IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

RENARD T. POLK,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO. 39457

FILED

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RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment Of Conviction
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STATEMENT OF THE ISSUES

1. Whether the State improperly elicited testimony regarding Defendant's prior drug use.

2. Whether the court erred in denying Defendant's motion for mistrial.

STATEMENT OF THE CASE

Renard Polk, hereinafter Defendant, was charged by way of Amended Criminal Complaint with two counts of Sexual Assault With a Minor Under Fourteen (14) Years of Age and one count of Sexual Assault With a Minor Under Sixteen (16) Years of Age. On April 25, 2000, defense counsel moved to have Defendant psychologically evaluated. As a result, the trial court directed counsel to have Defendant evaluated by a doctor. (1 A.A. 5). On June 27, 2000, defense counsel advised the court that he had a report that recommended Defendant be sent to Lakes Crossing. (2 A.A. 7). On August 1, 2000, pursuant to NRS 178.425, the trial court ordered Defendant remanded to the custody of the Administration of the Mental Hygiene and Mental Retardation Division for the Department of Human Resources for the detention and treatment at

a secure facility operated by the Mental Hygiene and Mental Retardation Division. (1 A.A. 8).

On November 2, 2000, State filed in open court an Order of Findings of Competency and Order to Transport Defendant in Open Court. (1 A.A. 8). The court agreed and found Defendant competent and ordered Defendant to be transported. (1 A.A. 8). On August 8, 2001, this matter was to go to trial. However, defense counsel filed a motion for additional time to seek out a different plea and advised the court that he was going forward with an insanity defense. (1 A.A. 13).

The charges were amended on January 7, 2002, by way of interlineation to three counts of Sexual Assault With a Minor Under Fourteen (14) Years of Age. (2 A.A at 123). Jury trial commenced on January 7, 2002. (1 A.A. 17). On January 9, 2002, defense counsel moved for a mistrial. (1 A.A. 18). Trial court denied defense counsel's motion for mistrial. (1 A.A. 18). On January 9, 2002, Defendant was convicted of Attempted Sexual Assault With a Minor Under Fourteen and Sexual Assault With a Minor Under Fourteen. (1 A.A. at 19).

The Defendant was sentenced to a maximum of one hundred twenty (120) months and a minimum of forty-eight (48) months for Count I, Attempted Sexual Assault With a Minor Under Fourteen. As for Count II, Sexual Assault With a Minor Under Fourteen (14), Defendant was sentenced to life with a minimum of two hundred forty (240) months. Count II is to run consecutive with Count I. In addition, Defendant was ordered to pay $1, 493.40 restitution and ordered to lifetime supervision upon release from any term of probation, parole or imprisonment. On April 3, 2002, Defendant filed a notice of appeal. The instant appeal followed.

STATEMENT OF THE FACTS

In January of 1999, Jahala was playing in her family's kitchen with her sisters: Javan, Anna, and Jamila. While Jahala was playing around and wrestling her brother, the Defendant wrestled her into the bathroom and shut the door. Behind this closed door Defendant ordered Jahala to lie on the ground where he covered her mouth so she

could not scream. Defendant then proceeded to take off Jahala's clothes. (2 A.A. 63). After getting Jahala naked, Defendant proceeded to get naked himself. He then laid down on top of Jahala and put his penis in her "butt hole." (2 A.A. 64-65).

However, Defendant had difficulties performing. (2 A.A. 64, 68). As a result, Defendant licked Jahala's anus to make penetration easier and increase his sexual gratification. (2 A.A. 64, 68). Intimidated and scared of Defendant, Jahala built up enough courage to tell her brother that he was hurting her. The pain of having her brother's penis in her anus was unbearable for Jahala.

Upon hearing this news, Defendant let his sister get up from the floor.(2 A.A. 65). However, he was not sexually satisfied. Defendant sat on the toilet and grabbed Jahala as she stood naked and told her to act like she was taking a "dump" while she sat on his penis. (2 A.A. 67).

On March 13, 1999, Anna Polk was ten years old and in the forth grade. (2 A.A. 46, 226). On this day she and her sisters were planning a trip to the store. However, Defendant, Anna's oldest brother, had other plans for Anna and did not allow her to go to the store with her sisters. (2 A.A. 96, 261).

After Anna's sisters left for the store, Defendant forced Anna into his bedroom. After forcing her into his bedroom, Defendant took Anna's pants and panties off against her will. Defendant then sat naked in a chair and forced Anna to sit on his lap. With Anna, Defendant's younger sister sitting naked on his lap, Defendant put his "dick" in her "butt hole" and began moving around. However, Defendant was not getting the sexual gratification he desired. (2 A.A. 99).

As a result, he pushed Anna on to the floor. (2 A.A. 100). While Anna laid naked face down on the floor, Defendant, once again, attempted to achieve sexual gratification by putting his penis in Anna's anus.(2 A.A. 100). However, Anna could not bear the pain. She begged and pleaded with Defendant to stop. However, Defendant was determined and did not want to hear Anna complain anymore. As a

result, he put a pillow over Anna's head and covered her mouth while he continued to satisfy his sexual needs by penetrating her anally with his penis.

When Jahala and Jamila came home from the store, they witnessed Anna crying. (2 A.A. 101). Before they got an opportunity to ask Anna what was the matter, Anna informed them that "he did it again." (2 A.A. 72). Jahala and Jamila were aware Defendant had been doing this to her consistently since she was five or six years old. (2 A.A. 93, 103). However, after this incident, unlike the other incidents, the girls told an adult. (2 A.A. 70).

Jamila, the oldest sister, called Aunt Susan and she immediately came over to the house. (2 A.A. 70, 76, 156). Jamila informed Aunt Susan, since Anna was too scared to speak, of the cruel acts Defendant was performing upon Anna. (2 A.A. 108). Aunt Susan called the police. (2 A.A. 109).

When the police arrived, they insisted Anna be taken to Sunrise Hospital for examination. (2 A.A. 73). However, the police were unable to talk to Defendant when they arrived at the house because he had fled from the scene. (2 A.A. 113).

In the early hours of August 14, 1999, Defendant telephoned dispatch and turned himself in for "raping his little sister." (2 A.A. 265; Respondent's Appendix (R.A.) 2). Detective Timothy Moniot interviewed Defendant and listened to his voluntary statement inside juvenile hall. (2 A.A. 268; R.A. 1). During this interview Defendant admitted to molesting Anna Polk, his younger sister, by sticking his "penis" in her "booty" more then one time while she cried and said "no." (R.A. 6, 12). In addition, Defendant admitted to "almost" penetrating his sister Jahala. (R.A. 17).

ARGUMENT

I.

THE STATE PROPERLY ELICITED TESTIMONY REGARDING DEFENDANT'S PRIOR DRUG USE

A. Defendant did not properly preserve this issue raised on direct appeal

The Defendant alleges the State improperly elicited testimony of Defendant's prior drug use. He asserts that this evidence was unduly prejudicial because it implicated him in uncharged misconduct in violation of NRS 48.045. However, the Defendant failed to properly preserve this issue for appeal, and in the alternative, his argument is without merit.

The Defendant failed to properly preserve this issue for review by making a proper and timely objection at trial. Objections to alleged errors must be lodged at trial in order to preserve appellate review. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); *see also* State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998), Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). "When an appellant fails to specifically object to questions asked or testimony elicited during trial, but complains about them, in retrospect upon appeal, we [this Court] do not consider his contention a proper assignment of error." Greene v. State, 113 Nev. 157, 931 P.2d 54, 65-6 (1997) (quoting Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970)).

By failing to make a timely objection to the line of questioning regarding Defendant's drug use, Defendant waived any objection to the introduction of this evidence. As a result his appeal should be denied.

