

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARENCE JAMES DOZIER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38560

**FILED**

OCT 05 2004

ORDER OF AFFIRMANCE

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

Appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Mark W. Gibbons, Judge.

Clarence James Dozier appeals from a final judgment of conviction entered following jury verdicts of guilty on separate counts of first-degree kidnapping and administration of a controlled substance to aid in the commission of a felony, and upon jury verdicts of guilty on twenty-five counts of sexual assault. The charges involved two victims, Dozier's former spouse, referred to in this order as Ms. A, and another former significant other, referred to in this order as Ms. B. Dozier lodges four primary assignments of error: first, that the district court should have dismissed the fourteen counts of sexual assault pertaining to his former wife as time-barred under the applicable statute of limitations; second and third, that the district court committed reversible errors by improperly permitting lay witness opinion testimony and denying Dozier's motion for mistrial; fourth, that the State committed prosecutorial misconduct during its closing argument. We affirm.

FACTUAL AND PROCEDURAL HISTORY

This case concerns allegations that Dozier committed numerous acts of sexual assault upon Ms. A and Ms. B through the administration of sedative medication with amnesia-like side effects. The

most damning evidence came in the form of a videotape recording made by Dozier during the alleged assaults.

The matters below first arose from the allegations made by Ms. B. After arresting Dozier and providing warnings under Miranda v. Arizona,<sup>1</sup> police searched Dozier's vehicle with his consent. As a result, the officers located a videotape cassette and a film canister containing sedative residue. Police viewed the videotape, which depicted Dozier committing multiple sex acts on an unresponsive Ms. B, and other scenes depicting Dozier committing sex acts upon another unresponsive woman, later identified as Ms. A.

Dozier admitted in writing that he videotaped Ms. B and performed sexual acts upon her, but claimed that he thought she consented to both. Dozier also admitted to providing Ms. B with ten to twelve sleeping pills at her request. Soon after Dozier's arrest, Ms. A saw a television news program about the videotape and the unidentified women depicted in the film. Upon contacting police and reviewing the tape, she confirmed that she was one of the women depicted in the recording and claimed that she did not consent to, nor did she have any knowledge of, the videotaped sex acts. She described three approximate time frames within which the assaults occurred based upon the scenes on the tape: May 1993 to January 1995, January 1995 to December 1997, and the spring of 1998.

On November 17, 2000, the State filed a criminal complaint against Dozier containing multiple counts as to both victims, but without mentioning Ms. A by name. On December 4, 2000, the State filed an amended complaint including counts specifying Ms. A by name as a

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<sup>1</sup>384 U.S. 436 (1966).

victim. After proceedings in justice court, the State filed a criminal information containing twenty-seven counts against Dozier. Eight involved Ms. B: one count of first-degree kidnapping, one count of administration of a controlled substance to aid the commission of a felony, and six counts of sexual assault. The remaining nineteen counts charged Dozier with sexual assault of Ms. A.

At some point in the proceedings, Dozier entered pleas of guilty to four of the twenty-seven counts pursuant to a plea agreement. For reasons not at issue in this appeal, the district court later permitted Dozier to withdraw his pleas. Dozier ultimately moved to dismiss the charges involving Ms. A based upon the four-year statute of limitation governing sexual assaults. The district court denied the motion, finding that Dozier appeared to conceal the assaults from Ms. A, thus tolling the limitation period. Accordingly, the court submitted the issue of whether the acts were done in secret for determination by the jury.

At trial, both victims denied consenting to any of the sexual acts depicted on the videotape. Dozier testified that the women consented and that they appeared unresponsive because they had voluntarily taken some form of medication, drugs or alcohol. Defense witnesses testified to conversations involving Ms. A, which undermined her claims that she was unaware of Dozier's actions until after viewing the tape at police headquarters. Other witnesses testified to conversations with Ms. B to the effect that she was not upset about the incident and was angry that Dozier had been arrested.

The jury rendered verdicts of guilty on all counts, after which the district court sentenced Dozier as follows: count one, kidnapping, life imprisonment with parole eligibility in five years; count two, administration of a controlled substance in furtherance of a felony,

seventy-two months imprisonment with parole eligibility in sixteen months; counts three through twenty-seven, sexual assault, terms of life imprisonment with parole eligibility in ten years on each count. Some of the sentences as to the various counts were imposed consecutively, others concurrently. The court also sentenced Dozier to lifetime supervision to commence upon his release from parole or imprisonment, and awarded him credit for 308 days for time served in the Clark County Detention Center prior to imposition of sentence. Finally, the district court ordered Dozier to submit to genetic marker testing, and to pay \$781.66 in restitution, a \$25.00 administrative assessment and a \$250.00 DNA analysis fee. Dozier filed his timely notice of appeal.

### DISCUSSION

#### Statute of limitations

Dozier contends that the statute of limitations governing sexual assaults barred the State's prosecution of the separate counts involving Ms. A. In this, he also argues that the State failed to adequately establish that the acts committed against her were done in secret so as to toll the limitation period. We disagree.

NRS 171.085(1) states that, "[e]xcept as otherwise provided in NRS . . . 171.095, an indictment for . . . sexual assault . . . must be found, or an information or complaint filed, within 4 years after the commission of the offense." However, NRS 171.095(1)(a) provides in relevant part:

If a felony, gross misdemeanor or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the periods of limitation prescribed in NRS 171.085 and 171.090 after the discovery of the offense . . . .

"[A] crime is done in a secret manner, under NRS 171.095, when it is committed in a deliberately surreptitious manner that is

intended to and does keep all but those committing the crime unaware that an offense has been committed.”<sup>2</sup> If substantial evidence supports a jury’s verdict, we will not disturb it on appeal.<sup>3</sup>

In the present case, the parties agreed that the State bore the burden of proving by a preponderance of the evidence that Dozier committed the assaults against Ms. A in a secret manner and filed the information within four years after discovery of the offenses.<sup>4</sup> These were factual questions for the jury. Thus, the district court properly instructed the jury to acquit Dozier if it found that he did not commit the offenses in a secret manner, or to acquit him if it found that the information was not filed within four years after the discovery of the offenses.

By convicting Dozier, the jury implicitly concluded that the State met its burden concerning the secret nature of the offenses. Ms. A testified that she was unaware of, and did not consent to, the acts portrayed upon the videotape, and did not learn of the molestation until she viewed the videotape in 2000. Additionally, the tape itself depicts an essentially unresponsive victim. While Dozier raised an inference at trial that Ms. A knew of Dozier’s actions before 2000, the jury could have

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<sup>2</sup>Walstrom v. State, 104 Nev. 51, 56, 752 P.2d 225, 228 (1988), overruled by Hubbard v. State, 112 Nev. 946, 920 P.2d 991 (1996).

<sup>3</sup>Washington v. State, 112 Nev. 1067, 1073, 992 P.2d 547, 551 (1996).

<sup>4</sup>But see Hubbard, 112 Nev. 946, 920 P.2d 99 (holding that criminal statutes of limitation are non-jurisdictional, affirmative defenses, thus placing the burden of proof upon the defendant and thereby overruling Walstrom in part). We need not consider whether our ruling in Walstrom or Hubbard applies to the charges at issue in this case, as the State agreed to accept the higher burden of proving by a preponderance of the evidence that NRS 171.095(1)(a) was satisfied.

discounted this evidence and chosen to believe Ms. A's trial testimony instead.

We conclude that, under NRS 171.085, the district court properly denied Dozier's motion to dismiss the charges brought concerning Ms. A, and that substantial evidence supports the jury's implicit conclusion concerning the secret nature of these offenses.

Lay opinion

Dozer argues that the district court committed reversible error by allowing the investigating detective to testify that Ms. B appeared traumatized when he interviewed her at the hospital after the assault against her. Dozier argues that the word "traumatized" is a technical term used by medical or psychological experts to describe a wound or injury or an emotional shock causing severe emotional damage. He asserts that the detective's opinion testimony improperly raised an inference before the jury that Ms. B suffered such an injury.

NRS 50.265 permits admission of lay opinion testimony if the opinion is rationally based upon the perception of the witness, and helpful to provide a clear understanding of the witness' testimony or the determination of a fact at issue. The detective did not use the term "traumatized" in a highly technical sense, but rather in a layperson's understanding of the word, *i.e.*, that Ms. B appeared very upset. The detective's description of Ms. B at the hospital was thus pertinent to corroborate her claims of sexual assault.

We conclude that the district court committed no error with regard to the detective's observations of Ms. B at the hospital.

### Guilty plea reference

Dozier contends that the district court committed reversible error by failing to grant his motion for a mistrial following a reference by a witness to his withdrawn “plea.”

