

IN THE SUPREME COURT OF THE STATE OF NEVADA

GORDON EDWARD WEAVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40761

FILED

APR 08 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Rubade*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with intent to commit sexual assault (count I), one count of gross misdemeanor false imprisonment (count II), and three counts of sexual assault (counts III-V). The district court sentenced appellant Gordon Edward Weaver to serve a prison term of 72 to 180 months for count I, a concurrent jail term of 1 year for count II, and two consecutive prison terms and one concurrent prison term of life with parole eligibility in 10 years for counts III-V.

Weaver contends that the district court erred in admitting jailhouse informant Craig Gonzales's testimony that Weaver had attempted to hire him to kill the trial witnesses. Weaver contends that Gonzales's testimony was irrelevant and unduly prejudicial because Weaver knew Gonzales would not be released from prison before trial and, therefore, Weaver's request did not show consciousness of guilt, but instead only showed his "thoughts about what he would do to the witnesses after he beat the case." We conclude that Weaver's contention lacks merit.

The district court has considerable discretion in determining the relevance and admissibility of evidence.¹ Threats to witnesses "made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence, or tend to establish intent may be admissible."² In this case, after conducting a Petrocelli³ hearing, the district court admitted Gonzales's testimony that Weaver attempted to hire him to harm the trial witnesses because it found that the evidence was both relevant to show consciousness of guilt and not unduly prejudicial pursuant to NRS 48.035. After reviewing the record on appeal, we conclude that the district court did abuse its discretion in admitting Gonzales's testimony.

Weaver next contends that Police Officer Terry Miller impermissibly vouched for the veracity of the victim-witness. Relying upon two Alaska cases, Weaver contends that the improper vouching in this case was particularly prejudicial, thereby warranting reversal of his conviction, because the witness doing the vouching was a police officer.⁴ We conclude that Weaver's contention lacks merit.

At trial, the prosecutor asked Officer Miller: "Now, based on giving [the victim] a [preliminary breath test] did you come to some opinion as to her ability to communicate with you about the use of alcohol that she consumed." Officer Miller responded:

¹See Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992).

²Abram v. State, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145 (1979).

³Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁴Sakeagak v. State, 952 P.2d 278 (Alaska Ct. App. 1998); Flynn v. State, 847 P.2d 1073 (Alaska Ct. App. 1993).

The information she was giving me, like I said, it was very confusing and I was trying my hardest to piece it together. I did believe that she had been sexually assaulted somehow and also that there had been a battery domestic that had occurred there. The time frames she was giving me . . . I am not positive that was the sequence of events. But, by the things that she was stating, I believe there was a sexual assault that had been committed.

Defense counsel did not object to Officer Miller's testimony.

This court has previously held that "it is improper for one witness to vouch for the testimony of another."⁵ The error, however, is subject to a harmless error analysis.⁶ Even assuming Officer Miller improperly vouched for the victim, we conclude that the error was harmless beyond a reasonable doubt in light of the fact that trial counsel did not object, the testimony was unsolicited, and there was overwhelming evidence of Weaver's guilt, including eyewitness testimony and circumstantial evidence.

Finally, Weaver contends that the prosecutor engaged in prejudicial misconduct in her closing argument by vouching for Gonzales. In particular, Weaver notes that the prosecutor argued that Gonzales was "telling the truth" and that his testimony was "reliable."

As a preliminary matter, we note that Weaver failed to object to the alleged instance of prosecutorial misconduct. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review

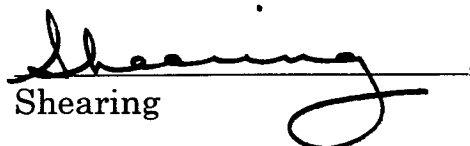
⁵Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

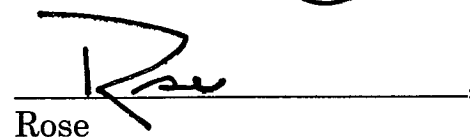
⁶See Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

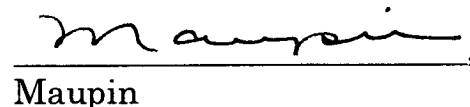
absent plain or constitutional error.⁷ After considering the challenged comments in context, we conclude that the prosecutor's remarks did not rise to the level of improper argument that would justify overturning Weaver's conviction.⁸

Having considered Weaver's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, C. J.
Shearing


_____, J.
Rose


_____, J.
Maupin

cc: Hon. Jerome Polaha, District Judge
John P. Calvert
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁷Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

⁸See Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002); Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).