

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICKY LEE GRUNDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35569

FILED

MAY 10 2002

JANEYTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of second-degree kidnapping with the use of a deadly weapon causing substantial bodily harm, battery with the use of a deadly weapon, battery with intent to commit sexual assault, sexual assault with the use of a deadly weapon, and sexual assault with a deadly weapon causing substantial bodily harm. The district court sentenced appellant Grundy as follows: second-degree kidnapping - two terms of 38 to 156 months; battery with use of a deadly weapon - one term of 30 to 96 months; battery with intent to commit sexual assault - one term of 56 to 156 months; sexual assault with use of a deadly weapon - two terms of 10 to 25 months; and sexual assault with use of a deadly weapon causing substantial bodily harm - two terms of 15 to 40 months. The sexual assault charges ran concurrently while the kidnapping and battery charges ran consecutively.

Grundy was charged with sexually assaulting Brita Weber. Grundy, Weber, Shandra Bruce (Grundy's wife), Jennifer Koaler, and three children shared a home in Las Vegas, Nevada. Weber, Bruce, and Koaler earned their livings as exotic dancers at topless clubs. Grundy allegedly operated an upholstery business out of the home.

Sometime between mid-October and mid-November 1996, Grundy allegedly held Weber captive in a motel room and, later at their mutual residence. During this time, Weber alleged that Grundy beat her with a baseball bat and sexually assaulted her by forcing the small end of the bat into her rectum and vagina. On November 16, 1996, Weber approached strangers at a local high school and asked to be hidden from her boyfriend. Weber appeared scared, but rejected initial urgings to call the police. Instead, Weber requested the people help her by contacting her family so that she could obtain money to leave Las Vegas. When she was unable to contact her family, Weber agreed to involve the police.

When the officers arrived, they observed Weber had numerous injuries and, after taking her statement, transported her to a local hospital. Testimony and medical records demonstrated that Weber had sustained serious injuries, including a lacerated liver, broken ribs, a broken wrist and lacerations of the rectum.

The defense theory of the case was that Weber's injuries were caused by other incidents unrelated to Grundy and that Weber was fabricating the charges to get back at Grundy because he had asked her to leave the house. Grundy also argued that Weber needed to fabricate the charges so that she could obtain custody of their son. Specifically, Grundy asserted that Weber's rib and wrist injuries had been caused by a fall down some stairs on October 5, 1996, while the rectal injuries were the result of rough sex involving a large dildo between Weber and Koaler a few days before November 16, 1996.

Grundy contends that the district court erred when it refused to admit a letter and videotape into evidence demonstrating that Weber and Koaler had a sexual relationship. This court extends substantial

weight to a district court's decision to admit or exclude evidence and will not reverse a district court's decision absent manifest error.¹

As to the letter, the record does not contain a copy of the letter or a summary of its contents. The failure to provide this court with this information precludes a meaningful review of this issue and we therefore decline to address the matter.²

With respect to the videotape, the record reflects that the tape does depict Koaler and Weber engaging in vaginal sexual activities using two dildos. One of the dildos appears to be about twelve inches in length and three and one-half inches in diameter. The tape was made in August 1996, approximately three months before the alleged sexual assault. Koaler testified that the same dildo depicted in the tape was used by her to penetrate Weber's rectum a few days before November 16, 1996, and that both she and Weber suffered injuries to their rectums after using the twelve-inch dildo.

Grundy sought admission of the videotape, both as direct evidence of the sexual relationship and as impeachment evidence, because Weber arguably denied the relationship on cross-examination. The State opposed the admission of the tape and any cross-examination of Weber about her relationship with Koaler on the grounds that such evidence violated Nevada's rape shield laws.³

¹Bletcher v. State, 111 Nev. 1477, 1479-80, 907 P.2d 978, 980 (1995) (citing Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)).

²See NRAP 30(b)(3) (requiring appendix to include portions of the record essential to determination of issues raised in appeal).

³See NRS 50.090.

The district court conducted several hearings and bench conferences on the issues involving Weber and Koaler's relationship. Not all of these proceedings were documented in the record.⁴ However, it appears from the record that the district court determined that Koaler would be permitted to testify about her relationship with Weber, but that Grundy would not be able to question Weber about the relationship. The issue relating to the admission of the videotape arose after Weber's trial testimony.

During trial, the following exchange took place during the cross-examination of Weber:

Mr. Fumo: Now, when you lived in Seattle before you moved to Las Vegas, you and Jennifer [Koaler] had [sic] also had a relationship, hadn't you?

[Weber]: No.

Mr. Fumo: You and Jennifer were lovers, weren't you?

[Weber]: No, we were not.

Mr. Fumo: If Jennifer comes in here and tells this jury –

[Prosecutor]: Objection.

⁴We remind the district court that all bench or chamber's conferences should be contemporaneously recorded or summarized with counsels' input at an appropriate recess.

The Court: Sustained

After this exchange, counsel for Grundy did not ask Weber any additional questions about her relationship with Koaler. We cannot determine whether the district court sustained the objection because of the inappropriate form of the question or as a result of the prior rulings and discussions involving the rape shield laws. However, the State argued at trial, and continues to assert on appeal, that the objection was properly sustained under the rape shield laws.

Grundy attempted to introduce the videotape after Weber had testified. He argued that it was admissible as direct and impeachment evidence. Although the question did not relate to a sexual relationship in Las Vegas and used ambiguous language (i.e. "lovers"), the State apparently conceded that Weber's answers amounted to a denial of any sexual relationship.⁵ The State then opposed the admission of the videotape or any additional examination of Weber, citing the rape shield law and the collateral impeachment rule.⁶ Thereafter, the district court denied the admission without addressing either of the State's contentions. Instead, the district court found that the videotape was irrelevant (i.e., vaginal as opposed to anal penetration with a dildo) and that the activities displayed were too remote in time to be significant. From the district

⁵Because Weber was not specifically questioned regarding the sexual activities depicted in the videotape, we cannot conclude that she understood the questions she did answer to include the videotaped sexual foreplay or that she would have denied that she and Koaler used a dildo for vaginal foreplay.

⁶See NRS 50.085(3).

court's comments, we can also infer that the district court believed the prejudicial value of the videotape outweighed its probative value.

This court has concluded:

The confrontation clause of the Sixth and Fourteenth Amendments to the United States Constitution guarantees a criminal defendant the right to confront his accusers and the opportunity to demonstrate the existence of a possible bias or prejudice of a witness in support of the defendant's theory of the case. This also includes a right to introduce evidence challenging the victim's credibility, in order to dispel an inference which the jury might otherwise draw from the circumstances.⁷

However, a defendant's right of confrontation is not absolute. A state can enact evidentiary laws to protect witnesses from irrelevant or improper questioning. One such law is NRS 50.090, Nevada's rape shield law. NRS 50.090 generally prohibits the admission of evidence of a victim's previous sexual conduct to challenge the victim's credibility. This court has held that, in deciding whether to exclude evidence of a victim's past sexual conduct, the district court must:

[B]alance the probative value of the evidence against its prejudicial effect, and that the inquiry should particularly focus upon "potential prejudice to the truthfinding process itself," i.e., "whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury,

⁷Cox v. State, 102 Nev. 253, 256, 721 P.2d 358, 360 (1986) (citing Davis v. Alaska, 415 U.S. 308, 317-18 (1974) and Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985)).

or cause the jury to decide the case on an improper or emotional basis.⁸

Additionally, this court has concluded that a “defendant’s ‘sixth amendment rights are subject to the same evidentiary rules as all other evidence . . . the threshold question for admissibility of evidence is relevancy.’”⁹ Therefore, a defendant “must, upon motion, be given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value in the context of [the] particular case outweighs the prejudicial effect on the [victim].”¹⁰ Such motion should, of course, be made out of the presence of the jury.”¹⁰

In this case, Grundy sought admission of the videotape to provide support for his theory of defense, specifically to demonstrate that Weber’s injuries could have been caused by conduct other than the alleged sexual assaults. Further, Grundy sought to utilize the videotape to challenge Weber’s veracity regarding an alleged sexual liaison between Weber and Koaler.

The State contends that the videotape constitutes collateral impeachment. We disagree. The relationship between Weber and Koaler

⁸Summitt, 101 Nev. at 163, 697 P.2d at 1377 (quoting NRS 48.035(1) and State v. Hudlow, 659 P.2d 514, 521 (Wash. 1983)).

⁹Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991) (quoting State v. Blue, 592 P.2d 897, 901 (Kan. 1979) (emphasis in original)).

¹⁰Summitt, 101 Nev. at 163, 697 P.2d at 1377 (internal citation omitted); Chapman v. State, 117 Nev. ___, ___, 16 P.3d 432, 434 (2001); see also NRS 48.069.

was a material aspect of the defense.¹¹ The State also contends that the videotape was inadmissible under the rape shield law. This contention also lacks merit. NRS 50.090 does not bar inquiries into a victim's prior sexual activities where the information is material to a sexual assault defendant's theory of defense. Thus, the record does not support the district court's finding that the videotape was irrelevant.

However, relevant evidence may still be excluded if it is more prejudicial than probative. The videotape does not depict Weber using the dildo for anal sex. Moreover, the record does not substantiate a finding that Weber was denying any sexual activity with Koaler. Thus, we cannot conclude that the district court's decision to exclude the videotape because of its prejudicial value constitutes manifest abuse of discretion.

The same cannot be said, however, about the district court's decision to prohibit Weber from being cross-examined regarding her sexual activities with Koaler. Because Weber's sexual activities with Koaler were a material part of Grundy's theory of defense, examination into those activities is not protected by NRS 50.090 and the district court erred in prohibiting cross-examination on this issue. We must now address whether that error warrants a reversal of any or all of Grundy's convictions.

In order for an error to be reversible, it must be prejudicial and not merely harmless.¹² The test, therefore, is "whether . . . the verdict

¹¹Rembert v. State, 104 Nev. 680, 683, 766 P.2d 890, 892 (1988) (presentation of extrinsic evidence involving a non-collateral, material issue is permissible.)

¹²Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (citing Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)).

would have been the same in the absence of the error.”¹³ This court has concluded that, in order to protect a criminal defendant’s constitutional rights, “guilty verdicts must be free from doubt.”¹⁴

Weber was the primary witness for the State, although the State also called three other witnesses. Two witnesses, a police detective with a medical background and one of the strangers who aided Weber at the high school, testified as to Weber’s demeanor and any injuries they observed. The remaining witness, the registered nurse who examined Weber on November 16, testified that the injuries sustained by Weber were more consistent with an attack with a baseball bat than a fall. The nurse also testified that she believed the rectal tears were more consistent with the use of an object like a bat than with rough sex with a dildo. She could not, however, rule out the possibility that a dildo inserted into the rectum without lubricants could cause the type of rectal injuries she observed. Finally, while the State did not call a physician to give an opinion regarding the age or source of the injuries, particularly the liver, rib and wrist, and rectal injuries, the medical records reflecting some of that information were admitted.

As to the kidnapping, battery with use of a deadly weapon, and battery with intent to commit sexual assault, we conclude that the results of the trial would not have been different if Grundy had been allowed to question Weber about her sexual activities with Koaler. Testimony regarding the sexual relationship has no bearing on the cause

¹³Id. (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)).

¹⁴Id. (citing Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988) and Yates v. State, 103 Nev. 200, 206, 734 P.2d 1252, 1256 (1987)).

of the significant injuries to Weber's liver, rib and wrist. Moreover, while Weber's credibility was at issue, we cannot conclude that a more extensive cross-examination about Koaler would have resulted in the admission of impeachment evidence affecting her credibility. Weber might simply have admitted to the sexual activity portrayed in the videotape, but denied using a dildo in anal sex. Finally, these counts were distinct in time from the incidents involving the use of a baseball bat anally and vaginally. With the exception of the additional cross-examination of Weber, the jury heard all of Grundy's evidence regarding alternate explanations for Weber's injuries and her motive for allegedly making false accusations against him on these counts. They rejected this evidence, and we conclude that the additional cross-examination regarding sexual activities with Koaler would not have changed the verdict.

We reach a different result however, when reviewing the convictions for vaginal sexual assault with a deadly weapon and anal sexual assault with a deadly weapon causing substantial bodily harm. Had Grundy been permitted to cross-examine Weber about her sex acts with Koaler, Weber might have admitted to using a dildo with Koaler. If Weber denied ever using the dildo, Grundy would be able to argue for the admission of impeachment evidence showing Weber using the dildo, but in a format less prejudicial than the videotape. Because these counts allegedly occurred at the same time, we cannot conclude that the verdict on the anal and vaginal sexual assault charges would have been the same if Grundy had been able to question Weber about her relationship with Koaler. We therefore conclude that Grundy's conviction for sexual assault with a deadly weapon and sexual assault with a deadly weapon causing substantial bodily harm must be reversed and these matters remanded for a new trial.

Grundy next contends that he cannot be convicted as a matter of law of second-degree kidnapping because Weber had the freedom to leave. When sufficiency of the evidence is challenged on appeal in a criminal case, “[t]he relevant inquiry for this court 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.’”¹⁵ In addition, “on appeal, the issue is not whether this court would have found appellant guilty, but whether the jury properly could.”¹⁶

NRS 200.310(2) states:

A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the state, or for the purpose of conveying the person out of the state without authority of law, or in any manner held to service or detained against his will, is guilty of kidnapping in the second degree.¹⁷ (Emphasis added.)

This court has construed ‘kidnap’ to mean “to take and carry away any person by unlawful force or fraud and against his will.”¹⁸

In this case, the jury heard conflicting testimony concerning Weber’s ability to leave the residence at various times. In addition,

¹⁵Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

¹⁶Anstedt v. State, 89 Nev. 163, 165, 509 P.2d 968, 969 (1973).

¹⁷NRS 200.310(2).

¹⁸Jensen v. Sheriff, 89 Nev. 123, 125, 508 P.2d 4, 5 (1973); see also NRS 200.310.

evidence was presented that Grundy took her to a motel room for a period of at least two days, during which time she was unable to leave due to the severity of her injuries. We conclude, therefore, that a jury, acting reasonably and rationally, could have found that Weber was not free to leave and was detained against her will sometime in the one-month period alleged in the information.

Grundy next contends that the district court committed judicial misconduct by improperly chastising or demeaning defense counsel in front of the jury. Specifically, Grundy asserts that the district court admonished defense counsel in a way which effectively sent a message of bias against Grundy to the jury that adversely affected their opinion of the defense theory of the case and appellant Grundy. Grundy asserts that two exchanges between the court and counsel for the parties resulted in judicial error. First, Grundy objected during the State's direct examination of Weber, stating:

Mr. Fumo (for Grundy): Your Honor, she is leading.

Court: Well, that's preliminary. Not leading up to anything yet. You understand me? Do you understand what I am telling you?

Mr. Fumo: I do, your Honor.

Court: Don't do that to me again. You hear me?

Mr. Fumo: I do, your Honor.

Court: Okay. Proceed.

The second incident occurred when the district court sustained the State's objection to a letter Grundy proposed to admit through the testimony of Koaler:

Mr. Fumo: How do you recognize this?

Ms. Koaler: It is [Weber's] handwriting. It's the letter that she gave me.

Ms. De La Garza (for the State): Judge, I am going to object.

Court: Just a second. Why are you offering that? That's nothing. You had [Weber] on the stand.

Mr. Fumo: Do you recognize this?

Ms. De La Garza: Judge, I am going to object. Foundation.

Court: Sustained.

Ms. De La Garza: It is hearsay.

Court: Sustained. That's enough of that. We don't need that. We have a witness on the witness stand.

Generally “[C]omments of the court in overruling objections to the admission of evidence do not constitute error.”¹⁹ Further, a court's admonishment and reprimand of a trial counsel is not usually considered judicial misconduct.²⁰ However, when the district court comments on the evidence or on counsel's conduct, it can rise to the level of judicial misconduct. Here, the statement that the question was “nothing” or unnecessary was improper and we caution the district court to avoid commenting on the question or evidence in the future. However, we conclude that any error was harmless beyond a reasonable doubt.

Having reviewed Grundy's contentions on appeal,²¹ we conclude that the district court committed reversible error in refusing to

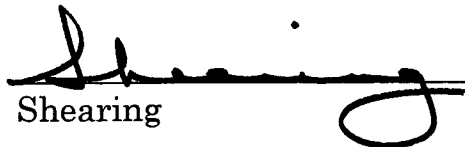
¹⁹Radkus v. State, 90 Nev. 406, 409, 528 P.2d 697, 698-99 (1974).

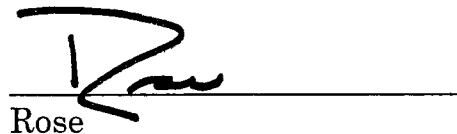
²⁰See Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998).

²¹Grundy raised three additional issues: (1) that the State and district court knowingly permitted perjured testimony, (2) that the State improperly attacked witnesses' credibility, and (3) that there was insufficient evidence to support the convictions. We have considered these contentions and conclude they are without merit.

allow Grundy to cross-examine Weber about her sexual activities with Koaler, but that the remainder of Grundy's contentions lack merit. We therefore affirm his convictions for second-degree kidnapping with the use of a deadly weapon causing substantial bodily harm, battery with the use of a deadly weapon, and battery with intent to commit sexual assault. However, we reverse and remand for a new trial with respect to Grundy's convictions for sexual assault with a deadly weapon and sexual assault with a deadly weapon causing substantial bodily harm. Accordingly we

ORDER the judgment of the district court **AFFIRMED IN PART AND REVERSED IN PART AND REMAND** this matter to the district court for proceedings consistent with this order.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General/Carson City
Clark County District Attorney
Goodman Chesnoff & Keach
Clark County Clerk