IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS ASHLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40717

FILED

MAR 04 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted sexual assault of a minor under sixteen years of age. Appellant Nicholas Ashley was sentenced to a maximum term of 96 months in prison.

Testimony at trial indicated Ashley, who was nineteen, attempted to sexually assault the fourteen-year-old victim at a party. The victim was intoxicated and lying unconscious on the bathroom floor of a house where she was attending a party. She awoke at one point to discover her clothes were pulled down around her ankles and that Ashley was poised above her. The victim testified that Ashley penetrated her. Later in the same night, three witnesses entered the bathroom and discovered Ashley lying next to the victim underneath a blanket. Both Ashley and the victim were naked from the waist down. A subsequent sexual assault examination of the victim revealed vaginal injuries.

Ashley appeals his conviction, alleging that the district court abused its discretion by refusing to instruct the jury on open or gross lewdness. Ashley claims the district court should have instructed the jury on open or gross lewdness as a lesser-included offense of sexual assault. The district court's rejection of a proffered jury instruction is reviewed for



04-04065

an abuse of discretion.[1] The test to determine whether an offense is a lesser-included offense of another was declared in Barton v. State,[2] where this court expressly adopted the elements test[3] of Blockburger v. United States[4] and Lisby v. State.[5] An offense is lesser included when in order to be convicted of the greater offense, the lesser offense had to have been committed.[6] "The test is met when all of the elements of the lesser offense are included in the elements of the greater offense."[7]

In Peck v. State,[8] this court concluded that open or gross lewdness is a lesser related, not a lesser included, offense of sexual assault. Sexual assault requires proof that the defendant penetrated the victim,[9] which is not required of open or gross lewdness. On the other hand, open or gross lewdness requires a public act,[10] which is not required of sexual assault. We also overruled Moore v. State[11] and concluded that

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[1]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[2]117 Nev. 686, 30 P.3d 1103 (2001).

[3]Id. at 694, 30 P.3d at 1108.

[4]284 U.S. 299 (1932).

[5]82 Nev. 183, 414 P.2d 592 (1966).

[6]Barton, 117 Nev. at 690, 30 P.3d at 1106.

[7]Id.

[8]116 Nev. 840, 7 P.3d 470 (2000).

[9]See NRS 200.366.

[10]Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993).

[11]105 Nev. 378, 776 P.2d 1235 (1989).

district courts were no longer required to give lesser-related instructions. Therefore, the district court did not abuse its discretion by refusing to offer Ashley's proposed instruction on the lesser-related offense of open or gross lewdness.[12]

Next, Ashley contends that the district court abused its discretion by refusing to grant his motion for a mistrial. Ashley claims a mistrial was warranted because of prosecutorial misconduct. In Lopez v. State,[13] this court "concluded that the trial court did not err in denying a defense motion for mistrial where there was no evidence of suppression or that the State intentionally withheld information from the defense."[14] Ashley alleges the prosecution agreed before trial to limit the scope of Marie Norberg's testimony and that the prosecution exceeded the scope of this agreement during trial. The record does not reflect the terms of any agreement between defense counsel and the State. Failure to properly preserve an issue before the district court precludes appellate review.[15] Accordingly, on review, Ashley has failed to demonstrate error.

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[12]Peck, 116 Nev. at 845, 7 P.3d at 473. Additionally, we note that Ashley's proposed instruction defining open or gross lewdness is not a correct statement of the law. The instruction incorrectly states that an element of open or gross lewdness is that the "act was committed with the specific intent to arouse, appeal to or gratify the lust, passions or sexual desires of such person or of the child." Open or gross lewdness does not require proof of this element. See Young, 109 Nev. at 215, 849 P.2d at 343.

[13]105 Nev. 68, 769 P.2d 1276 (1989).

[14]Tinch v. State, 113 Nev. 1170, 1175, 946 P.2d 1061, 1064 (1997) (discussing Lopez, 105 Nev. at 79, 769 P.2d at 1283).

[15]Bridger v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000); McKenna v. State, 114 Nev. 1044, 1053, 968 P.2d 739, 745 (1998).

Ashley also claims a mistrial was warranted because the prosecution solicited expert testimony from Norberg despite its failure to notice Norberg as an expert. Norberg has specialized knowledge from her experiences as a registered nurse and her training as a sexual assault examiner, which she used to assist the jury to understand the significance of the victim's vaginal injuries. The district court found,[16] and we agree, that Norberg did give expert testimony.

Pursuant to NRS 174.295(2), if a party fails to give adequate notice of expert testimony, "the court may . . . grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." Where the State's noncompliance with a discovery rule is inadvertent and the court takes appropriate action to protect the defendant against prejudice, the error does not justify dismissal of the case.[17]

Here, the district court granted a recess so that the defense could contact John Oakes, an attorney familiar with sexual assault cases. The district court also offered a continuance until Oakes would be available to assist at the trial. Additionally, the district court offered the jury an instruction reading, "[a] witness not qualified as an expert may not express an opinion on the issue as to whether a sexual assault has occurred." We conclude that the district court did not abuse its discretion

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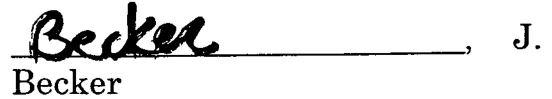
[16]See NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.").

[17]State v. Tapia, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992).

in refusing to grant Ashley a mistrial because the district court offered sufficient corrective actions to remedy any prejudice that Ashley may have suffered from the State's failure to notice Norberg as an expert. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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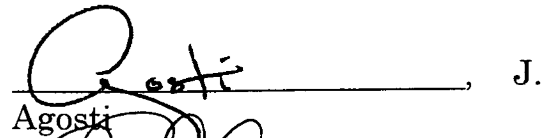
Becker



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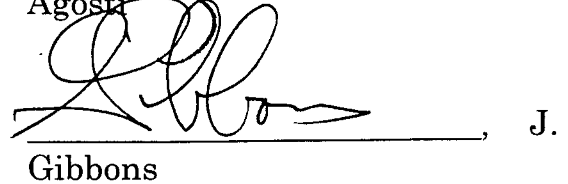

_______________, J.
Gibbons

cc: Hon. David A. Huff, District Judge
Larry K. Dunn & Associates
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk