

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSSIE GASTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42019

FILED

MAR 01 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one felony count each of pandering and attempting to live from the earnings of a prostitute. The district court sentenced appellant Ossie Gaston to serve two concurrent prison terms of 12-36 months.

First, Gaston contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of attempting to live from the earnings of a prostitute. Gaston argues that the State failed to present evidence regarding the required "without consideration" element of NRS 201.320(1).¹ We disagree with Gaston's contention.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.² Gaston testified at trial that on the night in question, he was

¹NRS 201.320(1) states that "[a] person who knowingly accepts, receives, levies or appropriates any money or other valuable thing, without consideration, from the proceeds of any prostitute, is guilty of [living from the earnings of a prostitute]." Emphasis added.

²See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

walking home after losing all of his money at a casino when he stopped to rest at a bus stop and met the victim. Gaston claims that he had never met the victim before that night. Shortly thereafter, while Gaston was making a telephone call, he saw the victim get into a vehicle, and she asked if Gaston also wanted a ride. At that point, as he attempted to get into the backseat of the vehicle, he was arrested.

The police officers who testified at trial contradicted Gaston's account of events. Detective Steve Digiulo of the Las Vegas Metropolitan Police Department, assigned to the vice squad, testified that he spotted Gaston and the victim walking together approximately 5-10 feet apart, with the victim in front, in an area known to be frequented by prostitutes. The two were engaged in conversation. The detective explained that "[i]t's commonly known amongst vice officers that prostitutes will often have a pimp who is standing near in the vicinity, possibly following the girl, coaching her how to work, encouraging her to work, and trying to get them to go out and make some money."

Detective Jason McCarthy of the vice-narcotics squad testified that he drove his car up to the sidewalk and Gaston approached the open passenger-side window. Detective McCarthy asked Gaston if the victim was "his girl," to which Gaston responded affirmatively. Detective McCarthy told Gaston that he was interested in the victim performing fellatio on him, and Gaston stated that it would cost the detective \$40.00. The victim "was crying a little bit . . . she didn't really want to be there," but Gaston pulled her towards the vehicle and forced her to get in. Gaston demanded that he be paid before the victim provided her services, and the detective informed Gaston that he would need to drive to an ATM to get the money. Gaston attempted to get into the vehicle in order to go with

the detective and the victim to get the money, and as he did, a surveillance team in several vehicles arrived and took both Gaston and the victim into custody. Detective McCarthy and Sergeant Donald Hoier both testified that after Gaston was taken into custody, he laughed and said to Detective McCarthy something similar to, "You got me this time or to the fact that you guys surprised me. You guys did a pretty good job. I would have never known."

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Gaston committed the crime of attempting to live from the earnings of a prostitute.³ It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.⁴ We also note that circumstantial evidence alone may sustain a conviction.⁵ Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Finally, relying on this court's recent ruling in Daniel v. State,⁶ Gaston contends that the State committed prosecutorial misconduct by insisting during its cross-examination that he explain why

³NRS 201.320; NRS 193.330(1).

⁴See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁵See Buchanan v. State, 119 Nev. ___, ___, 69 P.3d 694, 705 (2003).

⁶119 Nev. ___, ___, 78 P.3d 890, 904 (2003) (adopting a rule "prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly
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the police officers who testified against him might have lied. Gaston concedes that counsel failed to contemporaneously object to the prosecutor's allegedly improper line of questioning.

This court has stated that the failure to object to prosecutorial misconduct generally precludes appellate consideration.⁷ Moreover, Gaston has failed to demonstrate how the prosecutor's line of questioning prejudiced his defense.⁸ This court has stated that "[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt."⁹ "If the issue of guilt or innocence is close, [and] if the state's case is not strong, prosecutor[ial] misconduct will probably be considered prejudicial."¹⁰ As detailed above, the State presented overwhelming evidence of Gaston's guilt. Therefore, we

... continued

challenged the truthfulness of those witnesses"), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Jan. 29, 2004) (No. 03-8807).

⁷See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993); see also Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1252 (2002) (holding that "retroactivity of a new rule of state law is only applicable when the issue has been preserved for appeal").

⁸See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Daniel, 119 Nev. at ___, 78 P.3d at 904 (holding that violations of the newly announced rule are subject to harmless error analysis); Gallego v. State, 117 Nev. 348, 365-66, 23 P.3d 227, 239 (2001).


⁹Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998).

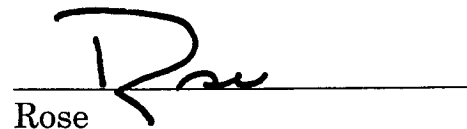
¹⁰Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

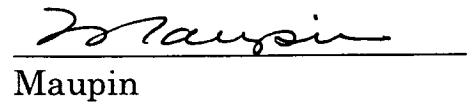
conclude that the prosecutor's misconduct, if any, amounted to harmless error.¹¹

Having considered Gaston's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error"); Skiba v. State, 114 Nev. 612, 614-15, 959 P.2d 959, 960-61 (1998) (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant's guilt); Rippo v. State, 113 Nev. 1239, 1254-55, 946 P.2d 1017, 1026-27 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).