

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES KEVIN MACK, SR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42031

**FILED**

APR 21 2005

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 entered upon jury verdicts on separate counts of sexual assault, first-degree kidnapping and burglary, and from a district court order adjudicating appellant a habitual criminal. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

The State charged appellant Kevin James Mack with first-degree kidnapping, sexual assault and burglary for confining and assaulting his girlfriend in Reno, Nevada. The victim testified that Mack beat her, dragged her from bed at 3 a.m., and drove her to a motel where he sexually assaulted her. She further testified that Mack then took her against her will to his mother's house in Oakland, California, where they remained for several days before returning to Reno. The jury returned guilty verdicts on all counts. The district court entered a judgment of conviction. Based on the jury verdicts and Mack's five previous felony convictions, the court also adjudicated Mack a habitual criminal and sentenced him to life imprisonment without the possibility of parole.

Mack appeals, arguing improper admission of evidence of other uncharged bad acts, insufficiency of the evidence, and improprieties at sentencing.

Prior bad acts

Mack contends that the district court abused its discretion by admitting evidence relating to drug possession and evidence that Mack repeatedly beat and threatened the victim before kidnapping and sexually assaulting her as evidence of uncharged crimes, acts or wrongs. We review the district court's determination as to the admissibility of such evidence for an abuse of discretion and will not reverse such a determination absent manifest error.<sup>1</sup> A court may, under NRS 48.035(3), admit evidence of other crimes if the charged crimes cannot be fully described without discussing the other acts<sup>2</sup>. Evidence "inextricably intertwined with the charged crimes" is admissible in order to allow a witness to present the full story.<sup>3</sup> Moreover, evidence of other, uncharged bad acts may be admissible for purposes other than to show action in conformity therewith, such as to show motive or ill will by a defendant toward a victim.<sup>4</sup>

The district court did not abuse its discretion by allowing testimony regarding Mack's drug possession, his repeated beatings of the victim and his continued threats. First, evidence that Mack was angry because the victim had stolen drugs from him formed an inextricable part of the victim's story and provided evidence of his motive for his crimes against her. Second, evidence of Mack's repeated beatings and threats

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<sup>1</sup>Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

<sup>2</sup>State v. Shade, 111 Nev. 887, 895, 900 P.2d 327, 331 (1995).

<sup>3</sup>Id. at 894, 900 P.2d at 331.

<sup>4</sup>Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

was admissible to refute the defense's attempt to demonstrate that the victim could leave at any time, thereby disproving the kidnapping allegations. The same evidence may also have explained why the victim made no attempt to escape. The district court also gave the jury a limiting instruction.

Sufficiency of the evidence

Mack also argues that insufficient evidence supported his convictions. On appeal, we examine "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt."<sup>5</sup> Sufficient evidence exists "if the evidence, viewed in the light most favorable to the [State], would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."<sup>6</sup> Moreover, the jury determines the weight and credibility to give various testimony.<sup>7</sup>

Regarding the first-degree kidnapping conviction,<sup>8</sup> Mack argues that he lacked the intent to commit sexual assault. The victim testified that Mack repeatedly hit her, threatened her life, dragged her by the hair, forced her into his truck through the driver's side door, drove her to several locations and sexually assaulted her. Viewing the evidence in the light most favorable to the State, the jury could have found the

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<sup>5</sup>Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 297 (1998) (quoting Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992), modified on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 714 (2000)).

<sup>6</sup>Id. at 1209-10, 969 P.2d at 297.

<sup>7</sup>Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

<sup>8</sup>See NRS 200.310(1).

victim's testimony convincing and determined that Mack unlawfully confined and carried away the victim with the intent to detain her for the purpose of committing a sexual assault.

Mack next contends the evidence does not support a conviction for sexual assault<sup>9</sup> because the victim testified inconsistently that Mack and the victim engaged in consensual sex, and that the victim did not take reasonable action to defend herself. In this regard, we have held that inconsistencies in the victim's testimony do not constitute a basis for reversal.<sup>10</sup> The jury's task is to "resolve these matters and the manner in which it did so and the weight it gave to the evidence will not be questioned upon appeal."<sup>11</sup>

According to the victim, she attempted to reject his sexual advances and tried to keep him from removing her pants. She testified that she yelled loudly for him to stop and that, when Mack hit her in the mouth, she let go of her pants to protect her face. She stated that Mack then used his body weight to force himself upon her and complete the sexual assault. A reasonable jury could have found the victim's testimony more credible despite any inconsistencies and found that she did not consent to sex.

Mack further argues that insufficient evidence supported his burglary conviction because he had authority to enter the premises where the victim was staying, and therefore he entered lawfully.<sup>12</sup> However,

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<sup>9</sup>See NRS 200.366(1).

<sup>10</sup>Garden v. State 73 Nev. 312, 315, 318 P.2d 652, 653 (1957).

<sup>11</sup>Id.

<sup>12</sup>See NRS 205.060(1).

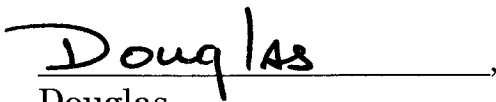
consent to entry is not a defense to burglary if the defendant entered with felonious intent.<sup>13</sup> Mack does not challenge the finding that he entered the premises with felonious intent, and therefore, his claim lacks merit.

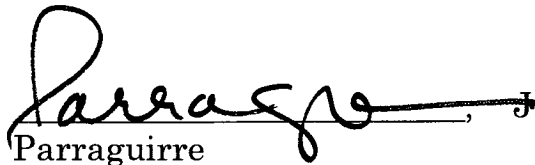
Imposition of sentence

Finally, Mack argues that the district court erred in adjudicating him a habitual criminal.<sup>14</sup> We review the record to determine whether the district court exercised its discretion or proceeded under the misconception that habitual criminal adjudication is automatic upon proof of prior convictions.<sup>15</sup> Here, the district court considered the State sentencing report, Mack's written statement to the court and Mack's five previous felony convictions. The record indicates the district court properly exercised its sentencing discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

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<sup>13</sup>Barrett v. State, 105 Nev. 361, 364, 775 P.2d 1276, 1277 (1989).

<sup>14</sup>See NRS 207.010(1)(b)(1).

<sup>15</sup>Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

cc: Hon. Steven R. Kosach, District Judge  
Hardy & Woodman  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney/Richard A. Gammick  
Washoe District Court Clerk