

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY BLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 33753

FILED

MAY 25 2000

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

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree kidnapping, one count of lewdness with a child under the age of fourteen and five counts of sexual assault on a minor under the age of sixteen. The district court sentenced appellant Anthony Ross Black to life with the possibility of parole after a minimum of five years has been served for the crime of kidnapping; to a maximum of 120 months with a minimum parole eligibility of thirty-two months for the crime of lewdness with a child under fourteen; and to life with the possibility of parole after a minimum of twenty years has been served for each count of sexual assault with a minor under sixteen years of age.¹ All sentences are to run consecutive to each other.

On appeal, Black contends that: (1) the district court erred in admitting evidence of his prior rape conviction; (2) the district court erred in admitting certain documents; (3) his defense was prejudiced by the State's

that the error was harmless. We further conclude Black's other contentions lack merit.

First, Black contends that the district court erred in admitting evidence proving that he had previously committed a rape. This evidence was admitted pursuant to NRS 48.045(2) and subsequent to a hearing concerning its admissibility pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). Admissibility of evidence is within the discretion of the district court and the court's decision will not be reversed on appeal unless "'manifestly wrong.'" Id. at 52, 692 P.2d at 508 (quoting *Brown v. State*, 81 Nev. 397, 400, 404 P.2d 428, 430 (1965)). Evidence of other crimes is not admissible to prove character in order to show that a person acted in conformity with that character. NRS 48.045(2). However, evidence of other crimes may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Id. Prior to admitting evidence of other crimes, wrongs or acts the district court must determine that: (1) the prior crime is relevant to the crime charged; (2) the prior crime is proven by clear and convincing evidence; and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

The prior rape involved a frail, elderly woman who lived in Black's apartment complex at a time when Black lived

properly determined that the prior rape was admissible to prove Black's motive, intent and modus operandi. Sufficient evidence was presented to sustain the trial court's finding that the prior rape was proven by clear and convincing evidence. Finally, we perceive no abuse of discretion in the trial court's determination that the prior rape's probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the district court's decision to admit the prior rape was not "manifestly wrong."

Second, Black contends that the district court erred in admitting the documents he authored as part of a relapse prevention program in which he participated while imprisoned for the prior rape conviction. We agree that the district court erred, but conclude that the error was harmless.

The documents describe Black's sexual fetishes for uriphilia and coprophilia and his sexual fantasies connected therewith.² As such, these writings are not "[e]vidence of other crimes, wrongs or acts" within the meaning of NRS 48.045(2). Clearly, the evidence was offered to prove Black's sexual deviancy. NRS 48.045(1) states: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."

Because we conclude that the information in the relapse prevention program documents was inadmissible character evidence, the district court erred first in

However, the improper admission of evidence constitutes harmless error "[w]here the independent evidence of guilt is overwhelming." *Turner v. State*, 98 Nev. 243, 246, 645 P.2d 971, 972 (1982); see also *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993) ("When evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant."). Because we have determined that the other evidence of Black's guilt was overwhelming, we conclude that the error was harmless.³

Third, Black contends that law enforcement's failure to conduct forensic tests on the interior of the car in which the attack took place and the disposal of the car without first making it available to the defense so prejudiced his defense as to constitute a due process violation warranting reversal. We conclude that this contention lacks merit. "It is not sufficient that the showing [of prejudice] disclose merely a hoped-for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that examination of the evidence would be helpful in preparing his defense." *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979). In light of testimony at trial that the car's condition after the accident was such that forensic tests would have been useless, Black has failed to show more than a hoped-for result in any further examination of the car.

³In his appeal, Black argues that the introduction of the documents forced him to take the stand to explain the documents and place them in the proper context for the jury.

Fourth, Black contends that the district court erred in refusing to grant a mistrial because the victim testified while holding a stuffed animal. Black argues that "prosecutorial misconduct . . . is imputed to the State." In order to preserve the issue of prosecutorial misconduct for appellate review, "the accused must make a timely objection, obtain a ruling, and request an admonition of counsel and an appropriate instruction to the jury." *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987). We conclude that because Black took none of these steps at trial, he has waived this issue on appeal.

Finally, Black contends that the State's witnesses improperly vouched for the truthfulness of the victim. We conclude that Black has waived this issue on appeal because the statements at issue were not objected to at trial. See *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992) ("[f]ailure to object below generally precludes review by this court").

For the reasons stated above, we conclude that the district court erred in admitting the relapse prevention program documents, but that the error was harmless. We further conclude that the remainder of Black's contentions lack merit.

Accordingly, we

ORDER this appeal dismissed.

cc: Hon. Michael L. Douglas, District Judge
Attorney General
Kirk T. Kennedy
Clark County District Attorney
Clark County Clerk