IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY R. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39514

FILED

AUG 13 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with the intent to commit a crime (count I), three counts of sexual assault (counts II-IV), one count of burglary (count V), and one count of grand larceny (count VI). The district court sentenced appellant Johnny R. Brown to serve a prison term of 26-120 months for count I, three concurrent prison terms of 10 years to life for counts II-IV, a prison term of 16-72 months for count V, and a prison term of 12-36 months for count VI; all of the prison terms were ordered to run concurrently. Brown was also ordered to pay $590.00 in restitution for the burglary and $1,345.19 in extradition fees; he was given credit for 702 days time served.

First, Brown contends that the district court abused its discretion in denying his pretrial motion to sever the burglary and grand larceny counts from the battery and sexual assault counts because the counts were unrelated. Brown argues that the joinder of the charges was unduly prejudicial, and as a result, he was deprived of his right to a fair trial. We disagree with Brown's contention.

NRS 173.115(2) states that multiple offenses may be joined and charged in a consolidated information if the offenses are "[b]ased on

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two or more acts or transactions connected together or constituting parts of a common scheme or plan."[1] Moreover, "[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed."[2] On the other hand, even if joinder is permissible under NRS 173.115, it may still be inappropriate if the joinder would have unfairly prejudiced the defendant.[3] To establish that joinder was prejudicial "'requires more than a mere showing that severance might have made acquittal more likely.'"[4]

In Honeycutt v. State, this court stated that the appellant bears the "heavy burden" of proving that the district court abused its discretion in denying a motion to sever.[5] The joinder of charges is reversible only if the simultaneous trial of the offenses has a "'substantial and injurious effect or influence in determining the jury's verdict.'"[6] In reviewing the issue of joinder on appeal, this court will consider the

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[1]See generally Honeycutt v. State, 118 Nev. ___, ___, 56 P.3d 362, 367 (2002); Floyd v. State, 118 Nev. ___, ___, 42 P.3d 249, 254 (2002).

[2]Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

[3]See NRS 174.165(1); see also Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998).

[4]Floyd, 118 Nev. at ___, 42 P.3d at 255 (quoting United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir. 1983)).

[5]118 Nev. at ___, 56 P.3d at 367.

[6]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990) (quoting United States v. Lane, 474 U.S. 438, 449 (1986)).

quantity and quality of the evidence supporting the individual convictions.[7]

In this case, soon after sexually assaulting his wife's 19-year-old daughter, Brown called the district manager of the Subway where he worked with the victim's mother and told the manager that he would no longer be working there. Brown asked for his last paycheck, but was told he needed to wait until payday. Brown proceeded to go to the Subway where he was scheduled to work that day. Evidence presented at trial indicated that while Brown's co-workers were busy with the afternoon lunch rush, Brown stole the change bag and money from the safe, an amount totaling approximately $600.00. Brown subsequently fled to Michigan where he was arrested on a fugitive warrant more than two weeks later.[8]

We conclude that the district court did not abuse its discretion in denying Brown's motion to sever the burglary and grand larceny counts from the battery and sexual assault counts. The evidence adduced at trial demonstrates that the offenses "were at the very least 'connected

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[7]See, e.g., Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (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, 105 Nev. at 739, 782 P.2d at 1343 (joinder did not have substantial and injurious effect where, inter alia, convincing evidence supported each conviction).

[8]Brown claims that he was in Michigan for his sister's wedding. When the Grand Rapids Police Department detective approached Brown upon seeing him in his sister's house, both Brown and his sister tried to deceive the detective and identified him as Jeffrey Brown, his brother.

together.'"[9] Moreover, evidence of the offenses would be cross-admissible in separate trials to prove motive and intent. The State's theory was that the burglary and grand larceny were clearly linked to the sexual assault and were committed in order to aid Brown's flight from Las Vegas and that Brown fled to Michigan in order to avoid future felony charges stemming from the sexual assault. Brown failed to demonstrate that joinder of the charges substantially influenced the jury or rendered his trial fundamentally unfair, or that the joinder was manifestly prejudicial. Therefore, we conclude that Brown's contention is without merit.