B. It Was Not Plain Error for the Trial Court to Permit References to Defendant's Drug Use Without Holding a Hearing

Even if counsel had properly objected, the court acted within its discretion in allowing the State to question Defendant about his passion to learn and how it related to his drug use.

In general, district courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Castillo v. State, 114 Nev. 271, 956 P.2d 103, 107 (1998), citing Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996). A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong. Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

Since the Defendant failed to object to this testimony, this Court must review the evidence under the plain error doctrine. *See* McCullough above. In this case, it was not plain error for the court to admit references to the Defendant's conduct without conducting a Petrocelli hearing. While a court should conduct a Petrocelli hearing prior to admitting uncharged misconduct, a district court's failure to hold a Petrocelli hearing is not plain error. Qualls v. State, 114 Nev. 900, 904, 961 P.2d 765, 767 (1998). Reversal is not necessary if: (1) the record is sufficient to determine that the evidence is admissible, or (2) the result would have been the same if the trial court had not admitted the evidence. Id.

Defendant claims that pursuant to NRS 48.045(2) that no reason existed to put before the jury Defendant's prior drug use. NRS 48.045(2) states that:

> Evidence of other crimes, wrongs or acts not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

However, there was reason for the State to address Defendant's prior drug use. Defense counsel continually claimed throughout the trial that the Defendant was not mentally stable and in addition he did not remember certain things because he was high and drunk.

Pursuant to NRS 48.045 (1)(a) evidence of a person's character or trait is admissible if it is offered by the accused and similar evidence is also admissible if offered by the prosecution to rebut such evidence.

In the instant case the State asked the Defendant if he remembered his conversation with Dr. Paglini in which he informed Paglini that he lost his "passion to learn" when he began using drugs in the ninth grade. This line of questioning was to rebut defense counsel's continuing theme throughout the trial that Defendant is mentally unstable and his voluntary confession that he raped his little sister is unreliable.

In defense counsel's opening statement, as stated below, he addressed Defendant's mental stability as well as Defendant's confession in which he claimed he did not remember certain things because he was high and drunk:

> Mr. Polk looks fine. You can look at him, he wears glasses, but he's not. He's not fine. You will learn he has some problems. Not to the level of he doesn't understand what's happening here, but he has some great difficulties.
> Mr. Polk went to that police station saying I feel bad, I want some help. Now, it is Mr. Polk's position now that he's not guilty, that he hasn't done this.
>
> ***
>
> And again, I want to reiterate that although he may look very straight forward to you, he doesn't have to testify, but if he does, you'll see that he's not quite altogether.

(A.A. 40-42)

This statement as well as Defendant's testimony, opened the door for the state and made all evidence relevant pursuant to NRS 48.025 that addressed the issue of how and why Defendant acts and says the things that he does. As a result it allowed the State to inquire about Defendant's drug use.

However, this was not the only time defense counsel addressed Defendant's ability to learn as well as his mental stability throughout the trial.

During cross examination of Susan Sims, Defendant's aunt, defense counsel asked Susan the following line of questions in regards to the Defendant's mental state as well as his passion to learn:

Q: Did he do well in school?

A: Renard was a great student in school.

Q: Study a lot?

A: Yes

Q: Did you know him to have any type of mental problems?

A: No

Q: You've never known him to have any type of mental problems?

A: No

Q: Have you ever known him to be hospitalized with mental problems?

A: No.

(2 A.A. 259-260).

In addition, in direct examination of Defendant, defense counsel stated Defendant was mentally unstable (A.A. 282) even before the following examination occurred:

Q: Have you ever been hospitalized for any mental instability?

A: Yeah

***

Q: Did you do anything specifically that caused you to be hospitalized?

A: Yeah

Q: What did you do?

A: Tried to commit suicide.

Q: Why did you try to commit suicide?

A: Well, I guess you could say, they call it hari-kari or whatever in the Chinese tradition or Japanese, some people call it "Sonichi."

Q: You wanted to kill yourself?

A: Yeah

Q: Why did you want to kill yourself?

A: Because people told me I had to do something about it.

Q: Was that--how long were you hospitalized?

A: About a week.

Q: In that the only time you have been hospitalized psychiatric?

A: Hospitalized, yes; counseled, no.

Q: You've never been anywhere else?

A: Oh, Lake Crossing, that's right.

Q: Have you been prescribed prescription drugs for mental problems?

A: Yeah

(A.A. 282, 286, 287)

Since defense counsel solicited testimony about Defendant's education and his mental stability he opened the door for the State to inquire about his learning ability and how drug use has affected this ability. As stated *supra*, defense counsel's continuing theme throughout the trial was that Defendant is mentally unstable and his voluntary confession that he raped his little sister is unreliable. However, Defendant himself admitted that his memory lapses occurred when he was high and drunk.(R.A. 6).

Therefore, the record is sufficient to determine that the inquiry into Defendant's drug use is admissible. As a result, Defendant's appeal should be denied.

II.

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR MISTRIAL

Defendant claims the district court erred in denying his motion for mistrial. In addition, Defendant claims that by inquiring about Defendant's plea the State violated the attorney-client privilege. However, the Defendant failed to properly preserve this issue for review. In addition, Defendant's claim is without merit.

A. Defendant did not properly preserve this issue raised on direct appeal

The Defendant failed to properly preserve this issue for review by making a timely and contemporaneous objection at trial. In fact, Defendant's motion for a new trial did not occur until the day after the State inquired into Defendant's plea in the case. (2 A.A. 315). As stated *supra*, objections to alleged errors must be lodged at trial

in order to preserve appellate review. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); *see also* State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998), Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). "When an appellant fails to specifically object to questions asked or testimony elicited during trial, but complains about them, in retrospect upon appeal, we [this Court] do not consider his contention a proper assignment of error." Greene v. State, 113 Nev. 157, 931 P.2d 54, 65-6 (1997) (quoting Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970)).

By failing to make a timely objection to the line of questioning regarding Defendant's plea in the case, Defendant waived any objection to the introduction of this evidence. As a result his appeal should be denied. However, if this Court does address the merits, it should conclude that they are without merit.

B. The Trial Court Did Not Err When it Denied Defendant's Motion for Mistrial

Defendant alleges the trial court erred in denying Defendant's motion for mistrial because the State improperly inquired into his plea in the case. By inquiring about Defendant's plea in the case Defendant claims that the State improperly shifted the burden of proof in the case and relies on this Court's holding in Colley v. State, 98 Nev. 14, 639 P.2d 530 (1982).

Defendant claims that in Colley this Court held that it is generally outside the bounds of proper argument to comment on a defendant's failure to call a witness or present a certain defense. However, this is not an accurate statement of the law in this case. This case does not state that it is outside the bounds of proper argument to comment on a defendant's failure to present a certain defense.

In Colley, during trial Colley gave an alibi testimony in his own defense. On cross-examination, the State asked Colley where Debra was. Colley responded that he would "stand the fifth on that" and the defense counsel objected to the line of questioning as being irrelevant. In response, the State stated "I believe that

Debra...was originally named as one of the alibi witnesses." The defense moved for a mistrial and the motion was denied. Id.

Defendant appealed from his conviction of attempted murder and battery with intent to commit sexual assault with substantial bodily harm. On appeal Defendant argued that the district court erred in denying the motion for a mistrial because the State's statement "impermissibly shifted the burden of persuasion to the defendant to prove his innocence" by forcing him to explain why Debra did not testify at trial.

This Court concluded that Defendant's argument is without merit and affirmed Defendant's conviction. This Court stated that although it is ordinarily impermissible to comment on a defendant's failure to call a witness, under the circumstances of this case the statement was not justified. Id. However, this Court did not state that it was generally outside the bounds of proper argument to comment on defendant's failure to present a certain defense.

As this Court concluded in Colley that it was justified to comment on Defendant's failure to call a witness, it should conclude that the State's inquiry into Defendant's plea in the instant case was justified as well and as a result it did not shift the burden of proof.

Here, defense counsel continually put Defendant's mental stability into question. As stated *supra,* in defense counsel's opening statement he addressed Defendant's mental stability and claimed that even though Defendant looked fine he in actuality had some great difficulties. (A.A. 40, 41, 42) In addition, in direct examination of Defendant, defense counsel stated Defendant was mentally unstable. (A.A. 282) while the following examination occurred:

Q: Have you ever been hospitalized for any mental instability?

A: Yeah

***

Q: Did you do anything specifically that caused you to be hospitalized?

A: Yeah

Q: What did you do?

A: Tried to commit suicide.

Q: Why did you try to commit suicide?

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Q: Why did you want to kill yourself?

A: Because people told me I had to do something about it.

Q: Was that--how long were you hospitalized?

A: About a week.

Q: In that the only time you have been hospitalized psychiatric?

A: Hospitalized, yes; counseled, no.

Q: You've never been anywhere else?

A: Oh, Lake Crossing, that's right.

Q: Have you been prescribed prescription drugs for mental problems?

A: Yeah

(A.A. 282, 286, 287)

NRS 48.045(1)(a) states that evidence of a person's character or trait is admissible if it is offered by the accused and similar evidence is also admissible if offered by the prosecution to rebut such evidence. This line of questioning, as stated *supra*, as well as defense counsel's opening statement puts Defendant's mental stability in question. Defense counsel continuously tried to convince the jury that the Defendant was mentally unstable.

Defendant also cites NRS 49.095 which sets forth the general rule of privilege between attorney and client. In relying on NRS 49.095 Defendant claims that the State breached the attorney-client privilege when it inquired into Polk's plea in the case. However, no confidential communication was disclosed.

Pursuant to NRS 49.055 a communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Defense counsel continuously addressed Defendant's plea in pretrial hearings. For example, On August 8, 2001, in the instant matter, defense counsel mentioned on the record at pretrial hearings that Defendant was going forward with an insanity defense. (A.A. 13). Once again on October 14, 2001, defense counsel stated that he is ready for trial, however, in September he heard the Defendant was in a mental facility and requested to obtain those records from the psychiatrist. (A.A. 14).

As a result of defense counsel disclosing to the court on the record Defendant's plea in the case, no confidential communication was disclosed during the cross examination of the Defendant. Hence, no attorney-client privilege was violated.

Therefore, it was proper to allow the State to cross-examine the Defendant and inquire about his plea after Defendant had been hospitalized for possible psychiatric reasons but still did not enter a plea of not guilty by reason of insanity. As a result, the trial court did not err when it denied Defendant's motion for a new trial and Defendant's argument must be denied.

C. Any Error Committed by the Trial Court Was Harmless

Even if the district court committed error by allowing the references as stated above, the error was harmless in view of the overwhelming evidence of guilt presented at trial. *See* Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416 (1992) (errors in admitting evidence "will be deemed harmless" when the evidence of guilt is strong). The evidence of guilt was strong. It is clear that the result of the trial would have been the same even without the references. In fact, both the victims identify the Defendant as the man that sexually assaulted them and in addition, Defendant, himself, admitted to molesting Anna Polk, his younger sister, and almost penetrating his sister Jahala. (R.A. 6, 12, 17).

Accordingly, the Defendant's appeal must be dismissed.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court dismiss the Defendant's appeal.

Dated this 13th day of November, 2002.

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By _____
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing RESPONDENT'S ANSWERING BRIEF to the attorney of record listed below on this 13th day of November, 2002.

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