Under NRS 48.125(1), evidence of a subsequently withdrawn guilty plea is not admissible in a proceeding involving the person who made the plea. While admission of such evidence may constitute grounds for a new trial,<sup>5</sup> “[d]enial of a motion for mistrial is within the trial court’s sound discretion. The court’s determination will not be disturbed on appeal in the absence of a clear showing of abuse.”<sup>6</sup> When the trial court denies a motion for a mistrial based upon an improper inadvertent statement, the appellant must prove prejudice, *i.e.*, that an admonition would not cure the error.<sup>7</sup> Further, NRS 178.598 directs that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”

In this case, the witness referred to the plea only to provide a chronological context for her testimony as to when a certain conversation with one of the victims occurred. We conclude that the reference did not affect the outcome of the trial. First, the reference was brief and not calculated to reveal the voided plea arrangement. In fact, the witness only referred to a “plea,” not a “guilty plea.” Second, the court immediately admonished the jury to disregard the statement. Third, neither party to

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<sup>5</sup>Robinson v. State, 98 Nev. 202, 644 P.2d 514 (1982) (admission of evidence of defendant’s statements made during plea negotiations was reversible error).

<sup>6</sup>Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980).

<sup>7</sup>Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983).

the case elicited the response. Fourth, the district court instructed the jury that it “must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.”<sup>8</sup> Fifth, the evidence of guilt against Dozier was overwhelming.

Accordingly, the district court properly exercised its discretion in denying Dozier’s motion for mistrial.

Prosecutorial misconduct

The State made the following statement in final argument concerning the charges concerning Ms. B:

This man raped her for multiple hours; he drugged her to the point where, if, in fact, she had drawn the bath [as Dozier claimed], for crying out loud, the woman, in all likelihood, if she ever got in there would never have gotten out because she would have drowned. This man who was completely oblivious to how much he was giving her. It didn’t matter how it affected her. It didn’t matter how it reacted with anything else in her body, and it didn’t really matter if she woke up.

Dozier contends that there was no evidence before the jury raising the “spectre of death” and that this statement unduly inflamed the passions of the jury. Dozier concedes, however, that he did not make a contemporaneous objection to the prosecutor’s statements.

While failure to lodge a contemporaneous objection to a prosecutor’s closing argument precludes review of the potential error on

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<sup>8</sup>See *id.* at 490-91, 665 P.2d at 241-42 (witness’ inadvertent reference to defendant’s other unrelated criminal activity was unsolicited by prosecution; when evidence of guilt was overwhelming, immediate admonition to the jury defused the error).



appeal, this court has the discretion to address an error if it was plain and affected the defendant's substantial rights.<sup>9</sup>

While we conclude that the prosecutor committed misconduct in making the rhetorical flourish of which Dozier now complains, we decline to reverse his convictions under the "plain error" doctrine. In this we conclude that the improper argument did not affect Dozier's substantial rights.

As a general proposition, "[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial."<sup>10</sup> Going further, "[i]f the issue of guilt or innocence is close, and if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial."<sup>11</sup> However, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error.<sup>12</sup>

We conclude that the misconduct now identified did not affect Dozier's substantial rights because the evidence against him was overwhelming, including documentation of the offenses filmed by Dozier

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<sup>9</sup>Green v. State, 119 Nev. \_\_\_, \_\_\_, 80 P.3d 93, 95 (2003); Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001); Steese v. State, 114 Nev. 479, 497 n.5, 960 P.2d 321, 333 n.5 (1998).

<sup>10</sup>United States v. Young, 470 U.S. 1, 11 (1985).

<sup>11</sup>King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (citing Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)).

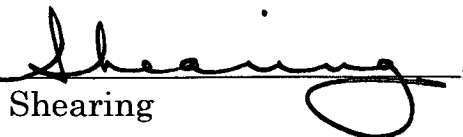
<sup>12</sup>Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).


himself. Accordingly, the prosecutorial misconduct issue raises nothing more than harmless error.

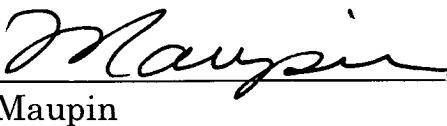
CONCLUSION

We conclude that Dozier's arguments on appeal lack merit. The district court correctly denied Dozier's motions to dismiss and for a mistrial, the court properly admitted lay opinion testimony, and the prosecutorial misconduct committed by the State does not compel reversal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C.J.  
Shearing

 \_\_\_\_\_, J.  
Rose

 \_\_\_\_\_, J.  
Maupin

cc: Hon. Stewart L. Bell, District Judge  
Clark County Public Defender  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk