IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM C. KENDALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64550

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of burglary and, pursuant to a jury verdict, of two counts of open or gross lewdness and one count of destruction or injury to property. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. Appellant William C. Kendall raises seven issues on appeal. We reverse the conviction for destruction or injury to property due to insufficient evidence but affirm the judgment of conviction in all other respects.

First, Kendall contends that the district court abused its discretion by allowing SA to give victim impact testimony. He argues that SA perjured herself and therefore should not have been permitted to make a victim impact statement. We conclude that even if her testimony at sentencing was perjurious, the risk of fundamental unfairness is tempered because the district judge was aware of the discrepancies between her accounts, the judge was well positioned to assess SA's credibility, and the concern of a prosecutor secretly using perjured testimony is not present. *Cf. Jimenez v. State*, 112 Nev. 610, 622, 918 P.2d 687, 694 (1996) (explaining that prosecution's knowing use of perjured testimony to secure a conviction is unfair and warrants reversal if there is any reasonable

likelihood that the false testimony affected the jury's verdict). Therefore, Kendall has not shown plain error on this issue. *See Dieudonne v. State*, 127 Nev. ___, ___, 245 P.3d 1202, 1204-05 (2011) (reviewing unobjected-to error for plain error).

Second, Kendall contends that the prosecutor committed misconduct during sentencing by stating that she knew that his actions were those of a typical domestic batterer.[1] We review claims of prosecutorial misconduct for improper conduct and then for whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). The prosecutor's insertion of her personal opinion was clearly improper and a departure from the unprejudiced, impartial, and nonpartisan role of the prosecutor, and the district court erred in failing to admonish the prosecutor. *See Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985). Kendall has not shown, however, that this error affected his substantial rights. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476 (reviewing unobjected-to error for plain error affecting a defendant's substantial rights). Accordingly, no relief is warranted for the prosecutor's misconduct.

Third, Kendall contends that the district court erroneously permitted victim impact testimony going beyond the scope of his convictions, allowing "over-emotional" testimony to impact his sentence. He further contends that the court should not have permitted testimony by SA or her mother because they were not victims. Here, KLM, SA, and SA's mother all qualified as victims for purposes of victim impact

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[1]Kendall's argument that Nevada Rule of Professional Conduct 3.7 compels disqualification is without merit.

statements. NRS 176.015(5)(d).[2] Each victim discussed permissible topics, *see* NRS 176.015(3), and where specific prior acts were mentioned, the acts fell within the scope of matters discussed during the trial, such that Kendall had reasonable notice of all prior acts raised, and all three testifying victims were sworn and cross-examined, *see Buschauer v. State*, 106 Nev. 890, 894, 804 P.2d 1046, 1048 (1990). Despite Kendall's characterization, the burglary to which he pleaded guilty was not a nonexistent offense, but rather a plausible charge based on the facts presented alleging an intent to kidnap SA, and SA was sufficiently alleged as a victim of the burglary charge as well as the kidnapping charge dismissed pursuant to Kendall's plea agreement. *See Ferris v. State*, 100 Nev. 162-64, 677 P.2d 1066, 1067 (1984). We conclude that the district court did not abuse its discretion in allowing the impact testimony. And because "[t]he district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision," *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993), we conclude that Kendall is not entitled to a new sentencing hearing based on "over-emotional" impact statements.

Fourth, Kendall argues that the district court should have ordered a retrial on the open-or-gross-lewdness convictions when it ordered a retrial on the count for kidnapping SA because the district court's erroneous admission of vouching testimony compelled retrial on all

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[2]Kendall's argument that this construction renders NRS 176.015(4)(c) unnecessary is not persuasive, as that section provides for mandatory notice of the sentencing hearing to a particular class of impacted persons and does not conflict with the plain reading of NRS 176.015(5)(d).

counts. This error, however, does not compel a new trial on the counts of open or gross lewdness. The improper testimony suggested that SA's initial police statements were more credible than SA's recantation but had no bearing on KLM's credibility, and the jury could find Kendall guilty of the open-or-gross-lewdness counts on the basis of KLM's testimony alone. *See LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). Further, the photograph of the mark on KLM's neck and the broken button on her pants supported KLM's testimony and the guilty verdict on these counts. We conclude that the district court's acknowledged error did not compel retrial as to the open-or-gross-lewdness convictions.

Fifth, Kendall argues that the district court erred by instructing the jury to consider SA's prior inconsistent statements as substantive evidence when the statements described Kendall's prior bad acts and were admitted solely to impeach the credibility of her trial testimony. We review the district court's broad discretion regarding jury instructions for an abuse of discretion or judicial error. *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008). The district court erred in presenting contradictory jury instructions (instructions 16 and 17), even if each would have been legally valid standing alone. *See id.* at 211, 180 P.3d at 662; *Greene v. State*, 113 Nev. 157, 167-68, 931 P.2d 54, 61 (1997). The contradictory instructions, however, were relevant only to SA's testimony and credibility. Therefore, we conclude that this error did not affect Kendall's substantial rights because it does not taint his convictions for burglary and open or gross lewdness. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (reviewing unobjected-to errors in jury instructions for plain error).

Sixth, Kendall argues that it was error to admit SA's trial testimony about her "rough sex" with Kendall because it was prejudicially erroneous to admit prior uncharged acts with an innocent or consensual sexual component. The presumption that *prior* bad act evidence is inadmissible can be rebutted if the State establishes that (1) the prior bad act is relevant to the crime charged for a nonpropensity purpose; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Bigpond v. State*, 128 Nev. ___, ___, 270 P.3d 1244, 1250 (2012). We review the district court's decision to admit prior bad act evidence for manifest error. *Braunstein v. State*, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). We conclude that the record does not show clear and convincing evidence supporting the challenged evidence. Nevertheless, the error in admitting the sexual-relationship evidence would not have altered Kendall's convictions. The error was harmless beyond a reasonable doubt as to the burglary conviction because Kendall pleaded guilty to that count and as to the open-or-gross-lewdness convictions because the "rough sex" evidence involved a different person, different acts, and an ongoing relationship, while the open-or-gross-lewdness charges were supported by other trial evidence. *See Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005). Kendall's argument that this evidence was not probative is not persuasive because it supports intent and makes the existence of facts shown by other evidence at trial more probable. *See* NRS 48.015; NRS 48.045(2). Therefore, the district court did not err.

Seventh, Kendall argues that sufficient evidence did not support his conviction for malicious destruction of property. We agree. NRS 206.310(1) provides for criminal liability where a person "willfully or

maliciously destroy[s] or injure[s] any real or personal property of another." The record shows merely that Kendall willfully drove the vehicle and does not suggest, to any degree, that he willfully or maliciously crashed the vehicle or otherwise caused damage. The State's argument that willfully driving the car and subsequently causing damage by crashing the vehicle supports liability is untenable. *See* NRS 193.0175 (defining "maliciously"); *see also Sheriff v. LaMotte*, 100 Nev. 270, 272, 680 P.2d 333, 334 (1984) (concluding that evidence of driving while intoxicated was insufficient to imply malice for second-degree-murder liability for deaths caused by intoxicated driving). Viewing the evidence in the light most favorable to the prosecution, we conclude that no rational trier of fact could find Kendall guilty beyond a reasonable doubt of the intent element of willfully or maliciously destroying or damaging the property of another and we reverse this conviction. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Having considered Kendall's contentions, we

ORDER the judgment of conviction REVERSED as to the destruction or injury to property count and AFFIRMED in all other respects and REMAND this matter for the entry of an amended judgment of conviction consistent with this order.

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Patrick Flanagan, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk