IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD BLANKENSHIP, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40490

FILED

MAY 05 2004

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. The jury found appellant Donald Blankenship, Jr., guilty of three counts of sexual assault on a child under the age of fourteen. The district court sentenced Donald to three concurrent life sentences with the possibility of parole after twenty years.

Donald and his former wife, Cynthia L., had three children: L.B., D.B., and G.B. In 2002 at the time of trial, L.B. was eighteen years old, D.B. was fifteen years old, and G.B. was thirteen years old. In 1996, the family moved from Washington to Lyon County, Nevada, where they lived in a tent for about a month. L.B. alleged that Donald sexually assaulted her on three specific occasions from the time she was twelve years old. All family members corroborated the places they lived and the times they lived there.

L.B. testified that the first incident of abuse occurred when the family lived in a tent. L.B. testified that Donald made her perform oral sex on him and she provided additional details of the incident. L.B. was twelve years old when this incident occurred.

After living in a tent, the family moved to Mobile Village in Yerington and lived in a trailer. While living in the trailer, the second sexual assault occurred. L.B. testified that Donald made her have sex

with him. L.B. stated that her sister was reading a book and her brother was playing with clay when the assault occurred.

After living in the trailer, Cynthia and Donald divorced. Cynthia and the children lived in a two-bedroom apartment in Yerington, and Donald lived in a recreational vehicle (RV) outside the apartment. L.B. testified that while they were living in the apartment, Donald sexually assaulted her for the third time. L.B. was thirteen years old when this assault occurred. She testified that her mom was at work and her brother and sister were at school. L.B. stayed home from school that day. L.B. testified that Donald had sex with her in the RV.

During her freshman year of high school when L.B. was fourteen years old, she met with Child Protective Services (CPS) because they received an anonymous report that she had been sexually abused. L.B. denied the abuse allegations because she thought that if she told CPS about the abuse, they would remove her from her home. She denied the allegations also because she felt embarrassed and uncomfortable.

L.B. finally reported Donald to CPS and spoke with Sevana Newman. Newman, a CPS social worker with twenty years of experience, investigated L.B.'s allegations against Donald. L.B. later told Officer Spinuzzi, the police officer who investigated L.B.'s allegations, that Donald sexually abused her. Based on her training and experience, Newman testified that it is not uncommon for victims of sexual abuse to deny the allegations. Defense counsel questioned Newman about the 1999 CPS report from school stating that "[L.B.] presents as an articulate 15-year-old who is able to determine the appropriateness of relationships." At that time, the CPS social worker thought that L.B. was comfortable with

confiding in her. The CPS report also revealed that Cynthia felt that Donald was not capable of sexual abuse.

D.B., L.B.'s sister, said that she did not believe that Donald had molested L.B. D.B. stated that L.B. was not an honest person. D.B. never saw any sexual abuse between Donald and L.B. D.B. testified that if Donald and L.B. had had sex around Christmastime, she would have noticed it. She also testified that there was never any sexual conduct between herself and Donald.

G.B., L.B.'s brother, testified that he never saw sexual contact between Donald and L.B. Donald never touched G.B. inappropriately either. G.B. stated that the reason he and Donald left town during the summer of 2001 was because rumors got around and Donald could not get a job. G.B. agreed with his sister, D.B., that L.B. is not honest and can lie. G.B. also testified that if L.B. and Donald had sexual contact, he would have known it happened.

After L.B. reported the sexual assault to CPS, Officer Spinuzzi and Newman interviewed her. During the interview, L.B. told Officer Spinuzzi about the sexual abuse allegations. After the interview, Officer Spinuzzi went to the canyon area to investigate L.B.'s allegations. He also confirmed that the family lived where the first incident of abuse allegedly occurred. On June 12, 2001, Officer Spinuzzi interviewed Donald with D.B. and G.B. present. In another interview, Officer Spinuzzi confronted Donald about leaving town and Donald indicated that he was considering it. Defense counsel also questioned Officer Spinuzzi regarding Donald's move during the investigation.

In July 2001, G.B. and Donald moved from Nevada to Texas and then to Tennessee. They left early in the morning, and G.B. did not

say goodbye to his mother or sisters. Cynthia testified that it was unusual for G.B. not to say goodbye. Cynthia next heard from G.B. when the police had him in custody in Tennessee. Donald never told Cynthia that they were going to Tennessee.

The police arrested Donald while he was in Tennessee with G.B. On May 13, 2002, the district court arraigned Donald on the charges in the information. After a three-day trial, the jury found Donald guilty on all three counts of sexual assault on a child under the age of fourteen. The court sentenced Donald to three concurrent life sentences with the possibility of parole after twenty years. Donald now appeals the jury's verdict alleging that the district court erred by (1) admitting evidence of prior bad acts or uncharged misconduct; (2) admitting evidence of Donald's flight; (3) admitting improper remarks to incite the jury; (4) admitting testimony to improperly vouch for the victim's credibility; and (5) failing to address Donald's concerns about his lawyer's competence.

Prior bad acts evidence

Donald argues that the district court erred by admitting evidence of his prior bad acts of uncharged misconduct. We disagree.

NRS 48.045 prohibits the admission of other crimes, wrongs or acts to prove a defendant acted in conformity with his character; however, we conclude that the uncharged misconduct was either not admitted into evidence or was solicited by defense counsel during cross-examination. Therefore, no violations of NRS 48.045 occurred.

Cross-examination of L.B.

When defense counsel cross-examined L.B. about an alleged incident of sexual intercourse with Donald, he asked, "Did it hurt?" L.B. answered, "Not at this point. It happened before." Defense counsel

promptly objected and the judge held a bench conference. The judge immediately instructed the jury to disregard the statement that "it happened before." This court has held that "[t]here is a presumption that jurors follow jury instructions."[1] Therefore, the statement was not part of the record which the jury could rely upon.

Sevana Newman's statement

The prosecution called Newman to testify about her investigation of the case. On direct examination, Newman testified that L.B. told her that "she had been having sexual relationships with her father since the time she was 11 years old until she was 16." Defense counsel promptly objected, and the judge instructed the jury to disregard that statement. As noted above, "[t]here is a presumption that jurors follow jury instructions."[2] Because the district court immediately instructed the jury to disregard the statement, Donald's argument lacks merit.

Officer Spinuzzi's statement

Defense counsel cross-examined Officer Spinuzzi about a conversation he had with Donald. Defense counsel asked Officer Spinuzzi if Spinuzzi took Donald's gun. Officer Spinuzzi answered, "Yes, sir." Defense counsel then asked Officer Spinuzzi why he took his gun. Officer Spinuzzi answered that Donald had a criminal history of armed assaults and he wanted the gun for safekeeping. Defense counsel continued to ask questions about Donald's prior criminal history, including whether Donald had a prior felony and whether he had been in jail.

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

[2]Id.

Donald's counsel opened the door to Officer Spinuzzi's testimony when, on cross examination, Donald's counsel questioned Officer Spinuzzi about Donald's gun and his prior criminal history. Therefore, the district court did not err by admitting Officer Spinuzzi's statements.

Flight evidence

Donald argues that the district court erred when it (1) failed to conduct a hearing regarding evidence of his flight and (2) admitted the flight evidence. He asserts that it was error because the prosecution commented and placed emphasis on his flight during closing argument. We disagree.

We have held that flight evidence is circumstantial evidence that a jury can consider to determine guilt.[3] "'Flight' signifies something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding arrest."[4] We have stated that flight evidence

> is conceivably relevant so long as the evidence shows the existence of an actual plan and that this plan is undertaken with a consciousness of guilt. Specifically, where an accused plans to flee the jurisdiction after committing a crime and takes overt steps toward completing this goal without actually fleeing, an instruction regarding the defendant's actions might be appropriate.[5]

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[3]Maresca v. State, 103 Nev. 669, 674, 748 P.2d 3, 6-7 (1987).

[4]State v. Rothrock, 45 Nev. 214, 229, 200 P. 525, 529 (1921).

[5]Tavares v. State, 117 Nev. 725,734-35, 30 P.3d 1128, 1134 (2001).

The prosecutor orally moved the district court to admit evidence that Donald fled the state while under investigation. The district court conducted a hearing prior to the trial regarding the admissibility of Donald's flight and found that this evidence was relevant and admissible.

At the trial, Officer Spinuzzi testified that Donald told him that he was considering leaving the area. The jury could infer that Donald not only planned to flee, but he did flee when he knew he was under investigation. The record indicates that Officer Spinuzzi spoke with Donald three to four times about the instant case before Donald fled. Donald told Cynthia that he and G.B. were going to Texas; however, they went to Tennessee. G.B. also did not speak with his mother the entire time they were gone. Because this information is relevant as circumstantial evidence of guilt, we conclude that the district court did not abuse its discretion by admitting the flight evidence.

When the State requested a flight jury instruction, the district court refused. The district court abused its discretion by not giving the flight instruction. However, the error was harmless since Donald was not prejudiced by the failure of the district court to instruct the jury regarding flight.

Statements made to incite the jury

Donald argues that the prosecutor made two improper comments in opening statement and made them only to incite the jury. We inquire "whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[6] "The statements should be considered in context, and 'a criminal conviction is

[6]Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002).

not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[7] We have held that "'the failure to make timely objections [to prosecutorial misconduct] and to seek corrective instructions during trial [precludes appellate consideration].'"[8] However, we will also consider "sua sponte plain error which affects the defendant's substantial rights, if the error either: '(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.'"[9]

The first statement was made in the prosecutor's opening statement. He stated, "This man is a child molester. This case is about a defendant who sexually assaulted and abused his own daughter." Improper comments include stating the prosecutor's beliefs or attempting to incite the jury.[10] Defense counsel did not object to this statement. In the instant case, that one comment at the beginning of the trial is not synonymous with calling Donald names, attempting to incite the jury or stating the prosecutor's beliefs.[11] Allowing the statement is not plain error because it did not have a prejudicial impact on the verdict when viewed in the context of the whole trial.[12] Additionally, the district court specifically

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[7]Id. (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[8]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998)).

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

[10]Shannon v. State, 105 Nev. 782, 789, 783 P.2d 942, 946 (1989).

[11]Id.

[12]Id.

instructed the jury that "[s]tatements and argument of counsel are not evidence." Because opening statements are not evidence and defense counsel failed to object to the statement,[13] Donald's argument lacks merit.

The second statement was made during the cross-examination of Officer Spinuzzi. Defense counsel asked:

> Q. Are you saying that [D.B.] was somehow hiding information from you?
>
> A. I'm saying that in a case like this, it's extremely complex. And when you're talking about these types of allegations, it's very normal, especially for a girl child, to protect her father.
>
> Q. So you are saying that [D.B.] was molested, too? I'm curious about where this conversation is going.
>
> A. I'm saying based upon the investigation and all the events leading to the lifestyle and so on, that it's entirely possible.

These statements were made in response the defense attorney's cross-examination. The questions were not asked by the prosecutor and were not made by Officer Spinuzzi to incite the jury. Additionally, Donald's attorney did not move to strike these statements. We conclude the statements do not amount to prosecutorial misconduct.

Vouching for a witness' credibility

Donald contends that three witnesses improperly vouched for L.B.'s credibility. We disagree.

In Marvelle v. State,[14] we held that "[i]t has long been the general rule that it is improper for one witness to vouch for the testimony

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[13]Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000).

of another." The rationale behind this rule is that the jury is charged with resolving the factual issues, judging the witnesses' credibility and ultimately determining whether the accused is guilty or innocent.[15] Therefore, one witness may not vouch for the credibility of another witness or a victim.

Sevana Newman's testimony

On direct examination, the prosecutor questioned Newman regarding the first investigation of sexual assault. During that investigation, L.B. denied that any sexual abuse occurred. The prosecution questioned Newman regarding her twenty years of experience as a social worker and whether it was common for victims of sexual abuse to deny the abuse. Defense counsel promptly objected for lack of foundation. The court sustained the objection and allowed the prosecutor to lay a foundation. After the prosecutor laid a foundation, Newman testified that based on her work experience and training, it was common for victims of sexual abuse to deny the abuse. Newman further testified that it is common for victims to delay reporting sexual abuse as well. Defense counsel did not object to the subsequent questions of the prosecutor.

Donald relies on Lickey v. State[16] in support of his argument that Newman vouched for L.B.'s credibility. A jury convicted Lickey of

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. . . continued

[14]114 Nev. 921, 931, 966 P.2d 151, 157 (1998) (abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000)).

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

[16]108 Nev. 191, 827 P.2d 824 (1992).

sexual assault on a child under the age of fourteen. On appeal, we granted Lickey a new trial and also held that "it is error to permit the State to have a psychologist testify as to the veracity of a victim."[17] We further stated that "it was improper for an expert to comment directly on whether the victim's [trial] testimony was truthful, because that would invade the prerogative of the jury."[18] We conclude that the facts are distinguishable.

In Lickey, the State's expert actually opined that the victim was truthful as a witness.[19] In the instant case, Newman did not testify as to the veracity of L.B.'s trial testimony. Newman testified regarding whether victims of abuse deny the abuse and delay reporting it, based upon her experience as a social worker. During direct examination, Newman never mentioned L.B.'s trial testimony. Because Newman did not testify or comment about L.B.'s trial testimony, Newman did not vouch for her credibility. Therefore, Donald's argument that Newman vouched for L.B.'s credibility lacks merit.

Kathleen Milbeck's testimony

The district court recognized Kathleen Milbeck as an expert witness in child sexual abuse. Milbeck met with L.B. in October 2001 to discuss the allegations. The prosecutor questioned Milbeck if she had an opinion on whether L.B.'s behavior was consistent with the behavior of a sexual abuse victim. Milbeck answered affirmatively and testified that L.B. met the criteria of being a sexual abuse victim. Milbeck also

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[17]Id. at 196, 827 P.2d at 826.

[18]Id. at 196, 827 P.2d at 827.

[19]Id. at 194, 827 P.2d at 825.

explained why she considered L.B. a victim. Defense counsel did not object to Milbeck's opinion.

During Milbeck's meeting with L.B., Milbeck would change certain minor details about her story to see if L.B. would correct her. Milbeck also testified that she checked L.B.'s statements to verify that they were consistent over time. In Milbeck's professional opinion, the fact that L.B.'s statements were consistent over time was an indication that she was a sexual abuse victim. Milbeck did not testify regarding the veracity of L.B.'s testimony. Milbeck never testified whether L.B. was telling the truth or lying on the witness stand. Milbeck testified only about her meeting with L.B. in 2001 and that, in general, abuse victims sometimes deny the abuse and delay reporting it. During direct examination, Milbeck never mentioned L.B.'s trial testimony. Because Milbeck did not testify or comment about L.B.'s testimony, she did not vouch for L.B.'s credibility.

Officer Spinuzzi's testimony

Officer Spinuzzi specifically referred to L.B.'s truthfulness in his testimony. Officer Spinuzzi testified:

> Because of the serious nature of the crimes, to be real honest with you, I tried as hard to prove that [L.B.] was lying as I did on any other aspect, investigation of this case. She was 16 years old. It was possible she could have made up the story for some reason. And if that were the case, I needed to bring that out.

Officer Spinuzzi proceeded to vouch for L.B.'s truthfulness. However, defense counsel did not object to Spinuzzi's testimony regarding L.B.'s veracity. Failure to object during the trial precludes appellate review.[20]

Ineffective assistance of counsel

Donald argues that the district court failed to address his concerns about his attorney's competence. We conclude that this argument is premature.

We have concluded "that the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief."[21] In opening statements, defense counsel stated, "By pleading guilty, Donald has denied that he did this." The district court promptly interrupted defense counsel and said, "By pleading not guilty." Donald's counsel then clarified himself, stating, "By pleading not guilty, Your Honor, I mean." Outside the presence of the jury, Donald told the trial judge:

> The Defendant: Thank you, Your Honor. I have concerns about my defense, Your Honor. I don't know whether I'm being adequately defended. And this is for my life.
>
> The Court: And what seems –
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> The Defendant: I don't believe that my attorney is prepared and understands fully the case he's prepping here. And yesterday when he addressed the Court – or the jury, he turned to me and said, and my client pleads guilty to these charges.

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[20]Cordova, 116 Nev. at 666, 6 P.3d at 482.

[21]Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981).

> Now, I'm sure that that was just a misunderstanding, or a misspoken word. But to the jury, I wonder how many ears were closed because of that. And I'm not happy.

The trial judge responded that he corrected the misstatement at that time and also agreed to restate to the jury that Donald pleaded not guilty. The district court found that the statement of defense counsel was harmless beyond a reasonable doubt.

Donald then told the judge that his attorney was not prepared and did not understand his arguments. The district court found that defense counsel provided Donald with adequate representation. Then the court instructed Donald to mention any other concerns Donald had with his attorney and the court would address them.

During closing arguments, Donald's counsel reiterated that "[w]hen my client, Donald [B.], entered a plea of not guilty, he denied each and every one of these things. Everything that happened, he denied it. And for a good reason, because it didn't happen."

The district court took time on the record to address Donald's concerns about his counsel. The district court informed Donald that it corrected defense counsel's misstatement and then reinstructed the jury that he pleaded not guilty. The district court did not err because it specifically addressed Donald's concerns about his counsel and instructed Donald to bring up any other problems. Donald's ineffective assistance of

counsel argument is premature and can be asserted in his pursuit of post-conviction relief.[22] We therefore,

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Archie E. Blake, District Judge
Rick Lawton
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk

[22]Id.