Second, Brown contends that insufficient evidence was adduced at trial to support his conviction on three counts of sexual assault. Brown argues that he had a consensual sexual relationship with his stepdaughter, and that she "was never raped, but was acting as a hurt and jilted partner" because he refused leave her mother. In support of his contention, Brown cites to allegedly inconsistent statements made by the victim, and points out that a witness testified at trial that after the attack, "she did not notice any unusual behavior on the part of [the victim]." We conclude that Brown's contention is without merit.

Evidence of sexual penetration is required to sustain a conviction for sexual assault.[10] Pursuant to NRS 200.366(1), the State must prove that the sexual penetration occurred "against the will of the victim or under conditions in which the perpetrator knows or should know

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[9]Floyd, 118 Nev. at ___, 42 P.3d at 254 (quoting NRS 173.115(2)); see also Howard v. State, 102 Nev. 572, 574-75, 729 P.2d 1341, 1342-43 (1986).

[10]NRS 200.366(1); Hutchins v. State, 110 Nev. 103, 109-10, 867 P.2d 1136, 1140-41 (1994).

that the victim is mentally or physically incapable of resisting." Sexual penetration is defined in NRS 200.364(2) as "cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning."

In this case, our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[11] In particular, we note that the victim testified to the following facts at trial. After finishing a late shift at work, she arrived at her mother's apartment around 12:30-1:00 a.m., hoping to sleep. She found her mother asleep in the bedroom and Brown in another room listening to music and watching television, so she slept beside her mother in the bed. At a certain point during the night, the victim awoke to find Brown sitting on the bed next to her. She immediately jumped up and left the room, and went to sleep on the couch in the living room.

After her mother left work the following morning, the victim was awakened when Brown hit her over the head with a cast iron skillet. Brown told her that he had a pistol but would not kill her if she did what he said. With a tight grip around her arm, Brown proceeded to grope her breasts, outside and underneath her shirt. The victim protested repeatedly and cried. Brown told her that if she did not quiet down, he would kill her, and then took off her pants. The victim testified that Brown forcibly carried her into the bedroom. Despite her continuous

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[11]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. ___, ___, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

crying and resistance, Brown digitally and orally penetrated her vagina, and ultimately engaged in sexual intercourse.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Brown committed three counts of sexual assault.[12] Although the medical examination revealed no conclusive evidence of a sexual assault, the nurse who examined the victim testified at trial that in approximately "forty to forty-five percent of [sexual assault] cases, there is no trauma." Photographs taken of the victim and witness testimony confirmed the victim's injuries, yet the victim's uncorroborated testimony alone would have been sufficient to prove that a sexual assault had occurred.[13] Additionally, evidence of Brown's flight after the assault is relevant to demonstrate consciousness of guilt.[14] As this court has stated many times, it is for the jury to determine the weight and credibility to give any allegedly conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[15] Therefore, we conclude that Brown's contention is without merit.

Third, Brown contends that, pursuant to NRS 48.035(1), the testimony of a Las Vegas Metropolitan Police Department police officer was irrelevant and should have been excluded because its probative value

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[12]NRS 200.364; NRS 200.366(1).

[13]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)).

[14]See Walker v. State, 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997) (quoting Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981)).

[15]See Washington, 112 Nev. at 1073, 922 P.2d at 551.

was substantially outweighed by its prejudicial effect. The officer testified at trial that while checking the jail cells at the police station for security purposes, he found Brown "[b]elligerent, hostile, making threats, kicking the door, very upset and angry." Brown repeatedly protested that he was innocent and threatened to shoot the officer's family. The officer testified that Brown also admitted to having sex, albeit consensual, with the victim, and that Brown told him, "there was nothing wrong with it, it was just his stepdaughter." Brown concedes that he failed to contemporaneously object to any of the officer's challenged testimony at trial. We therefore conclude that the issue has not been properly preserved for review on direct appeal, and that Brown has failed to demonstrate that plain error occurred thus requiring this court to address the matter.[16]

Having considered Brown's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

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[16]Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991); cf. Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1254 (2002).

cc: Hon. Michael A. Cherry, District Judge
Schofield Chelini Law Firm
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk