

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WAYNE WINSLETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42429

FILED

MAR 24 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count each of attempted sexual assault and battery with the intent to commit sexual assault. The district court sentenced appellant Kenneth Wayne Winslett to serve two concurrent prison terms of 53-240 months and 24-84 months, and ordered him to pay \$325.00 in restitution.¹

Citing to Buschauer v. State² for support, Winslett contends that the prosecutor engaged in misconduct and that the district court denied his right to due process at sentencing by allowing the prosecutor to present argument consisting of hearsay statements alleging prior bad acts. Winslett challenges the following exchange that occurred during his sentencing hearing:

STATE: [Winslett] sexually assaulted his wife twice and probably more than that for all the other times she didn't want anal sex. He is a violent person. He slapped her so hard he broke her ear drum a few years back. She never

¹Winslett was initially charged with five counts of sexual assault for conduct directed towards his wife.

²106 Nev. 890, 804 P.2d 1046 (1990).

reported it. She has heard things from the other wives or the children –

DEFENSE: Objection. This is all improper. . . . It is cited only to inflame the passions of the Judge. I don't have any information of this in front of me. I can't respond. It is inappropriate conduct and it is prosecutorial misconduct without providing me any information.

COURT: I am inclined to say hold up on this where she has simply reported hearsay from other people.

STATE: They haven't told her anything specific. They just expressed remorse that something like this would have happened to her. She doesn't know what has happened to the other women. . . .

DEFENSE: Objection. Even mentioning other women is unreasonable and unfair. I have never been apprised of any other allegations of other women being involved in this. And second, any information to me or on the record, it is improper for the Court to even consider it and I ask –

STATE: He is aware of other wives and that's what I am talking about and it is in the presentence [that the victim] is his third wife, I believe.

COURT: I will go so far as to allow [the prosecutor] to state what she stated, that people are sorry for [the victim's] experience.

Counsel for Winslett did not move for a continuance, and the prosecutor ultimately requested that the district court impose the maximum possible sentence with the terms to run consecutively. Winslett compares the prosecutor's comments above to a victim-impact statement, and argues that he was neither given prior notice of the bad act allegations nor the opportunity for cross-examination under oath, and therefore, a new sentencing hearing is required. We agree that the comments above were

admitted in error, but conclude that the error was harmless and that Winslett is not entitled to relief.

In general, factual matters outside the record are irrelevant and an improper basis to support a sentencing argument.³ Therefore, we agree that the prosecutor's references to hearsay allegations of prior bad acts committed by Winslett were improper. "This court has held that in order for prosecutorial misconduct to constitute reversible error, it must be prejudicial."⁴ Further, we have repeatedly declined to interfere with a sentencing determination when the sentence is legal, within the statutory limits, and not supported solely by impalpable and highly suspect evidence.⁵ In the instant case, the sentence imposed is legal and within the parameters provided by the relevant statute.⁶

Additionally, we note that Winslett has failed to demonstrate, let alone articulate, how exactly he might have been prejudiced by the prosecutor's comments or the district court's ruling during the sentencing hearing. Our review of the sentencing hearing transcript reveals that the district court did not rely on the prosecutor's improper comments in

³See Ybarra v. State, 103 Nev. 8, 15, 731 P.2d 353, 358 (1987) (citing Collier v. State, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985)).

⁴See Sherman v. State, 114 Nev. 998, 1010, 965 P.2d 903, 912 (1998).

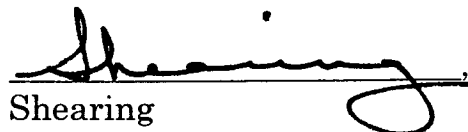
⁵See Denson v. State, 112 Nev. 489, 493, 915 P.2d 284, 287 (1996); see also Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

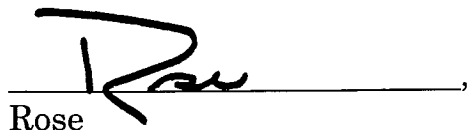
⁶See NRS 200.366(2); NRS 193.330(1)(a)(1) (providing for a sentence of 2-20 years for attempting to commit a category A felony); NRS 200.400(4)(b) (providing for a sentence of 2-15 years for battery with the intent to commit a sexual assault).

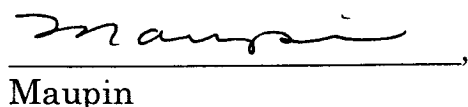
determining the sentence. The district court noted the violent nature of Winslett's crime, calling it "reprehensible," yet also considered the favorable psychosexual evaluation which concluded that Winslett was not a high risk to re-offend. In following the sentencing recommendation of the Division of Parole and Probation, the district court expressly rejected the prosecutor's request for the maximum sentence. "[J]udges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence."⁷ Therefore, based on all of the above, we conclude that the admission of the improper comments by the prosecutor at sentencing amounted to harmless error.

Accordingly, having considered Winslett's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

 _____, C.J.
Shearing

 _____, J.
Rose

 _____, J.
Maupin

⁷See Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (quoting People v. Mockel, 276 Cal. Rptr. 559, 563 (Ct. App. 1990)).

cc: Hon. Steven P. Elliott, District Judge
Jack Marshall Fox
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk