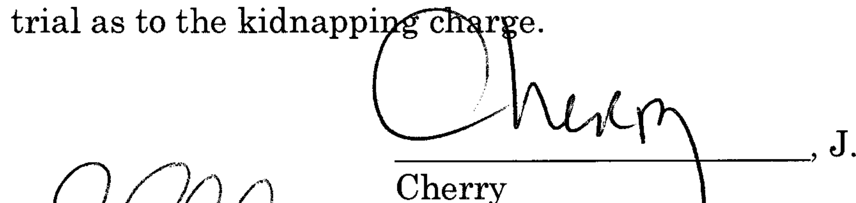
Bautista contends that the combination of errors in this case warrants reversal. Cumulative error can violate a defendant's constitutional right to a fair trial. Valdez, 124 Nev. at 1195, 196 P.3d at 481. This court considers the following factors in deciding a cumulative error claim: (1) the pervasiveness and scope of the errors; (2) whether the

evidence of guilt was close; and (3) the severity of the charged crime. Id. Our reversal of the kidnapping conviction obviates the cumulative error argument as to that count. As to the sexual assault count, we find no reversible error and thus reject Bautista's cumulative error challenge.

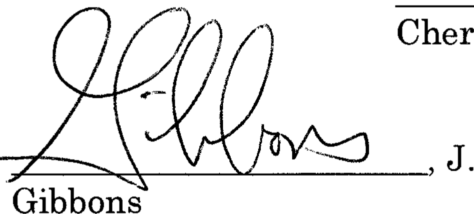
J. Denial of post-verdict motions

Whether to grant a motion for new trial is a matter entrusted to the sound discretion of the district court. See State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994). As to the sexual assault conviction, we affirm. No abuse of discretion in denying Bautista's motion for new trial has been shown. Nor has Bautista demonstrated that acquittal on the sexual assault count is warranted because, "'viewing the evidence in the light most favorable to the prosecution, a[ ] rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).[6]

Accordingly, we ORDER the judgment of the district court AFFIRMED in part and REVERSED in part and REMANDED for a new trial as to the kidnapping charge.



_______________, J.
Cherry



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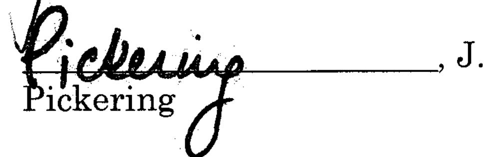
Gibbons



_______________, J.
Pickering

[6]We have considered and rejected Bautista's remaining assignments of error.

cc: Hon. James M. Bixler, District Judge
Clark County Public Defender
Attorney General/Carson City
Jeffrey S. Rogan
Clark County District Attorney
Eighth District Court Clerk