IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ENRIQUEZ LOPEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37578

FILED

JUN 27 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count each of battery with the use of a deadly weapon with substantial bodily harm, gross misdemeanor child abuse and neglect, and battery constituting domestic violence, third offense. The district court sentenced appellant to serve a prison term of 35 to 156 months for the battery count, a concurrent jail term of 12 months for the child abuse, and a consecutive prison term of 19 to 48 months for the domestic violence count. The district court also ordered appellant to pay $11,892.00 in restitution.

At appellant's preliminary hearing, Melissa Gustafson, the victim in this case, testified that after she and appellant broke up, appellant attacked Gustafson in her automobile while her four-year-old son was sitting in the back seat. Gustafson testified that appellant hit her and then cut her face from her eyebrow to her neck resulting in nerve damage and some vision loss.

Appellant first contends that the district court violated appellant's Sixth Amendment right of confrontation by admitting Gustafson's preliminary hearing testimony without first establishing that she was "unavailable" at the time of

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trial as mandated by Ohio v. Roberts.[1] We conclude that appellant's contention lacks merit.

The task of serving Gustafson's subpoena was assigned to Craig Woods, an investigator with the Clark County District Attorney's office. Woods testified that he mailed a subpoena to appellant's last known address and then attempted personal service at Gustafson's apartment on Royal Crest. However, Woods learned from the apartment manager that Gustafson had moved and did not provide a forwarding address. Thereafter, Woods searched for Gustafson's forwarding address in the records of the Department of Motor Vehicles, the telephone company, and a commercial address database. Woods also contacted Gustafson's former employer, which he located through police work card records, but did not obtain any new information about Gustafson's whereabouts. Finally, Woods tried to locate Gustafson by contacting her father, but after a credit report check, Woods discovered that Gustafson's father lived out of State and had an unlisted telephone number.

Although appellant points out that the State could have made additional efforts to locate Gustafson, we cannot say that such efforts would have led to Gustafson's attendance at trial.[2] Because the State made reasonable, good-faith efforts to locate Gustafson, we conclude that the district court did not err in admitting her prior testimony at trial

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[1]448 U.S. 56, 74-75 (1980) (holding that a witness is not unavailable, and thereby excepted from the confrontation requirement of the Sixth Amendment, unless the State can prove that it made a good-faith effort to procure the witnesses' attendance at trial).

[2]See Quillen v. State, 112 Nev. 1369, 1376, 929 P.2d 893, 898 (1996) ("[A] reviewing court need not consider every untried effort the Sate could have made in locating a witness," instead, this court's inquiry is whether the State demonstrated good-faith efforts.).

despite the fact that there were other avenues the State could have pursued to locate Gustafson.[3]

Appellant next contends that the district court erred in admitting evidence of appellant's two prior domestic battery convictions because it was improper character evidence. We disagree.

After conducting a hearing, the district court allowed the State to present evidence that two months prior to the attack on Gustafson, appellant had pleaded guilty to physically grabbing or hitting Gustafson and spitting on her. Additionally, the district court admitted evidence that appellant had attacked his former girlfriend, Alexandra Adorno, after she broke up with appellant. Appellant attacked Adorno in a manner similar to Gustafson in that, after a recent break-up, he hit her and then cut her face. We conclude that the district court did not abuse its discretion in admitting evidence of these prior bad acts to show intent, motive, or common scheme.[4]

Finally, appellant contends that the district court erred in allowing police officer Rob Lovell to testify to Adorno's out-of-court statements describing appellant's attack upon her because these statements were inadmissible hearsay. We disagree.

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[3]See id. at 1374-76, 929 P.2d at 896-98 (holding that the State's investigator made reasonable efforts to locate a witness where he went to her last known address, searched for a forwarding address, and contacted her last known employer).

[4]See NRS 48.045(2); see also Tillema v. State, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996) (evidence of prior conviction for same offense committed under similar circumstances admissible to show common scheme and intent); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (evidence that the defendant had previously "dropped the victim to the ground from shoulder height" admissible to show that the defendant harbored ill-will toward the victim).

According to Lovell, he spoke with Adorno about an hour after the attack and she was extremely upset and crying. Adorno told Lovell that appellant had hit her, rendering her unconscious, and then cut her face and cut out large chunks of her hair. We conclude that the district court did not abuse its discretion in ruling that Adorno's statements fell within the purview of the excited utterance exception to the hearsay rule because evidence was presented that Adorno was upset about the attack and that it occurred approximately one hour prior.[5]

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

[5]See NRS 51.095; Dearing v. State, 100 Nev. 590, 592, 691 P.2d 419, 421 (1984) (holding that victim's statement to police made one and one-half hours after the attack when victim was nervous and upset was admissible as an excited utterance); see also Hogan, 103 Nev. at 23, 732 P.2d at 423.

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O R D E R

Cause appearing, we grant respondent's motion filed on May 18, 2001. Accordingly, the clerk of this court shall file the fourteen-page amended fast track response received on May 18, 2001. Further, the clerk of this court shall strike page 1 of respondent's fast track appendix filed on May 11, 2001.

It is so ORDERED.

Maupin, C.J.

cc: Attorney General
Clark County District Attorney
Clark County Public Defender

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