IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN BOWYER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38413

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of sexual assault and solicitation to commit murder. Appellant John Bowyer brought his mentally disabled adult niece, Aimee Lindsey, to his apartment, showed her pornographic videos, and then engaged in multiple sexual acts with her. While Bowyer was in jail awaiting trial, he offered another prisoner $10,000 to kill Aimee. Bowyer later repeated this offer to an undercover police detective posing as a contract killer. The State tried Bowyer for kidnapping, three counts of sexual assault, and solicitation to commit murder. The jury convicted on one count of sexual assault and solicitation to commit murder, and acquitted on the other charges. Bowyer appealed.

In support of his appeal, Bowyer offers four separate arguments. First, he contends that the district court abused its discretion in joining the solicitation to commit murder charge with the other charges. Second, Bowyer claims that the State failed to prove either that Aimee lacked the mental capacity to consent or, if she had the capacity to consent, that she did not do so. Third, Bowyer asserts that the district court committed plain error in failing to issue a sua sponte instruction to the jury on the definition of nonconsent. Last, Bowyer claims that the prosecutor's comparison of his calm demeanor to that of angry witnesses

when confronted with the charges constituted an impermissible argument that invocation of Fifth Amendment privileges presumes guilt. We find that Bowyer's claims are without merit.

Bowyer contends that the solicitation to commit murder and sexual assault charges were not part of a common scheme or plan. We agree. The State does not dispute this, but counters with the argument that the offenses are nevertheless connected.

This court has previously held that offenses may be properly joined under NRS 173.115 even if they are not part of the same scheme or transaction when it is clear that they are connected.[1] While Bowyer solicited the murder of Aimee well after the commission of the sexual assaults, there is little doubt that the solicitation was inspired by the threat of Aimee's impending testimony. The solicitation to commit murder and the sexual assaults are clearly linked and joinder was proper.

Bowyer also claims that the district court abused its discretion by failing to sever the solicitation to commit murder charge on the basis of unfair prejudice. NRS 174.165(1) grants the court discretion to sever charges to prevent unfair prejudice that would exist if the charges remained joined.[2] The district court abuses its discretion if failure to sever "has a substantial and injurious effect on the jury's verdict."[3] To measure

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[1]Howard v. State, 102 Nev. 572, 574-75, 729 P.2d 1341, 1342-43 (1986).

[2]Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998).

[3]Id. at 1108. (citing Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989)).

substantial and injurious effect, this court has traditionally considered the quantity and quality of evidence supporting individual convictions.[4]

Here, while medical examination revealed no evidence of sexual assault, Aimee's uncorroborated testimony alone would have been sufficient to prove that sexual intercourse had occurred.[5] Aimee's testimony was supported by the fact that police found, in Bowyer's possession, pornographic movies and a sex toy that matched the detailed description provided by Aimee.

Bowyer makes no claim that he was prejudiced by his inability to assert Fifth Amendment privilege in response to one of the charges while wishing to testify in response to others. Additionally, the only bad act evidence admitted in this case involved Bowyer's offer to pay Aimee's mother $30,000 in exchange for dropping the charges. "Deliberate avoidance of apprehension or prosecution may be properly admissible as showing consciousness of guilt."[6] Therefore, this bad act evidence would have been admissible regarding both charges, even if tried separately.

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[4]See, e.g., Brown v. State, 114 Nev. 1118, 1125, 967 P.2d 1126, 1131 (1998) (overwhelming evidence of guilt, along with other factors, supported joinder); Middleton, 114 Nev. at 1108, 968 P.2d at 309 (no error in joining charges where, inter alia, sufficient evidence supported convictions); Mitchell v. State, 105 Nev. 735, 739, 782 P.2d 1340, 1343 (1989) (joinder did not have substantial and injurious effect where, inter alia, convincing evidence supported each conviction).

[5]See Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996) (citing Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981)).

[6]Kearney v. State, 97 Nev. 127, 129, 625 P.2d 93, 94 (1981).

Because the offenses were clearly connected and Bowyer was not subject to unfair prejudice, the district court did not abuse its discretion by requiring Bowyer to stand trial on the charges jointly.

Bowyer next contends that the State failed to show that Aimee lacked the mental capacity to consent or, if she had the capacity, failed to show that she did not consent. Because we find that the State adequately demonstrated that Aimee lacked the capacity to consent, we need not consider whether actual consent was given.

The State offered evidence that Aimee had the mental capacity of an eleven-year-old. Aimee's disability results from a head injury while a toddler. While she has made substantial progress such as graduation from high school in a special education program, she still is incapable of living alone or driving.

Evidence revealed that Aimee understood the general nature of sex and that she was not supposed to view pornographic materials. While many eleven-year-olds are capable of understanding the consequences of sexual activity, no evidence was presented to indicate Aimee's level of understanding in this regard.

Nevertheless, Bowyer used his position of authority over Aimee to facilitate the sexual assault. Bowyer's familial status as Aimee's uncle and her dependence upon him for her return home placed him in an advantageous position over Aimee and mitigated her limited capacity to consent. Thus, we find that Aimee, under these circumstances, lacked the capacity to consent to sexual activity with Bowyer.

Bowyer's next ground for reversal focuses on the trial court's failure to issue a sua sponte instruction regarding the definition of consent. Because we find that Aimee lacked the capacity to consent, plain error that "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings"[7] did not occur in this case.

Finally, Bowyer argues that the district court erred in permitting the prosecutor to make comments regarding Bowyer's failure to testify. The district court did, however, instruct the jury that it could not draw any inferences from Bowyer's decision not to testify.

A passing reference to a defendant's silence is not misconduct.[8] The test for assessing if such comments rise to the level of misconduct is whether a jury would naturally and necessarily conclude that the comment implies a failure of the accused to respond.[9] It is unclear whether a jury would reach such a conclusion. Moreover, there is a presumption that a jury follows its instructions.[10] Here, they were instructed not to draw inferences over Bowyer's election not to testify.

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[7]Rowland v. State, 118 Nev. ___, ___, 39 P.3d 114, 118 (2002) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

[8]Deutscher v. State, 95 Nev. 669, 682, 601 P.2d 407, 415 (1979).

[9]Id.

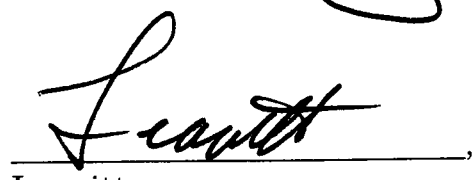
[10]Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

Finally, this error, if any, was harmless in light of the overwhelming evidence presented to the jury proving the crimes.[11]

Having considered Bowyer's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Robert M. Draskovich, Chtd.
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[11]See King v. State, 116 Nev. 349, 355, 998 P.2d 1172, 1176-77 (2000).