IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL CARDENAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58595

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of sexual assault. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge. Appellant Joel Cardenas raises six issues on appeal.

First, Cardenas argues that the prosecutor committed misconduct in closing argument by commenting on the failure of the defense's expert to examine the adult victim, when the expert was precluded from doing so by the district court. Cardenas did not object to the challenged statements, and we conclude that he failed to demonstrate plain error affecting his substantial rights. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (challenges to unobjected-to prosecutorial misconduct are reviewed for plain error); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when reviewing for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice"). Contrary to Cardenas's argument, the district court did not preclude the defense from examining the victim but rather requested that the defense first provide a scientific basis for the expert's interview of the victim, which the defense never provided. Accordingly, this claim does not warrant relief.

Second, Cardenas contends that there was insufficient evidence to support the jury's verdict because the victim was intoxicated at the time of the alleged offense, and there was no evidence corroborating her testimony that she was sexually assaulted. Cardenas has provided transcripts of the victim's testimony but has failed to provide transcripts for much of the other evidence that was presented to the jury. See Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Nevertheless, because his sole argument is based on the victim's testimony, which is provided in the record on appeal, we are able to review it and conclude that his contention is without merit. Here, the victim testified with specificity that Cardenas committed sexual assault against her, that she did not consent, and that she told him to stop and tried to push him away from her. This testimony, absent any corroborating evidence, is sufficient to support his conviction. See Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) ("It is well established law in Nevada that in a rape case, a jury may convict upon the uncorroborated testimony of the victim.").

Third, Cardenas contends that the district court erred in permitting the State to introduce evidence of prior bad acts without first holding a Petrocelli[1] hearing. We disagree. At trial, a rebuttal witness

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[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707,

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testified that she and the victim had encountered Cardenas on two different occasions—first at a barbecue, where Cardenas made unwanted sexual comments to them, and then at a bar, where Cardenas attempted to kiss and dance with the victim. The district court ruled that, because Cardenas testified that the sex on the night in question was consensual and the victim had previously come on to him at a bar, the witness's testimony about the bar incident was proper.[2] The district court found that the barbecue incident was not admissible and instructed the jury to disregard that testimony. We conclude that the testimony of the rebuttal witness about a prior incident in which Cardenas attempted to dance with and kiss the victim and was rebuffed was properly admitted for the purpose of contradicting Cardenas's own testimony that the victim flirted with him, kissed him, and engaged in "dirty dancing" with him. See Jezdik v. State, 121 Nev. 129, 139, 110 P.3d 1058, 1064-65 (2005) (the admission of extrinsic evidence is proper when it directly contradicts the defendant's own testimony during trial); Bostic v. State, 104 Nev. 367, 371-72, 760 P.2d 1241, 1244 (1988) ("The testimony of [a] witness for the

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711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

[2]Cardenas did not provide us with the transcript of his trial testimony. Thus, for purposes of reviewing this claim, we accept the district court's undisputed characterization of Cardenas's testimony. See Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (when the objecting party fails to provide sufficient record on appeal, "the missing portions of the record are presumed to support the district court's decision"), rev'd on other grounds, 504 U.S. 127 (1992).

purpose of contradicting [the defendant's] testimony is clearly distinguishable from the use of specific acts of misconduct to impeach the accused's character or credibility.").

Fourth, Cardenas argues that the district court erred in giving a flight instruction based on his failure to appear at his first scheduled trial almost seven months after the alleged offense occurred. "[U]nder Nevada law, a district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest." Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). Here, the defense stipulated that six months after Cardenas failed to appear at his first scheduled trial, police officers located him living at a residence in the state of Washington. When the police went to the residence to arrest him on his outstanding warrant for sexual assault, Cardenas jumped out of the second-story window, ran away from the police, and had to be subdued by a police canine. We conclude that this evidence supported an inference that he fled due to a consciousness of guilt and to avoid prosecution. See id.; see also United States v. Hernandez-Miranda, 601 F.2d 1104, 1107 (9th Cir. 1979) ("Flight immediately after the commission of a crime, or immediately prior to trial, both support an inference of consciousness of guilt."). Thus, the district court committed no error in its flight instruction to the jury.

Fifth, Cardenas argues that the district court erred by denying his motion for mistrial during voir dire because the jury observed an individual in handcuffs being escorted through a courtroom door, which was the same door used by Cardenas. He contends that the jury may have seen him use that door to enter the courtroom, from which they could infer

that he too was in custody. We discern no abuse of discretion by the district court. The fact that a handcuffed individual and the defendant both used the same door did not reveal Cardenas's custodial status. See Haywood v. State, 107 Nev. 285, 287-88, 809 P.2d 1272, 1273 (1991). Furthermore, the district court immediately instructed the jury that the handcuffed individual had nothing to do with Cardenas's case and that the jury should disregard the incident. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (we presume that the jury follows the district court's instructions). We also note that, rather than conduct a hearing to question each juror as to whether he or she observed Cardenas entering through that door, defense counsel agreed that the matter could be cured by an instruction to the jury. Accordingly, we conclude that the district court did not abuse its discretion in denying Cardenas's motion for mistrial.

Finally, Cardenas argues that the district court erred in denying his motion for mistrial based on juror misconduct. During closing arguments, the district court was alerted that a juror communicated with an individual outside of the courtroom. The district court held a hearing, at which it was determined that a courtroom spectator had approached the juror, asked him a question about jury nullification, and when the juror refused to talk to him, the spectator made a comment about ignorance. Based on the limited record provided for our review, we conclude that Cardenas has failed to show that this communication had a reasonable probability or likelihood of affecting the jury's verdict.[3] See Meyer v.

[3]We again note that Cardenas failed to provide the entire transcript relating to this issue, including the district court's factual findings and

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State, 119 Nev. 554, 563, 80 P.3d 447, 455 (2003) (the defendant must establish that juror misconduct occurred and that it was prejudicial in order to prevail on a motion for mistrial). As for Cardenas's argument that there was a presumption of prejudice, we have firmly rejected "the position that any extrinsic influence is automatically prejudicial." See id. at 564, 80 P.3d at 455 (the district courts must "examine the nature of the extrinsic influence in determining whether such influence is presumptively prejudicial"); see also Lamb v. State, 127 Nev. ___, ___, 251 P.3d 700, 712 (2011) (explaining that Meyer substantially limited the presumed-prejudice rule). Thus, Cardenas has failed to demonstrate that the district court abused its discretion in denying his motion for mistrial.

Having considered Cardenas's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

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ruling on his motion for mistrial. Thus, our review is based on the incomplete record before us.

cc: Hon. Robert W. Lane, District Judge
Paul E. Wommer
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk