IN THE SUPREME COURT OF THE STATE OF NEVADA

LANALSIKOV LOWE A/K/A JOHNNY QUEST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37165

FILED

MAY 10 2002

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

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of sexual assault (anal), one count of robbery, and two counts of misdemeanor battery. The district court sentenced appellant Lanalsikov Lowe to life imprisonment with parole eligibility after 10 years for the sexual assault, 72 months to 180 months for the robbery (to be served consecutively to the sexual assault conviction), and 6 months for each misdemeanor battery conviction, to run concurrently with all other convictions.

Lowe was originally charged with nine counts: first degree kidnapping, sexual assault (vaginal intercourse), sexual assault (anal intercourse), sexual assault (fellatio), battery with intent to commit robbery, robbery, battery with intent to commit sexual assault, coercion and dissuading. The jury acquitted Lowe on the vaginal and fellatio sexual assault charges as well as the first degree kidnapping, coercion and dissuading charges. The jury also failed to convict Lowe on the felony battery charges, instead convicting him on the lesser-included misdemeanor battery offenses. The jury did convict Lowe of the robbery and anal sexual assault charges.

The charges were based upon allegations brought by the victim, Laurene Mackey. At trial, Mackey testified that she had given a mutual friend permission to use her truck. Appellant Lowe, rather than the mutual friend, returned the truck sometime around midnight on December 28, 1999. Mackey then accompanied Lowe to his apartment in order to drop him off. Mackey testified that, once at Lowe's apartment, Lowe got out of the truck taking the keys with him. Mackey stated that she followed Lowe into his apartment in order to obtain her keys where Mackey alleges that she was forced to have sexual intercourse, including anal intercourse, with Lowe.

Following the alleged assaults, Mackey attempted to retrieve her keys and leave Lowe's apartment. She could not find the keys but left Lowe's apartment with her cell phone. Lowe followed Mackey to the apartment parking lot. Mackey stated that Lowe eventually drove her home where she got ready for work. Lowe then drove Mackey to work and kept possession of her truck after dropping her off. At the end of Mackey's shift, Lowe and his uncle picked up Mackey and a friend, Christine Smith, from Mackey and Smith's place of work. Mackey testified that she started to use her cell phone during the drive and that Lowe took it away from her refusing to return it.

Lowe drove Mackey and Smith to the apartment of a mutual friend. Upon arrival, Lowe ordered Smith out of the truck and forcibly removed Mackey from the vehicle as well. Lowe proceeded to have a conversation with the mutual friend some distance away. At some point, Lowe returned to Mackey and began beating her. Smith testified that she ran from the scene and called the police. Both Mackey and Smith testified that Lowe did not return Mackey's cell phone and fled the scene in

Mackey's truck. Mackey then went to Smith's apartment to await the police.

Shortly after midnight on December 29, 1999, Mackey was transported to University Medical Center. She showed visible signs of having been beaten and told the nurses that she had been sexually assaulted by appellant Lowe, a friend. Mackey stated that Lowe had raped her (i.e., vaginally, anally and orally) in his apartment during the early morning hours of December 28, 1999 and, later that same day, had beaten her in front of a number of witnesses. Examination of Mackey by a sexual assault nurse at the hospital revealed that Mackey had injuries to her rectal area. The sexual assault nurse also testified that the anal injuries were "fresh" and occurred most probably within 48 hours of the exam, but no more than 72 hours before the exam.

Based upon information obtained from Mackey and evidence taken from Lowe's residence during the execution of a search warrant, police obtained an arrest warrant for Lowe on December 30, 1999.

Following his arrest, Lowe was interviewed by police detectives. Lowe admitted to police that he hit Mackey but denied having had any type of sexual intercourse with Mackey. The defense theory included that the anal injuries sustained by Mackey were caused by anal intercourse that Mackey had with another individual within 72 hours of the sexual assault examination. However, during trial, the district court refused to allow Lowe to cross-examine Mackey or any other witness regarding the prior sexual act. The district court concluded, based upon the medical testimony, that the prior sexual act could not have caused the anal injuries, was overly prejudicial when balanced against its probative

weight, and violated Mackey's privacy interests under the rape shield statute.[1]

Lowe first contends that insufficient evidence was adduced at trial to support his convictions for robbery, battery and sexual assault.

Lowe argues that insufficient evidence was adduced to demonstrate that he took Mackey's truck and cell phone with force or with threat of force. Lowe asserts that Mackey voluntarily loaned him her truck, which he timely returned. Lowe contends that, although he retained possession of the truck following the alleged sexual assaults, Mackey never called the police to report her vehicle as stolen. Further, Lowe asserts that he hit Mackey on the day after the alleged sexual assaults, not to retain her cell phone, but because another person had said something to him which enraged him. Finally Lowe argues that in light of his acquittal on the vaginal and fellatio sexual assault charges, there is insufficient evidence to convict him of the anal sexual assault.

The standard of review for sufficiency of the evidence on appeal is whether a rational trier of fact, after viewing the evidence in the

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[1]NRS 50.090 states:

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim.

light most favorable to the prosecution, could have been convinced of the defendant's guilt beyond a reasonable doubt.[2] A jury's verdict will not be disturbed where substantial evidence exists to support it.[3] Further, "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."[4] Finally, circumstantial evidence alone may sustain a conviction.[5]

In this case, our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of robbery, anal sexual assault and battery beyond a reasonable doubt. Compelling evidence and testimony exist which suggest that Lowe took Mackey's cell phone the day after the alleged assaults in order to prevent her from calling anyone for assistance and that he would not return the phone to her when she asked for it back. Additionally, sufficient evidence was adduced at trial which demonstrated that Lowe beat Mackey and subsequently fled the scene in her vehicle. The medical evidence concerning the anal injuries, together with Mackey's testimony, is sufficient to support the conviction for sexual assault.

Lowe next contends that the district court erred in not allowing Lowe to cross-examine Mackey about an act of consensual anal intercourse that occurred approximately 72 hours prior to the sexual

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[2]See Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992) and McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (internal citation omitted).

[3]Kazalyn, 108 Nev. at 71, 825 P.2d at 581.

[4]Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

[5]McNair v. State, 108 Nev. 53, 56-67, 825 P.2d 571, 576 (1992).

assault examination and within 48 hours of the alleged sexual assaults. Specifically, Lowe argues that his Sixth Amendment right to cross-examine witnesses against him was violated when he was precluded from cross-examining Mackey. Lowe asserts that his constitutional right to confront and cross-examine a witness was violated: (1) in light of the fact that the evidence against him was not strong where the jury found him not guilty of six of the charged crimes, in particular, the crimes that were not supported by independent evidence; (2) that the sexual assault nurse's testimony indicated that consensual anal intercourse could have caused the type of rectal tears that Mackey sustained; and (3) that the sexual assault nurse was unable to date the rectal lacerations with exactness.

The State argues that questioning Mackey about an act of consensual intercourse that may have occurred 72 hours prior to the sexual assault examination is not relevant because there was marginal evidence that the consensual intercourse fell within the 72-hour period, and Mackey stated she did not have any injury to her rectal area prior to the assault by Lowe. The State asserts that the proper inquiry on the admissibility of evidence is relevancy and the district court did not, therefore, err when it refused to allow Lowe to cross-examine Mackey or any other witness regarding the prior act of anal intercourse.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[6]

With respect to Sixth Amendment rights, this court has noted:

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[6]Green v. State, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

> "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.[7] 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."[8]

The U.S. Supreme Court has concluded that the confrontation clause, "a right secured by the Sixth Amendment and made obligatory on the states by the Fourteenth Amendment,"[9] provides two types of protection for the criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination.[10] This right, however, is not absolute. The Court has allowed an exception to the right "only when necessary to further an important public policy."[11] Specifically, the U.S. Supreme Court has stated the following:

> "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate

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[7]Cox v. State, 102 Nev. 253, 256, 721 P.2d 358, 363 (1986) (citing Davis v. Alaska, 415 U.S. 308, 317-18 (1974)).

[8]Cox, 102 Nev. at 256, 721 P.2d at 363 (citing Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985)).

[9]Summers v. State, 102 Nev. 195, 202, 718 P.2d 676, 681 (1986) (internal citations omitted).

[10]Coy v. Iowa, 487 U.S. 1012 (1988).

[11]Maryland v. Craig, 497 U.S. 836, 845 (1990) (internal citation omitted).

> cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness' "[12]

Thus, if appellant Lowe can show that a reasonable jury might have received a significantly different impression of the witness' credibility had his counsel been permitted to pursue the proposed line of cross-examination, then Lowe has demonstrated a violation of his Sixth Amendment rights under the confrontation clause.[13]

In the present case, Lowe was prohibited from cross-examining Mackey, the investigating detective, and the nurse regarding the prior anal intercourse. Based on the offers of proof contained in the record, such examination would have revealed the possibility that the rectal injuries documented in the medical records could have been caused by the consensual anal act. We recognize that the nurse would have rendered an opinion that the injuries were probably caused by nonconsensual anal intercourse and were not caused by the consensual act. In her examination outside the presence of the jury, she indicated that the healing status of the injuries and their nature were more consistent with nonconsensual anal intercourse. Nevertheless, she also stated that it was possible for the injuries to have been caused by consensual anal intercourse if the intercourse occurred within 72 hours of the exam. The record reflects that the timing of the consensual act was very close to this period. Mackey, however, was permitted to state before

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[12]Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (quoting Davis, 415 U.S. at 318).

[13]Id.

the jury that she did not have any rectal injuries prior to the alleged assault by Lowe.

Accordingly, we conclude that, because Lowe was not permitted to present his theory of defense (i.e., that Mackey's injuries could have been caused by someone other than himself), his Sixth Amendment rights were violated where the district court did not allow him to cross-examine Mackey regarding the prior act of anal intercourse. We have repeatedly concluded that NRS 50.090 does not bar such inquiries into a victim's prior sexual activities where that information is material to a sexual assault defendant's theory of defense.[14] Therefore, we conclude that the district court erred in not allowing Lowe to cross-examine Mackey regarding the prior act of anal intercourse and, as such, his conviction for sexual assault must be reversed.

Because the remaining convictions relating to the robbery and battery charges rest on substantial evidence in addition to Mackey's testimony, we conclude that the error relating to the prior sexual act does not warrant reversal of the remaining convictions. There is overwhelming

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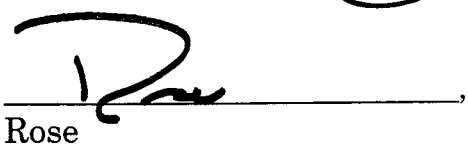
[14]See generally Johnson v. State, 113 Nev. 772, 777-78, 942 P.2d 167, 170-71 (1997); Benson v. State, 111 Nev. 692, 694, 895 P.2d 1323, 1325 (1995); and Summitt v. State, 101 Nev. 159, 162, 697 P.2d 1374, 1376 (1985).

independent evidence to support the convictions for robbery and battery. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

_____, J.
Shearing



_____, J.
Rose

_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk