IN THE SUPREME COURT OF THE STATE OF NEVADA

CURT BURRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40025

FILED

FEB 18 2004

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 sexual assault. The district court sentenced appellant Curtis Lavelle Burris to serve a prison term of life imprisonment with the possibility of parole after 120 months.

Burris contends that the district court abused its discretion in allowing the State to present prior bad act evidence. The State introduced evidence that the police found a glass pipe in Burris's apartment and referred to Burris's prior drug use in closing argument. We disagree with Burris's contention.

During Burris's opening statement, his counsel repeatedly mentioned that Burris had previously used drugs. Burris's counsel also repeatedly questioned his witnesses about Burris's drug use during Burris's case-in-chief.

We conclude that Burris opened the door for the State to present evidence regarding Burris's drug use when Burris's attorney mentioned Burris's drug use during his opening statement. This court has noted that "once appellant himself opened the door, the evidence was properly admitted."[1] Therefore, the district court did not err in admitting

[1]Taylor v. State, 109 Nev. 849, 861, 858 P.2d 843, 851 (1993) (Shearing, J., concurring in part and dissenting in part); see also Wesley v. State, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996) (holding that defense

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this evidence. We also conclude that the district court did not err in failing to conduct an evidentiary hearing, because Burris himself opened the door to this evidence during his opening statement.

Burris also contends that the district court erred in refusing to read to the jury Burris's proposed jury instruction A. The proposed jury instruction provides:

> The crime of sexual assault is rarely perpetrated in the presence of witnesses other than the defendant and the victim. Thus the presence or absence of other evidence which would support or refute the testimony of the involved parties has the potential for great significance.

Burris argues that because he and the victim, Dawn Hoffman, were the only witnesses to the sexual assault, the instruction was necessary for Burris to receive a fair trial. Burris also contends that this instruction was necessary and consistent with his argument that the sexual contact was consensual.

In Williams v. State, this court noted that "[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it."[2] However, in Geary v. State, this court noted, "a criminal defendant is not entitled to an instruction which incorrectly

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. . . *continued*
counsel opened the door to the prosecutor's questions on cross-examination).

[2]99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

states the law."[3] Burris asserts that the proposed instruction is a correct statement of law because the instruction was taken from Cook v. State.[4]

The instruction used in Cook has no application to the facts here. In Cook, this court held that the defendant's due process rights had been violated because the police lost a significant amount of potential exculpatory evidence.[5] In making that determination, this court used similar language to Burris's proposed jury instruction A.[6] Unlike in Cook, Burris does not claim that the police lost any potential exculpatory evidence. Burris also offered no evidence to support his defense theory. Therefore, we conclude that the district court did not err in excluding this instruction.

Because Hoffman's testimony was inconsistent with her statements to police, the State introduced the testimony of the police officer who spoke to her after responding to her call. Burris asserts that Officer Ron Russo's testimony regarding Hoffman's out-of-court statements did not fall under the excited utterance exception to the hearsay rule, as the district court found. NRS 51.095 provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." "A district court's

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[3]110 Nev. 261, 265, 871 P.2d 927, 929 (1994).

[4]114 Nev. 120, 953 P.2d 712 (1998).

[5]Id. at 125-26, 953 P.2d at 715-16.

[6]Id. at 126, 953 P.2d at 716.

decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong."[7]

Officer Russo testified that when he interviewed Hoffman she told him that Burris was acting "weird and funny and it made her nervous, so she tried to flee." Officer Russo also testified that Hoffman told him that when she tried to leave the apartment, Burris "grabbed her and brought her back into the apartment, produced a handgun and stated that that was a mistake for her, the worst mistake of her life, . . . and proceeded to rape her." When Burris's attorney objected to this testimony as hearsay, Russo testified that Hoffman was still "[s]haking slightly, her face was red from crying, and she was a little bit ex[c]ited." Russo also testified that this conversation took place around ten to twelve minutes after Hoffman had called the police. Based on this testimony, the court held that the statements were an excited utterance. The district court did not abuse its discretion.

Having reviewed Burris's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, C. J.
Shearing

_____, J.
Becker

_____, J.
Gibbons

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

cc: Hon. Donald M. Mosley, District Judge
Robert M. Draskovich, Chtd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
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