IN THE SUPREME COURT OF THE STATE OF NEVADA

SANTOS WILFREDO TEJEDA A/K/A SANTOS TEJEDA-PERALTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36815

FILED
JUN 05 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rivada
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first degree kidnapping and attempted sexual assault. Following the jury's verdict, the district court sentenced appellant Santos Wilfredo Tejeda to a term of life with the possibility of parole after five years for first degree kidnapping, and a concurrent sentence of not more than ninety-eight months with a minimum eligibility of parole after thirty-nine months for attempted sexual assault. Tejeda was given 351 days credit for time served.

Tejeda argues that there was insufficient evidence to find him guilty of attempted sexual assault and first degree kidnapping. "The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution."[1] Furthermore, this court will

[1]Jackson v. State, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001) (quoting Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371

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only disturb a verdict on appeal upon a finding that the verdict was not supported by substantial evidence.[2]

Tejeda contends that the jury could not have found him guilty of attempted sexual assault because the attempted sexual assault count was dismissed, and there was insufficient evidence to find him guilty of attempted sexual assault. We disagree.

Here, viewing the evidence in the light most favorable to the prosecution, Tejeda attacked Mendoza, threw her on the bed, and attempted to tie her to the bedposts several times. Tejeda disrobed her, and despite her screams, digitally penetrated her vagina. While Tejeda did not remove his own pants or expose his penis, he rubbed his genital area against hers while she struggled to escape. We conclude that under these circumstances, a rational trier of fact could have found, beyond a reasonable doubt, that Tejeda attempted to sexually assault the victim but failed since there was no medical evidence presented that showed any actual penetration occurred.

Tejeda also argues that the jury could not have found him guilty of attempted sexual assault as a lesser-included offense of the sexual assault described by Mendoza because attempt sexual assault is not a lesser-included offense of sexual assault. In Crawford v. State,[3] this court held that "the State may charge a defendant with the completed

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. . . *continued*
(1996)). See also Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997).

[2]Id.

[3]107 Nev. 345, 811 P.2d 67 (1991).

crime and nevertheless obtain a conviction for attempt as provided by NRS 175.501."[4] However, there must be evidence to support an attempt.[5]

We conclude that Crawford does not support Tejeda's contentions. In Crawford, the defendant's conviction for attempt sexual assault was reversed and remanded for a new trial because there was no evidence of attempt sexual assault.[6] There, the victim alleged that the defendant penetrated his anus three separate times, but tests later that day revealed no evidence of anal penetration.[7] In addition, there was no further evidence of any attempt sexual assault.[8] Here, no tests were administered since Mendoza did not report the assault, so evidence of penetration could not be introduced. However, several witnesses heard Mendoza screaming, and the State introduced photographs of her injuries and the bed with ties attached.

"To prove an attempt to commit a crime, the prosecution must establish (1) the intent to commit the crime; (2) performance of some act towards its commission; and (3) failure to consummate its commission."[9] We conclude that the jury could have reasonably believed that Tejeda intended to sexually assault Mendoza. The jury could have believed that Tejeda acted in furtherance of that crime by attacking her, attempting to

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[4]Id. at 351, 811 P.2d at 71.

[5]Id. at 352, 811 P.2d at 71.

[6]Id.

[7]Id. at 347-48, 811 P.2d at 68-69.

[8]Id.

[9]Moffit v. State, 96 Nev. 822, 824, 618 P.2d 1223, 1224 (1980).

tie her to the bedposts and disrobing her, but failed to complete the sexual assault.

Tejeda also claims that there was insufficient evidence to convict him of first degree kidnapping because the detention of the victim was contemporaneous with the crime of sexual assault and because the victim was never removed from her residence. We disagree.

NRS 200.310 provides that:

> A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon him, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person . . . is guilty of kidnapping in the first degree.

Asportation is not required unless the detention of the victim is incidental to the underlying crime.[10] However, kidnapping is established as an additional offense if the victim is physically restrained.[11] Furthermore, if the risk of harm to the victim is increased by the restraint, the kidnapping is not incidental to the underlying crime.[12]

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[10]Hutchins v. State, 110 Nev. 103, 108, 867 P.2d 1136, 1140 (1994) (citations omitted).

[11]Id.

[12]Id.

In Hutchins v. State, the defendant dragged the victim through her apartment, beat her, took some of her money and jewelry, committed various acts of sexual assault upon her, untied her and left the apartment.[13] We held that there was sufficient evidence to convict the defendant of first degree kidnapping.[14] We reasoned that the victim was taken to a different part of the residence where she was restrained and less likely to be heard by a passerby.[15] In addition, the forcible method used coupled with the measures to accomplish the restraint created a greater risk of harm.[16]

In the present case, a rational trier of fact could have found beyond a reasonable doubt that Tejeda committed first degree kidnapping. Tejeda detained Mendoza for several hours, forced her onto the bed, dragged her from room to room, increasing her risk of harm by keeping her from leaving, preventing her from using the telephone and preventing neighbors from being able to hear her screams. In addition, Mendoza attempted to escape and screamed to a neighbor, but Tejeda dragged her back into the house. Therefore, we conclude that there was sufficient evidence to convict Tejeda of first degree kidnapping.

Tejeda next contends that the trial court erred by denying the defense the right to present evidence of Mendoza's prior false reports of sexual assault. Namely, Tejeda claims that he should have been allowed

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[13]Id. at 106, 867 P.2d at 1138.

[14]Id. at 109, 867 P.2d at 1140.

[15]Id. at 108, 867 P.2d at 1140.

[16]Id. at 108-09, 867 P.2d at 1140.

to present evidence that Mendoza told her ex-husband that she had been raped, but that no rape had ever occurred. We conclude that Tejeda's contention is without merit.

Nevada's rape shield statute prohibits the introduction of evidence of the sexual assault victim's previous sexual conduct in order to impeach the victim, unless evidence of such conduct is presented by the prosecution or through the victim's own testimony.[17] However, "prior false accusations of sexual abuse or sexual assault by complaining witnesses do not constitute 'previous sexual conduct' for rape shield purposes."[18] In order to determine the probative value of such evidence, the defendant must establish that the accusation was actually made, that it was false, and that the evidence is more probative than prejudicial.[19] This court will not set aside a district court's decision whether to admit evidence absent an abuse of discretion.[20]

Here, the district court conducted a hearing to address Tejeda's motion to present evidence of prior false claims of sexual assault. Mendoza's ex-husband, Ned Wheelock, testified that Mendoza claimed to have been raped, but never reported it to the police. Further, Wheelock testified that Mendoza claimed that her mother forced her to abort the fetus. In denying the motion to admit the evidence, the district court concluded that there was never any accusation of rape made by the

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[17]NRS 50.090.

[18]Miller v State, 105 Nev. 497, 501, 779 P.2d 87, 89 (1989).

[19]Id. at 502, 779 P.2d at 90.

[20]Koerschner v. State, 116 Nev. 1111, 1120, 13 P.3d 451, 457 (2000).

complaining witness. The district court noted the contentious nature of the divorce between Mendoza and Wheelock, and the lack of any evidence suggesting Mendoza accused anyone of rape. Therefore, we conclude that the district court did not abuse its discretion when it denied Tejeda's motion to admit evidence of Mendoza's alleged prior false accusations of sexual assault.

Tejeda argues that medical proof that Mendoza was beaten and sexually assaulted was lost due to the forty-day delay by the police in filing charges against him. We disagree.

This court has held that when police fail to collect evidence, a two-part test is used to determine whether an injustice has occurred.[21] First, the defense must show that the evidence was material.[22] Second, if the evidence was material, the court must determine whether the failure to collect the evidence was due to negligence, gross negligence or bad faith.[23]

Here, Tejeda acknowledges that the police did not process the case against Tejeda as a sexual assault case because Mendoza did not inform the police that she had been sexually assaulted. However, Tejeda claims that Mendoza acted in bad faith by failing to report the incident to the police as a sexual assault, and this bad faith can be imputed to the prosecution.

This court has stated that sexual offense victims encounter various disincentives to report sexual offenses, including the fear of

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[21]Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

[22]Id.

[23]Id.

humiliation that accompanies the publicity of the charge.[24] Mendoza testified that she did not report the incident as a sexual assault because she felt ashamed and dirty. We conclude that it was this fear of humiliation, and not bad faith, that prevented Mendoza from accurately reporting the incident to the police. Further, Tejeda provides no authority for the proposition that Mendoza's failure could be imputed to the police or prosecution. We decline to impute the victim's failure to report the sexual assault to the State and conclude that the police did not fail to collect evidence since Mendoza did not initially report the incident as a sexual assault.

Tejeda relies on Cook v. State[25] to argue that the failure by police to investigate the incident as a sexual assault deprived him of obtaining exculpatory evidence. However, in Cook, the police took photographs of the crime scene, but lost the photographs.[26] This court held that the loss of this evidence severely prejudiced the defendant.[27] In contrast, the police in this case were never informed of any alleged sexual assault, and there has been no allegation that the police collected and lost any material evidence. Therefore, we conclude that Tejeda's reliance on Cook is misplaced.

Tejeda next contends that Mendoza's references to her religious beliefs improperly and unfairly vouched for her credibility and

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[24]See Turner v. State, 111 Nev. 403, 404, 892 P.2d 579, 579-80 (1995).

[25]114 Nev. 120, 953 P.2d 712 (1998).

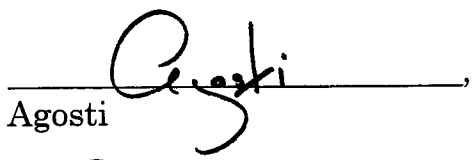
[26]Id. at 123, 953 P.2d at 714.

[27]Id. at 126, 953 P.2d at 716.

truthfulness. "When an appellant fails to specifically object to questions asked or testimony elicited during trial, but complains about them, in retrospect upon appeal, we do not consider his contention as a proper assignment of error."[28] Here, there was no contemporaneous objection to the prosecutor's questioning regarding the particular verse of the Bible that Mendoza quoted during the incident. Therefore, we need not consider this argument. Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young



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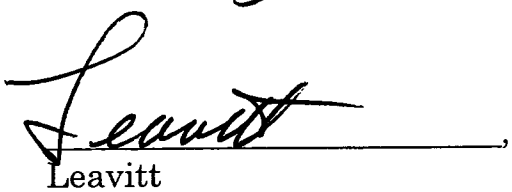
Agosti



_____, J.
Leavitt

cc: Hon. Lee A. Gates, District Judge
Gary E. Gowen
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[28]Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970).