IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN EUGENE LEPLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39737

FILED

NOV 0 4 2003

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 verdict of guilty for sexual assault on a minor. On appeal, appellant Brian Lepley argues the following: (1) the district court improperly vouched for a witness; (2) the State committed prosecutorial misconduct; (3) insufficient evidence of nonconsent existed to support a conviction for sexual assault; (4) the district court improperly answered a jury question during deliberations; and (5) the district court erred in admitting evidence of Lepley's prior bad acts.

FACTS

Lepley, a thirty-two-year-old substitute teacher, went to a small party at a pond in Pahrump with three minors. The minors, one of whom was AB, brought beer to the party, and Lepley brought marijuana. The four people smoked three marijuana joints, with AB receiving the majority of "hits" off the joints. In addition, AB drank three forty-ounce beers in approximately three hours.

Later, AB left with Lepley in Lepley's car. They traveled approximately forty-five miles before stopping on the side of an isolated road. They drank more beer and smoked another marijuana joint. Lepley asked AB if he wanted a massage, and AB consented. Lepley then asked AB if he wanted a "blow job." AB again consented. Before performing oral

sex on AB, Lepley asked once again for AB's "total consent." AB consented, and Lepley performed oral sex on AB until he climaxed.

AB testified he consented to Lepley's advances only because he was drunk and high. He regretted the incident several days later and told Lepley he did not want to engage in sex with him again. At a second gathering approximately a week later, Lepley attempted to put his hands down AB's pants. AB said no, and Lepley stopped.

AB wrote a letter to a friend shortly after these incidents, but he did not mention the assault. AB was neither high nor drunk when he composed the letter, and the letter suggests AB was enjoying himself.

Nye County Sheriff's Lieutenant William Becht responded to a call from the high school principal regarding a teacher possibly molesting students. During the investigation, Becht contacted AB's father concerning a letter AB's mother found. Becht then interviewed AB at the home of AB's father. AB admitted to drinking alcohol and smoking marijuana provided by Lepley. AB denied any sexual contact with Lepley.

As Becht prepared to leave, AB asked to speak with him privately. AB then admitted to Becht that Lepley "had given him a, quote unquote, blow job." He also told Becht it would have never happened if he had not been under the influence of alcohol and marijuana.

Nye County Sheriff's Detective Steve Huggins, along with Becht, interviewed Lepley after the alleged incident. During an informal interview, Lepley denied having sex or providing alcohol to any of the children. At the end of the interview, Becht arrested Lepley.

The State charged Lepley with sexual assault; attempted sexual assault; solicitation of a minor to engage in acts constituting a crime against nature; attempted solicitation of a minor; attempted open or

gross lewdness; offer, attempt, or commission of an unauthorized act relating to a controlled substance; and intentional transmission of human immunodeficiency.

A jury convicted Lepley of sexual assault; attempted open or gross lewdness; offer, attempt, or commission of an unauthorized act relating to a controlled substance; possession of a controlled substance; intentional transmission of human immunodeficiency; and sales/furnishing of a controlled substance.

On appeal, we reversed the sexual assault conviction because the State argued to the jury that the victim could not consent without knowledge of Lepley's HIV status. We remanded the case for retrial on the sexual assault charge but affirmed the remaining convictions.

At retrial, AB testified about Lepley's assault. AB indicated he was unafraid of Lepley during the assault, although he stated the opposite at the first trial. When questioned about this inconsistency, AB testified a lawyer convinced him he was scared. AB also stated the lawyer, a district attorney, did not know AB was unafraid of Lepley.

Another witness testified about a conversation Lepley had with her brother-in-law in her presence. During that conversation, Lepley stated that "you've got to do what I am doing. I'm a substitute teacher at the school. And these boys, . . . all you have to do is buy them beer and smoke some weed with them, and they'll go out and have, you know, sexual relationships with you. These nubile young boys, were - - they were just ripe for the picking."

After conducting a Petrocelli hearing, three witnesses testified about Lepley's sexual relationships with young boys. Two of the witnesses were victims and the other witness was Lepley's friend. All testified to

Lepley's sexual activity with male minors after providing them with marijuana and/or alcohol.

Lepley admitted he provided marijuana to AB and then performed fellatio on him but said that AB consented. He further admitted to lying to police regarding drugs, sexual relationships with male minors and his homosexuality.

After a three-day trial, a jury found Lepley guilty of sexual assault. The record is silent as to a verdict on the solicitation charge. The district court sentenced Lepley to imprisonment for a minimum of ten years and a maximum of twenty-five years. This appeal followed.

DISCUSSION

Improper vouching

"A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong."[1] We determine error to be harmless or prejudicial by evaluating whether "'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"[2]

Lepley argues the district court misstated trial evidence by sustaining the State's objection to an alleged mischaracterization of witness testimony by Lepley's counsel during closing arguments. The district court's misstatement improperly suggested to the jury the victim did not commit perjury.

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[1]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

[2]DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000) (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)); see NRS 178.598.

During closing argument, Lepley's counsel paraphrased AB's testimony about his fear of Lepley. AB testified in Lepley's first trial that he was afraid of Lepley. Here, AB testified he was unafraid of Lepley. When questioned about the inconsistency, AB testified that one of the assistant district attorneys convinced him he was afraid of Lepley. Lepley's counsel suggested that AB stated, "[A] DA convinced me that it was in my best interest to say it even though it is not true."

Actually, Lepley's counsel posed the question to AB, and AB answered affirmatively. The State imprecisely objected to the misstatement. The district court simply sustained the State's objection. The inference created by Lepley's counsel was that someone from the district attorney's office encouraged Lepley to testify falsely. The district court's decision to sustain the objection was not "manifestly wrong."[3] While the proper phrasing of a response to an objection should be "objection sustained," the district court's phrasing constitutes only harmless error because it was within the court's discretion to prohibit the mischaracterization of witness testimony. The unconventional ruling from the bench was not prejudicial to the defendant.

Prosecutorial misconduct

"'The level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt.'"[4] "'If the

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[3]Libby, 115 Nev. at 52, 975 P.2d at 837.

[4]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998)).

issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial.'"[5]

In Rowland v. State,[6] the defendant claimed the prosecutor improperly vouched for the credibility of four witnesses during closing arguments. We concluded that while calling witnesses or the defendant a liar is impermissible, arguing the credibility of a witness is acceptable argument.[7] Even occasionally stating that a witness is lying is not misconduct when credibility is at issue.[8]

Misconduct occurs, however, when a prosecutor comments on the character of a witness.[9] This "'amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence.'"[10] A determination of misconduct is often difficult; therefore, we rely on the district court to properly rule on objections to argument by counsel.[11]

NRS 178.598 defines harmless error as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." A defendant's substantial rights are affected "if the error either: '(1) had a

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[5]Id. at 38, 39 P.3d at 118-19 (quoting Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)).

[6]Id. at 39, 39 P.3d at 119.

[7]Id.

[8]Id.

[9]Id.

[10]Id. (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)).

[11]Id. at 40, 39 P.3d at 119.

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.'"[12]

Lepley contends the State committed prosecutorial misconduct, both by vouching for the victim concerning possible perjury and telling the jury it had a duty to find Lepley guilty. The misconduct by the State was prejudicial; therefore, Lepley deserves a new trial.

Lepley argues the State improperly vouched for AB by denying his perjury admission. This is an incorrect statement of the facts. First, the State did not deny AB's perjury admission; to the contrary, the State pointed out the inconsistency in his testimony from the first trial to the second trial. Second, the prosecutor objected to Lepley's mischaracterization of AB's testimony because it appeared as though the district attorney's office knowingly encouraged AB to lie. As discussed above, Lepley's counsel misstated AB's testimony, making an objection proper. The State's conduct was not an "inappropriate use of the prosecutor's power."[13]

Lepley also contends the State committed misconduct by telling the jury its duty was to find him guilty. Notably, Lepley fails to cite in the record where the State argued the jury had a duty to do anything. The only time the State used "duty" in a sentence was during

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[12]Id. at 38, 39 P.3d at 118 (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

[13]Id. at 40, 39 P.3d at 119.

its rebuttal argument: "Our duty, our burden is proof beyond a reasonable doubt." This does not constitute prosecutorial misconduct.

Finally, Lepley alleges prosecutorial misconduct by the State in urging the jury not "to settle for Count II. That's what the defendant wants you to do." Upon objection by Crowley, the district court clarified that the prosecutor's argument was on behalf of what the State wants. The district court's statement effectively overruled Lepley's objection. This was in the district court's discretion. Further, the State's argument did not constitute prosecutorial misconduct.

None of these alleged errors affected Lepley's substantial rights.[14] The State's argument was that the jury should focus on the sexual assault charge. Any error was harmless. The State's comments did not have a "'prejudicial impact on the verdict when viewed in context of the trial as a whole.'"[15]

Nonconsent

"To sustain a conviction, sufficient evidence must be presented to establish the essential elements of each offense beyond a reasonable doubt as determined by a rational trier of fact."[16] Further, this court will not overturn on appeal a verdict supported by substantial evidence.[17]

NRS 200.366 provides in pertinent part:

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[14]See id. at 38, 39 P.3d at 118.

[15]Id. (quoting Libby, 109 Nev. at 911, 859 P.2d at 1054, vacated on other grounds, 516 U.S. at 1037).

[16]Sanders v. State, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994).

[17]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

Nonconsent "encompasses two aspects: (1) whether the circumstances surrounding the incidents indicate that the victims had reasonably demonstrated their lack of consent and (2) whether it was reasonable from the point of view of the perpetrator to conclude that the victims had manifested consent."[18] Physical force is unnecessary to prove sexual assault; committing an act of sexual penetration against the victim's will is sufficient.[19]

Lack of consent

Lepley contends insufficient evidence existed to support the jury's verdict of guilty on the sexual assault charge. AB's willingness to allow Lepley to perform fellatio on him negates an essential element of sexual assault, specifically nonconsent.

A "victim is not required to do more than [his] age, strength, and the surrounding facts and attending circumstances would reasonably dictate as a manifestation of [his] opposition."[20] "Lack of protest by a

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[18]McNair, 108 Nev. at 57, 825 P.2d at 574.

[19]Id.

[20]Id.

victim is simply one among the totality of circumstances to be considered by the trier of fact."[21]

Here, AB was sixteen years old when Lepley assaulted him. Prior to the assault, AB met Lepley at a party, where Lepley provided marijuana and beer to AB. AB saw Lepley at school several times when Lepley worked as a substitute teacher. Lepley also called AB at home numerous times. On the night of the assault, Lepley met AB and two of AB's friends at a pond. One friend, Jimmy, was approximately twenty-one years old. AB's other friend, Marty, was approximately nineteen years old. Lepley brought marijuana for all four people to smoke. They smoked two or three joints and drank beer provided by one of AB's friends. AB testified he smoked about fifteen "hits" from the joints and drank three forty-ounce beers. When the marijuana joints became smaller, Lepley placed the joints in a marijuana bong he brought with him.

AB testified he was both drunk and high when he left the pond with Lepley. When Lepley parked on the deserted road, they drank more beer and smoked another marijuana cigarette. It was at this point Lepley asked for AB's consent to perform fellatio on him.

Lepley was a thirty-two-year-old adult getting drunk and high with a sixteen-year-old boy. Notwithstanding AB's consent, the totality of the circumstances indicates he was unable to "exercise an independent judgment concerning the act of sexual penetration."[22] That contention is supported by AB's testimony that he did not want to have sexual relations with Lepley and that he said yes only because he was drunk and high. It

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[21]Id.

[22]Id. at 58, 825 P.2d at 575.

was unreasonable for Lepley to accept AB's consent because of the influence of alcohol and drugs.

Reasonableness of Lepley's conclusion

As discussed above, Lepley provided AB with alcohol and marijuana. AB testified he was drunk and high while in Lepley's car. It is unreasonable to conclude a minor under the influence of alcohol and marijuana consented to Lepley's sexual advances. This is not to suggest AB did not utter the words "I consent." Despite his utterance, Lepley could not have reasonably thought AB was "in a position to exercise an independent judgment concerning the act of sexual penetration."[23] As this court noted in McNair v. State, "mere gestures of affection should not be construed as invitations to an assault."[24]

While the facts in McNair involved a doctor sexually assaulting his female patients, it is analogous.[25] The court noted that McNair "abused his professional status and trust" in violating his patients.[26] The doctor used examinations "to exploit his unsuspecting and vulnerable patients and gratify his personal sexual desires."[27]

Here, Lepley similarly exploited AB's trust for his own sexual desire. Lepley was a substitute teacher at AB's school. He befriended AB through gifts and phone calls. Then, he provided AB with illegal drugs

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[23]Id.

[24]Id. at 58 n.6, 825 P.2d at 575 n.6.

[25]Id. at 54-55, 825 P.2d at 572-73.

[26]Id. at 59, 825 P.2d at 575.

[27]Id.

and alcohol. When AB felt the full effects of these substances, Lepley began his attack on his unsuspecting prey. Assume, arguendo, AB voluntarily participated. Lepley, as the predator, knew or should have known that AB could not reasonably consent because he was under the influence of substances Lepley provided. Thus, sufficient evidence existed to support the jury's guilty verdict on the sexual assault charge.

District court response to jury question

NRS 175.451 states:

> After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or his counsel.

If the district court fails to notify the parties, but answers the jury correctly, the error is harmless.[28] It is not harmless error, however, if the court incorrectly instructs the jury without notifying the parties.[29] Further, "[t]his court presumes that a jury follows the district court's instructions."[30]

Lepley argues the district court responded incorrectly to a jury question regarding continued deliberation on the sexual assault charge.

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[28]Cavanaugh v. State, 102 Nev. 478, 484, 729 P.2d 481, 485 (1986).

[29]Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 25, 16 P.3d 415, 419 (2001).

[30]Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001).

The district court's answer addressed lesser-included offenses, not separate counts.

The jury wrote a note to the district court asking, "We can't come to a unanimous decision on Count 1. We can come to a unanimous decision on Count 2. If we can't get by the lock on Count 1 does that throw out Count 2[?]" The district court returned a written note stating:

> You need to continue to reach a decision that is unanimous for count 1 (sexual assault) if you can. If you find the defendant not guilty of sexual assault then you should consider count 2 (solicitation). If you find that he is guilty of sexual assault you need not consider the solicitation.

The record is unclear as to whether the district court notified the parties. In Lepley's opening brief, however, he indicates the district court returned the note "without objection." This implies the district court made the parties aware of its actions. Thus, we conclude any error was harmless.

Prior bad acts

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error."[31]

NRS 48.045(2) provides that prior bad acts are admissible only to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In addition, an incident relevant to the crime charged is admissible if proved by clear and convincing evidence, and "the probative value of the evidence is not

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[31]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

substantially outweighed by the danger of unfair prejudice."[32] The district court must conduct a hearing to determine these issues.[33] Failure to conduct a hearing may be grounds for reversal unless the district judge gives a limiting instruction.[34]

This court has concluded that evidence of a defendant's propensity for sexual deviancy is inadmissible to show intent.[35] This evidence is admissible, however, to prove a common plan or scheme or motive.[36] In the instant case, the district court properly held a Petrocelli hearing on testimony concerning three teenagers with whom Lepley had sex after smoking marijuana with them. The district court conducted a Petrocelli hearing as it did with all three witnesses at the first trial.

The first witness, John Doe, testified Lepley provided him with alcohol and marijuana when he was approximately seventeen years old. John Doe met Lepley at the community college. Subsequently, he had both oral and anal sex with Lepley. John Doe testified this would not have occurred but for the influence of drugs and alcohol Lepley provided.

The second witness, David Wiberg, testified about conversations with Lepley regarding Lepley's sexual relationship with a seventeen-year-old boy named CS. Wiberg discussed using marijuana with Lepley and AB after Lepley's relationship with CS ended.

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[32]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[33]Braunstein, 118 Nev. at 72-73, 40 P.3d at 416-17.

[34]Tavares v. State, 117 Nev. 725, 731-32, 30 P.3d 1128, 1132 (2001).

[35]Braunstein, 118 Nev. at 73, 40 P.3d at 418.

[36]Id.

The third witness, CP, was fourteen or fifteen years old when he met Lepley. Lepley offered CP marijuana in the bathroom of a public park area. Lepley put his hand up CP's swimsuit, allegedly to check to see if he was gay. On another occasion, CP helped Lepley with new telephone equipment at Lepley's home. In appreciation, Lepley provided him with more marijuana and attempted to grab CP's penis several times.

The district judge determined all three witnesses could testify, which was consistent with his ruling in the first trial. The district judge stated, "The evidence is clear. It's convincing. It's relevant. The prejudicial value is not outweighed by the probative value. It goes to a lot of the reasons we allow it in, intent, preparation, plan, knowledge, identity, absent mistake or accident, opportunities. I mean, it fits into the statutes perfectly." The district court did not commit manifest error.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Steve E. Evenson
Robert E. Glennen III
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk