IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AMARILLAS, III,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35101

FILED

JAN 23 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of statutory sexual seduction (counts I-IV), and one count each of aggravated stalking (count V) and assault with a deadly weapon (count VI). The district court sentenced appellant to four concurrent prison terms of 12-36 months for counts I-IV, and two consecutive prison terms of 12-48 months for counts V-VI; the sentences were ordered to run consecutively to the sentence in another case.

First, appellant contends the State adduced insufficient evidence to support his convictions for statutory sexual seduction, aggravated stalking, and assault with a deadly weapon. We disagree.[1]

When reviewing a claim of insufficient evidence, the relevant inquiry 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.'" Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted). Furthermore, "it is the jury's function, not that of the court,

[1]Appellant also contends the victim's "mature physical appearance and adult actions would not have forewarn [sic] a reasonable person that she was under the age of 16 years," and that the State failed to produce "credible evidence that appellant knew that [the victim] was under the age of 16 years." This court has stated that specific intent is not required and that mistake of fact as to the age of a victim is not a defense to the offense of statutory sexual seduction. See NRS 200.364; Jenkins v. State, 110 Nev. 865, 877 P.2d 1063 (1994). We therefore decline appellant's invitation to revisit this issue, and conclude that appellant's contention is without merit.

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to assess the weight of the evidence and determine the credibility of witnesses." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). In other words, a jury "verdict will not be disturbed upon appeal if there is evidence to support it. The evidence cannot be weighed by this court." Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972); see also Nev. Const. art. 6, § 4; NRS 177.025.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Origel-Candido, 114 Nev. at 378, 956 P.2d at 1378. In particular, we note that the victim and witnesses testified to the nature of the relationship between the victim and appellant and its final violent episode, and the victim testified to the several threats made and intimidation by appellant. Moreover, we also note that appellant challenges the credibility of the witnesses and not the presentation of evidence by the State. We therefore conclude that appellant's contention is without merit. See McNair, 108 Nev. at 56, 825 P.2d at 573; see also Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) (the uncorroborated testimony of a sexual assault victim, if believed, is sufficient to sustain a conviction).

Second, appellant contends that evidence elicited during the trial from the victim "was the product of impermissible leading and suggestive questions by the prosecutor" in violation of NRS 50.115. We disagree.

Initially, we note that appellant failed to contemporaneously object to the prosecutor's line of questioning during the trial. This court has held that "[a]s a general rule, failure to object below bars appellate review." Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991). Nevertheless, upon review we conclude that appellant's contention lacks merit.

This court has stated that "[w]hether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules

regarding them is not ordinarily a ground for reversal." Anderson v. Berrum, 36 Nev. 463, 470, 136 P. 973, 976 (1913); see also Barcus v. State, 92 Nev. 289, 291, 550 P.2d 411, 412 (1976). Moreover, appellant failed to specify which questions were improper and leading. We therefore conclude that appellant's contention is without merit.

Third, appellant contends "the prosecution against appellant was accomplished through a conscious indifference to appellant's statutory and constitutional rights." More specifically, appellant argues that pursuant to NRS 173.035(2), the State is barred from seeking an indictment on charges dismissed at an earlier preliminary hearing. We disagree.

At the conclusion of the preliminary hearing, appellant was bound over to the district court on the charge of battery with the use of a deadly weapon; all other charges were dismissed. The State subsequently sought and obtained an indictment on nine other charges, including those for which appellant was convicted.

This court has stated that "[p]ursuant to NRS 178.562(2), if a defendant is not bound over, the state may: (1) seek leave to file an information by affidavit in the district court, pursuant to NRS 173.035(2); or (2) seek an indictment by a grand jury." State of Nevada v. District Court, 114 Nev. 739, 743, 964 P.2d 48, 50 (1998). In this case, the State sought an indictment on charges for which appellant was not bound over. We therefore conclude that appellant's reliance upon NRS 173.035(2) is misplaced and that his contention is without merit.

Fourth, appellant contends the district court erred by allowing the admission at trial of prior bad act evidence. Appellant argues that evidence that the victim consented to having sex with appellant in exchange for drugs, and that appellant threatened the victim and her family with physical harm was irrelevant and prejudicial, and its admission requires a new trial. We disagree.

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. See NRS 48.045(1). NRS 48.045(2) states that evidence of prior bad acts committed by a defendant may be admitted at trial "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." During an evidentiary hearing required by Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), the district court must determine whether the evidence offered for admission is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value "is not substantially outweighed by the danger of unfair prejudice." 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). Furthermore, "[t]he 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. ___, ___, 7 P.3d 426, 436 (2000) (citing Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983)).

We conclude that the district court did not err in admitting the evidence in question. The district court conducted a Petrocelli hearing and found that the evidence pertaining to the sex and drugs was necessary for a full and complete understanding of the nature of the relationship between appellant and the victim. Moreover, during the hearing, counsel for appellant conceded that this evidence was admissible. The district court found that the evidence pertaining to the threats of harm made by appellant towards the victim was relevant and necessary to establish elements of the charged offenses. Additionally, the evidence was relevant and admissible to show appellant's intent and absence of mistake. See NRS 48.045(2). We therefore conclude that appellant's contention is without merit.

Fifth, appellant contends the prosecution committed gross misconduct by calling a witness to testify during its case-in-chief for the sole purpose of impeaching him. We disagree with appellant's contention.

Initially, we note that appellant once again failed to contemporaneously object and preserve this issue for appeal. See Emmons, 107 Nev. at 60-61, 807 P.2d at 723. Nevertheless, upon review we conclude that appellant's contention lacks merit.

Pursuant to NRS 50.075, "[t]he credibility of a witness may be attacked by any party, including the party calling him." We therefore conclude that the prosecution did not commit gross misconduct and that appellant's contention is without merit.

Having considered appellant's contentions and concluded that they are without merit, we affirm the judgment of conviction.

It is so ORDERED.

Young, J.

Rose, J.

Becker, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Gary E. Gowen
Clark County Clerk