

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH G. SMITH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42069

FILED

DEC 21 2005

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
*J. Bloom*  
DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT  
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree kidnapping and sexual assault. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The parties are familiar with the facts; therefore, we provide only those necessary to explaining our disposition of the case.

DISCUSSION

Exclusion of taped and transcribed statements

Smith asserts that the district court erred in preventing him from admitting the audiotaped and transcribed forms of statements Smith made to Detective Hendrix regarding the incident. Specifically, Smith argues that NRS 47.120(1) required admission of his statements in both forms. Smith also argues that the tapes and transcript constitute the "best evidence" of his statements.

This court reviews decisions to admit or exclude evidence for an abuse of discretion.<sup>1</sup> NRS 47.120(1) provides the following:

When any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is

<sup>1</sup>Jezdik v. State, 121 Nev. \_\_\_, \_\_\_, 110 P.3d 1058, 1062 (2005).

relevant to the part introduced, and any party may introduce any other relevant parts.

In Collman v. State, this court determined that the defense's use of a forensic report during cross-examination of its preparer amounted to an introduction of part of the report for purposes of NRS 47.120(1).<sup>2</sup> From this, the court concluded that the district court properly admitted the report in its entirety under the statute, because introduction of parts of the report required admissibility of other relevant parts.<sup>3</sup>

Regardless of whether the State's direct examination of Detective Hendrix concerning Smith's statements amounted to an introduction of these statements under NRS 47.120(1), we conclude the district court did not abuse its discretion in excluding the tapes and transcript of Smith's statements to Detective Hendrix. First, the district court permitted use of the transcript to refresh the detective's recollection of Smith's statements; therefore, Smith had the opportunity to utilize the transcript on cross-examination to remedy the instances in which Detective Hendrix lacked memory of particular statements. Second, the district court determined that several of Smith's responses on the tape were unintelligible.

Despite Smith's contention that the tapes and their transcription constitute the "best evidence" of his statements, we are unable to ascertain the merits of this argument because neither party submitted the tapes or the transcript on appeal. Therefore, we conclude that it was not unreasonable for the district court to exclude the tapes and

---

<sup>2</sup>116 Nev. 687, 706-07, 7 P.3d 426, 438-39 (2000).

<sup>3</sup>Id. at 707, 7 P.3d at 439.

the transcript due to the potential for confusing or misleading the jury under NRS 48.035(1).

Prosecutorial misconduct

Smith takes issue with several of the prosecution's statements delivered in opening and closing arguments. Smith failed to object to these arguments; therefore, we will assess each in turn for plain error. In undertaking plain error review, we examine whether an "error" occurred, whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights.<sup>4</sup>

Motive to lie

The prosecution delivered the following statement in closing argument:

Who is the only person that you saw in this entire room who has got something to lose? Him, the defendant, the person charged with these crimes, the only person who has a reason to not be honest.

We conclude that this type of argument is always improper. First, it is improper to characterize the defendant as a liar.<sup>5</sup> Second, under this argument, the State need only charge a person to motivate that person to be dishonest. However, this argument does not merit reversal, as it did not affect Smith's substantial rights, as explained in the harmless error analysis below.

---

<sup>4</sup>Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

<sup>5</sup>See Honeycutt v. State, 118 Nev. 660, 680, 56 P.3d 362, 371 (2002).

### Disparaging defense counsel

The prosecution also stated in closing argument the following:

[Defense counsel] talked a little bit about the defendant being consistent in what he said to Detective Hendrix. Was he in the same courtroom we were?

We conclude that this argument was not improper. In any event, the argument does not warrant reversal of the convictions below.

### Implication in larger social problems

Lastly, the prosecutor argued the following in its rebuttal closing argument:

They want you to believe that we inflamed you by bringing in all these sex toys. You know what, you should be inflamed. This happened in our town. A cab driver took somebody who is a tourist in our town, and we survive based on tourists. We don't pay state income taxes because of tourists.

The cab driver from our town took a tourist to our town and did this to her. You should be inflamed, and look at what he did to her. He took her into his bed while she was passed out and she was, basically, poured into the cab.

This commentary was inappropriate because it shifts the jury's focus away from whether Smith committed the crimes at issue, and toward implication of Smith in greater general social and economic issues, which are irrelevant and potentially prejudicial. Under the circumstances presented in this case, reversal is unwarranted, as explained below. Nonetheless, we caution the prosecution to refrain from such commentary in the future.

### Improper lay witness testimony

Smith argues that the district court improperly permitted Leroy Dumag, an EMT and security officer with the Luxor Hotel, to

characterize Solorzano as a “typical rape victim” he had encountered in the past. The State responds by asserting that Dumag was qualified to characterize Solorzano in this manner because of his experience as a police officer and deputy sheriff, and his handling of several sexual assault cases in the past.

“[A] district court has discretion to qualify a particular witness as an expert and to permit that witness to give opinion evidence.”<sup>6</sup> NRS 50.345 permits introduction of expert testimony to demonstrate that a victim’s mental or physical condition is consistent with that of one who has suffered sexual assault. Further, NRS 50.265 permits a lay witness to testify only as to observations rationally based on the witness’s perceptions and helpful to a clear understanding of the witness’s testimony.

We conclude that the district court abused its discretion in permitting Dumag to refer to Solorzano as a “typical rape victim.” NRS 50.345 permits no other type of testimony, other than that given by an expert, regarding the physical and mental condition of a sexual assault victim. The State never offered Dumag as an expert, or complied with the procedures necessary to qualify Dumag as an expert.<sup>7</sup> Regardless, we conclude that this error does not compel reversal, as explained below.

#### Harmless error

Despite the errors associated with prosecutorial delivery of improper statements during closing argument and admission of improper

---

<sup>6</sup>Rudin v. State, 120 Nev. 121, 135, 86 P.3d 572, 581 (2004).

<sup>7</sup>See, e.g., NRS 174.234(2) (requiring disclosure of expert witnesses and submission of copies of expert curriculum vitae, summaries of expert testimony and expert reports 21 days before trial).

lay witness testimony, we conclude that these errors are harmless beyond a reasonable doubt.<sup>8</sup>

First, Evidence at trial indicated that Solorzano was mentally unable to consent to sex per NRS 200.366(1).<sup>9</sup> Both Solorzano and Patricia Caballero testified regarding Solorzano's extensive and prolonged drinking beginning at dinner the night before the incident and ending shortly before Solorzano got into the cab with Smith. Also, Smith told police that Solorzano was in and out of consciousness in the cab and at his house, and that he could smell alcohol on her breath. Second, Luxor security personnel testified as to Solorzano's distraught behavior after Smith dropped her off at the hotel. Third, Solorzano testified with some particularity regarding the incident, which is sufficient in itself to uphold a conviction.<sup>10</sup> Therefore, we also conclude that sufficient evidence supports the jury's verdict.<sup>11</sup>

---

<sup>8</sup>See Chapman v. California, 386 U.S. 18, 24 (1967).

<sup>9</sup>NRS 200.366(1) provides in pertinent part:

A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting . . . is guilty of sexual assault.

<sup>10</sup>LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

<sup>11</sup>Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002) (stating that this court's review of evidence supporting a jury verdict entails a determination of whether a reasonable jury could have been convinced beyond a reasonable doubt of the defendant's guilt).

In addition to the above, Smith posits arguments concerning the following issues: (1) violation of his rights to present a defense and to not testify; (2) prosecutorial misconduct during opening statements; (3) prosecutorial misconduct in failing to test Solorzano's blood for drugs; and (4) cumulative error. We have considered each in turn and conclude that they are without merit.


Judgment of conviction


We note that the judgment of conviction incorrectly states that Smith was convicted pursuant to a guilty plea.<sup>12</sup> Therefore, we remand this case for the limited purpose of correcting this document so that it reflects Smith's conviction by jury verdict.

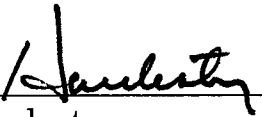
CONCLUSION

We conclude that the errors committed below do not warrant reversal. Therefore, we

ORDER the judgment of the district court AFFIRMED, with remand for the limited purpose of correcting the judgment of conviction.

 J.  
Maupin

 J.  
Gibbons

 J.  
Hardesty

---

<sup>12</sup>See Zabeti v. State, 120 Nev. \_\_\_, \_\_\_, 96 P.3d 773, 777 (2004) (remanding for the limited purpose of correcting a judgment of conviction, which incorrectly reflected that the defendant was convicted pursuant to guilty plea, when he was in fact convicted pursuant to jury verdict).

cc: Hon. Donald M. Mosley, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk