

IN THE SUPREME COURT OF THE STATE OF NEVADA

VARIAN NEPHI KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39870

FILED

JAN 27 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction pursuant to a jury verdict for sexual assault. Appellant Varian King was sentenced to life in prison with parole eligibility after ten years. On appeal, King argues the following: (1) two witnesses improperly vouched for the victim, (2) the testimony of the victim's father was inadmissible, (3) the district court erred in admitting evidence of King's prior conduct toward the victim, (4) the district court erred by admitting lay opinion testimony about King's trustworthiness, (5) the district court erred by not allowing King to question the victim about prior rapes, and (6) the district court violated his Sixth Amendment rights by prohibiting questioning about the victim's prior false rape allegations.

FACTS

King was a twenty-three-year-old deputy sheriff with the Nye County Sheriff's Office. He was married with three children. The victim was a sixteen-year-old girl who became King's neighbor only one month before her attack.

King called the victim's home to ask if she could baby-sit his children while he worked in the garage. His wife was out of town at a church function. The victim told King she would be right over.

King returned from the garage shortly after the victim's arrival, presumably because he injured his hand. He inquired about her age and asked if he could kiss her. Both agree the victim asked to think about the question before responding.

According to King, he began to rub the victim's arm and shoulders. This led to him rubbing her breasts. One of his children woke up, interrupting the activities. When he resumed, King began kissing the victim. The victim testified that she told King "it was wrong, umm, and I'm sixteen, I shouldn't be doing that, he's a cop. He's married. Has kids."

King testified he did not recall the victim saying no to him. While removing her shirt, he invited her into the bedroom. King picked her up and took her into the bedroom.

King subsequently penetrated the victim. Quickly, he told the victim he was about to climax and that she should tell him when she was finished. She promptly told him she was finished.

After cleaning up, King asked the victim if the sex was consensual. King testified that the victim responded affirmatively. King attempted to mask their activities with air freshener and candles. The victim returned to the living room to finish watching a movie.

The victim's story diverges from King's at the point of his questioning about a kiss. She testified that she repeatedly told him his behavior was wrong and he should not be acting that way. The victim remained in the home after the alleged assault because she "didn't know what to do." The next morning, the victim confided in a friend about the attack. Subsequently, she told a schoolmate and her aunt. The aunt called the Sheriff's Office and the victim's father.

After conducting an investigation, police arrested King and charged him with sexual assault. At trial, the victim testified about the assault and King's conduct at a party a few weeks earlier where he tried to put his arms around her. King did not object to her testimony.

The district court denied King's request to ask the victim about prior rapes. The victim had testified at a preliminary hearing about five or six prior rapes in the past three years.

The State called Dr. Elizabeth Richitt to testify about the victim's behavior. Richitt, a clinical psychologist, testified that the victim's behavior was consistent with sexual abuse. Although the district court did not allow King to question the victim about prior rapes, Richitt testified that the victim never informed her about prior rapes.

The victim's father, Mark Frye, testified about conversations with King and the victim's childhood. He further testified about speaking with King on the evening of the assault. Frye indicated he spoke to King before giving the telephone to the victim. King denied speaking with Frye.

Detective Jack Hennigan, the investigating officer, testified about his interview with the victim. He stated that "upon completion of the interview, I felt that, uhhh, the allegations that she were [sic] making could possibly be true."

King testified in his own defense. On cross-examination, the State inquired about his departure from the Sheriff's Office. The district court, upon objection, limited the questioning to King's answer that he voluntarily resigned.

Outside the jury's presence, the State sought to introduce Officer Mark Medina's testimony. Medina had an opinion regarding King's truthfulness. After a lengthy hearing that included a rehearsal of

exactly what Medina would say, the district court allowed his testimony. Medina testified that he thought King was "dishonest and not truthful." Medina based his opinion on an administrative investigation involving King's duties as a deputy sheriff.

The district court also conducted a Miller¹ hearing regarding the admissibility of prior false rape allegations by the victim. A police officer who investigated the allegation testified outside the jury's presence that insufficient evidence existed to prosecute.

King demonstrated that the victim had made a prior allegation that was unsubstantiated; however, the district court found the evidence more prejudicial than probative. The victim made the initial allegation when she was eight years old; she was sixteen when King assaulted her. The district court determined the victim's age at the time of the first allegation was too young to be relevant now.

After a three-day trial, a jury convicted King of sexual assault. The district court sentenced King to life imprisonment with parole eligibility after ten 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."² We determine error to be harmless or prejudicial by

¹Miller v. State, 105 Nev. 497, 502, 779 P.2d 87, 90 (1989).

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

evaluating whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."³

King argues the district court committed reversible error when it allowed Hennigan and Richitt to vouch for the victim's credibility. Because the jury is the final arbiter of credibility, this vouching unfairly prejudiced King's trial.

Generally, a defendant must raise a contemporaneous objection at trial to preserve the issue for appellate review.⁴ Despite failing to object, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."⁵

First, King did not object when Hennigan testified that the victim's story "could possibly" be true. As an investigator examining allegations against another officer, his impressions concerning the alleged victim's veracity were relevant and arguably admissible.

Second, King questioned Richitt about the victim's prior rapes despite the State's objection. Richitt also testified, in her expert opinion, about whether the victim's behavior was consistent with sexual abuse. King failed to object to this testimony, which appears to be admissible.⁶

³DeChant 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.

⁴McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

⁵NRS 178.602, quoted in Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

⁶See Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987).

The testimony of these individuals did not constitute plain error. Thus, King's failure to object at trial precludes appellate review. King's substantial rights were unaffected; thus, any error was harmless.

Opinion testimony

A witness can testify to matters in which he has personal knowledge.⁷ NRS 50.025(1)(b) also permits a witness to testify as to his opinion provided that "[h]e states his opinion or inference as an expert." Even lay witnesses may testify about "opinions or inferences which are . . . [r]ationally based on the perception of the witness[] and . . . [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."⁸ Thus, expert testimony in the form of an opinion is admissible even if "it embraces an ultimate issue to be decided by the trier of fact."⁹ Expert testimony regarding a victim's behavior in a sexual assault case is also admissible.¹⁰

King contends that Hennigan's testimony is inadmissible because it concerns the veracity of the victim's statement.¹¹ A witness may not vouch for the testimony of another.¹² Likewise, an expert cannot testify as to the truthfulness of another witness.¹³

⁷NRS 50.025(1)(a).

⁸NRS 50.265.

⁹NRS 50.295.

¹⁰NRS 50.345.

¹¹See DeChant, 116 Nev. at 924, 10 P.3d at 112.

¹²Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998).

¹³Id.

Hennigan conducted an interview of the victim to formulate an opinion as to her veracity. Hennigan testified about his perceptions of the victim when he interviewed her. Specifically, he testified that at the conclusion of the interview, he felt "the allegations that she were [sic] making could possibly be true."

Whether Hennigan is classified as an expert or a layperson, his testimony is admissible. As an expert, his knowledge, skill and experience as a detective investigating crimes would "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁴ As a lay witness, his opinion was "[r]ationally based on [his] perception . . . [and was] [h]elpful to a clear understanding of his testimony or the determination of a fact in issue."¹⁵ As such, the district court properly admitted Hennigan's testimony.

King contends Richitt's testimony exceeded the scope of admissibility regarding child sexual abuse.¹⁶ In Townsend v. State,¹⁷ we concluded that expert testimony is admissible on the issue of whether a victim's behavior is consistent with sexual abuse. The expert may not, however, testify as to the perpetrator of the sexual abuse.¹⁸

Although the expert's opinion addresses an ultimate issue, the truthfulness of the victim, it also "represents both the peculiar expertise

¹⁴NRS 50.275.

¹⁵NRS 50.265.

¹⁶See Townsend, 103 Nev. at 118, 734 P.2d at 708.

¹⁷Id.

¹⁸Id.

and consummate purpose of an expert's analysis."¹⁹ As such, the probative value of the expert testimony far outweighs the prejudicial value.²⁰

Richitt interviewed the victim to determine if the victim's behavior was consistent with being sexually abused. During the interview, Richitt discussed the victim's past as well as the alleged sexual assault. Richitt observed that the victim appeared to fear King because he was a law enforcement officer. Richitt concluded that the victim's behavior was consistent with a child who had been abused.

Richitt's testimony was consistent with both NRS 50.345 and our decision in Townsend. She did not exceed the scope of admissibility because she merely characterized the victim's behavior based upon her interview with the victim. This testimony did not constitute vouching for the victim's credibility. Richitt gave her opinion based upon her expertise and experience, the very purpose of allowing expert testimony.

Testimony by victim's father

NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." This is tempered by the statutory requirement that, even if relevant, evidence that is more prejudicial than probative is inadmissible.²¹

In Lord v. State,²² we held that allowing a relative to testify unnecessarily about immaterial issues solely to arouse sympathy

¹⁹Id.

²⁰Id.

²¹NRS 48.035(1).

²²107 Nev. 28, 33, 806 P.2d 548, 551 (1991).

constituted error. However, testimony of relatives about matters pertinent to the crime charged is admissible.²³

King argues that the testimony of Mark Frye, the victim's father, was irrelevant and offered only to arouse sympathy for the victim. Because the testimony was unnecessary and prejudicial, the district court erred by allowing him to testify.

Here, the only witnesses to the sexual assault were the victim and the accused. At issue is whether the victim consented to the sexual intercourse. Circumstantial evidence relating to how and why the victim went to King's home is material.

When Frye testified, the State did not know if King would testify. The State needed to present circumstantial evidence supporting the victim's story. Evidence that King called to entice the victim to come to his home is material.

Frye testified about his daughter's troubled past and the events immediately preceding the sexual assault. His testimony was relevant on the issue of consent and was not unduly prejudicial. Therefore, the district court properly allowed Frye's testimony.

King's prior conduct

"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."²⁴ "[P]rior acts that are remote in time and involve conduct different from the charged conduct" are usually

²³Id.

²⁴Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

inadmissible.²⁵ "[T]he use of uncharged bad acts is heavily disfavored and is likely to be prejudicial or irrelevant."²⁶ "Thus, using uncharged bad acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal."²⁷

Here, the victim testified King tried to put his arms around her at a party three weeks earlier. This is not too remote in time to be inadmissible. It is relevant to the crime charged. In addition, it is not necessarily a bad act.

King contends he had consensual sexual intercourse with the victim. Evidence of prior contact between the accused and the victim clarifies the issue of consent for the jury. While it may be construed as evidence of his intent to touch the victim inappropriately, it could actually bolster his story of consent. The trier of fact must weigh the credibility of the witnesses in reaching a verdict.

Impeachment by opinion testimony

"NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used. Impeachment on a collateral matter is not allowed."²⁸

²⁵Id. at 73, 40 P.3d at 417.

²⁶Id.

²⁷Id.

²⁸Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000).

"Impeachment consists of attacking a witness's credibility, which depends on that witness's willingness and ability to tell the truth."²⁹

King contends the district court erred by allowing Sergeant Mark Medina to testify as to his opinion of King's veracity and the specific act forming the basis of that opinion. As previously stated, a defendant's failure to object precludes appellate review unless the error affects the defendant's substantial rights.³⁰ Here, King not only failed to object, but also specifically approved the questioning now raised as error.

King testified that he had consensual sexual intercourse with the victim. Since King and the victim were the only witnesses, the trier of fact had to determine the credibility for truthfulness or untruthfulness of both parties as to the issue of consent. During cross-examination, the State questioned King about his separation from the Sheriff's Office. King indicated he voluntarily resigned his position. The district court, upon King's objection, prohibited further questioning on the matter, determining the answers were irrelevant.

To attack King's credibility for truthfulness, the State sought to impeach him with testimony from Medina. After a lengthy discussion outside the jury's presence, Medina testified that in his opinion, King was dishonest and untruthful. The State then questioned Medina about the basis for his opinion. Medina said he based "that opinion on the administrative investigations [he] did involving [King's] matters." In response to the State's next question, Medina said that King "was dishonest and not truthful."

²⁹Id. at 709, 7 P.3d at 440.

³⁰McCullough, 99 Nev. at 74, 657 P.2d at 1158; NRS 178.602.

King contends Medina's opinion testimony was admissible, but that the district court erred in admitting testimony regarding King's alleged prior acts of dishonesty. We agree. However, the error was harmless.

Evidence of prior rapes

NRS 50.090 prohibits an accused from attacking a victim's credibility by presenting evidence of the victim's prior sexual history, subject to exceptions inapplicable here. The purpose of the "rape shield law" is to protect rape victims "from unnecessary indignities and needless probing into their respective sexual histories."³¹

King argues that the district court should have allowed him to cross-examine the victim about her statements made during a preliminary hearing regarding prior rapes. King also contends he should have been permitted to question Richitt, the psychologist, about the victim's statements.

At the preliminary hearing, the victim testified that she had been raped five to six times over the past three years. King sought to ask the victim about the statement at trial and whether it was true. The district court denied King's motion, stating he could ask only about the prior rapes if the State opened the door. The State did not open the door during direct examination of the victim; thus, the district court precluded King from asking about the statement during cross-examination.

The district court properly denied King's motion. The Legislature designed the rape shield created by NRS 50.090 to prohibit

³¹State v. Lemon, 456 A.2d 261, 264 (R.I. 1983), quoted in Johnson v. State, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997).

without harassment and embarrassment stemming from public disclosure of irrelevant evidence concerning their private sexual experiences."³⁷

King asserts the district court's decision during the Miller hearing regarding the falsity of the allegation was improper. The jury should determine all issues of credibility; thus, the district court should have allowed King to question the victim about the prior allegations.

Here, the district court conducted a Miller hearing outside the jury's presence. A police officer from Washington testified regarding an alleged rape when the victim was eight years old. The officer testified that he made a determination that the allegation was false. King argues that satisfies the test set forth in Miller.

However, the district court found that King failed to satisfy the last Miller prong. Specifically, the district court stated that "I think the probative value is, uhhh, not as great as the time – the confusion, the waste of time and the prejudicial value of the thing." The district court did not abuse its discretion in finding the remoteness in time between the first allegation and the current charge was dispositive. The first allegation occurred when the victim was eight years old; the victim was sixteen when King assaulted her.

The district court's decision also did not violate the defendant's Sixth Amendment rights. "The Constitution guarantees a fair trial, not necessarily a perfect one."³⁸ While a defendant has the right to confront witnesses against him, the threshold question is always whether

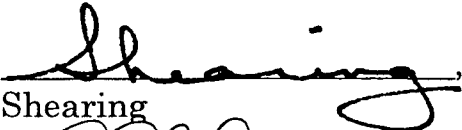
³⁷Id. at 167, 807 P.2d at 1381.


³⁸Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

the evidence is relevant.³⁹ This evidence was not relevant to the charge against King.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing, C. J.


Gibbons, J.

cc: Hon. John P. Davis, District Judge
Rick Lawton
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk

³⁹Brown, 107 Nev. at 168, 807 P.2d at 1382.

BECKER, J., concurring in part and dissenting in part:

I concur with the majority in all but two points; the admission of evidence of prior rapes, and the admission of evidence regarding a prior false allegation of rape. Because I conclude the district court erred in refusing to admit this evidence and the error is not harmless beyond a reasonable doubt, I would reverse and remand for a new trial.

As noted by the majority, during the preliminary hearing, the victim stated she had been raped five to six times by persons unrelated to this case in the three years prior to the charged incident. King wished to question the victim about this statement at trial and use the preliminary hearing transcript to impeach her if she denied the statement. King wished to use the evidence to attack the victim's character. King also desired to demonstrate that the victim had been previously raped, never reported those incidents, and therefore it was more likely that the sex in this case was consensual. The district court did not abuse its discretion in initially finding that the probative value of the evidence was outweighed by its prejudicial effect in light of the considerations of the rape shield law.

Subsequent to this ruling, Dr. Elizabeth Richitt was called as an expert witness by the State. She indicated that she believed the victim's profile and conduct were consistent with someone who was subjected to sexual abuse. Dr. Richitt indicated that the victim had told her that she had been abused once before when she was eight years old. On cross-examination, King sought to ask Dr. Richitt if her conclusion might change if the victim had been raped several times in the last few years. The State objected.

In a hearing outside the presence of the jury, King indicated that because Richitt opined that the victim's demeanor was consistent

with sexual abuse and that the eight year old incident would not produce the affects Richitt observed, King was now entitled to ask her if her opinion would change if she knew that the victim stated she had been raped several more times in recent years. King also indicated that he should be able to now use the preliminary hearing testimony to establish that the victim had in fact been previously raped. The district court permitted King to cross-examine Richitt but did not allow the admission of the preliminary hearing testimony. Thus, the jury heard that such evidence could affect Richitt's opinion, but did not know that such evidence actually existed.

I conclude that the evidence was important to Richitt's opinion and that the district court erred in not permitting cross-examination of the victim on this issue or the admission of the preliminary hearing transcript.

Dr. Richitt's testimony is also implicated in the second issue of error. The eight year old incident that Dr. Richitt referred to in her testimony was the subject of the Miller¹ hearing. The district court expressed its belief that King had met the burden of proving that the previous allegation was false, but felt that the allegation was more prejudicial than probative due to its age. However, in light of Dr. Richitt's testimony, King should have been permitted to introduce evidence that the allegation was false. This information, together with the prior unreported rapes, is important to King's arguments attacking the validity of Dr. Richitt's opinon.

¹Miller v. State, 105 Nev. 497, 779 P. 2d 87 (1989).

Finally, because Dr Richitt's testimony is a key piece of corroborative evidence, I cannot conclude that the errors were harmless. For these reasons, I would reverse the judgment of the district court and remand for a new trial.

Becker, J.
Becker