

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38021

STATE OF IDAHO,)	2011 Unpublished Opinion No. 677
)	
Plaintiff-Respondent,)	Filed: October 27, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
VICTOR LUIS HERNANDEZ,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Judgment of conviction and sentence for rape, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

This is an appeal by Victor Luis Hernandez from a judgment of conviction and sentence imposed for the crime of rape, I.C. § 18-6101. He asserts that the district court erred during trial by admitting certain evidence that Hernandez considered irrelevant. He also contends that the district court abused its sentencing discretion by imposing a unified sentence of ten years, with two years fixed. We affirm.

I.

BACKGROUND

Hernandez was charged with rape for an act he committed against his then-estranged wife, Maria, while the two of them were at a local hospital where their four-year-old son was being treated for a serious illness. Maria testified at trial that she and Hernandez had been separated for several months and were living apart with a divorce action pending. She explained that on the night of the rape, a Sunday, she had taken a break from the hospital and visited her

new boyfriend, Herminio, at her home. When she returned to their son's room in the hospital around 10 p.m., Hernandez was there. He criticized her for leaving their son in the hospital while she visited Herminio. Hernandez became very upset and demanding. He grabbed her by the shoulders, pushed her into the bathroom in the hospital room and told her he could have whatever he wanted, whenever he wanted it. She related that he then pulled down her pants, bent her down over the toilet and raped her from the backside. She said that after he finished he kept reminding her that their other two children, girls, were with his mother and "if you tell anybody what happened, just remember the girls are with my side of the family." He also told her, "now Herminio . . . is going to know what it is to have his girlfriend f---d by someone else." Maria explained that although she called a detective the next morning, Monday, to report threats made to her by Hernandez, she did not immediately report the rape because she was afraid and humiliated. She waited until later on Monday to report the rape after she had obtained possession of her girls by picking them up after school. The police were able to get DNA evidence from Maria to support her accusation that she had been raped by Hernandez.

During Maria's testimony, the prosecutor attempted to elicit information that, while still in the hospital room shortly after the rape, Hernandez made a telephone call to a friend. Hernandez objected to this testimony and, outside the presence of the jury, Maria testified that she overheard Hernandez tell someone that they were going to get some weapons and visit Herminio. Hernandez argued that Maria's testimony was inadmissible under Idaho Rules of Evidence (I.R.E.) 402 and 403.¹ In response, the State asserted that Hernandez's statement was only one of a number of threats he had made during the incident and that it was not offered as proof of any prior uncharged misconduct. The district court overruled the objection, concluding that the statement was relevant to Maria's state of mind and that it explained why she took the action she did in delaying a report of the rape. The court also determined that the statement was relevant to Hernandez's state of mind. Finally, the court held that, under Rule 403, the probative value of the evidence was not outweighed by prejudicial effect. Maria thereafter testified to the

¹ Idaho Rule of Evidence 402 provides that "all evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state." Rule 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

jury about the overheard conversation, stating that Hernandez “told a friend over the phone to get the weapons ready, we are going to visit Herminio.” Immediately after this testimony, the district court gave a limiting instruction, advising the jury that the “statement is not being offered for the truth of any matter asserted in the statement, it is merely being offered for the purpose of showing [Maria’s] state of mind.”

The State introduced DNA evidence to support Maria’s testimony that she and Hernandez had engaged in sexual intercourse. Hernandez did not testify during the trial but challenged Maria’s credibility through cross-examination of her and other witnesses and suggested that the activity in the hospital bathroom had been consensual.

The jury found Hernandez guilty of rape. Hernandez was sentenced to ten years, with two years fixed, and the district court retained jurisdiction for six months. At the conclusion of the period of retained jurisdiction, the district court relinquished jurisdiction and ordered the sentence executed. Hernandez appealed.

II. DISCUSSION

A. Relevancy Question

Hernandez argues that the district court erred in overruling Hernandez’s objection, permitting Maria to testify that while in the hospital she overheard Hernandez tell someone on the telephone about a plan to get weapons and to visit Herminio. Hernandez’s objection cited I.R.E. 402 and 403 as a basis for the objection and focused solely on whether the effect of the proffered evidence was substantially outweighed by the danger of unfair prejudice.

On appeal, Hernandez suggests the testimony was also admitted in contravention of I.R.E. 404(b). This rule precludes admission of evidence of unrelated bad acts or misconduct on the part of the defendant which may cause the jury to imply that because of the defendant’s character he must have acted consistently with those past bad acts or traits. However, Hernandez failed to object on I.R.E. 404(b) grounds and thus did not preserve any claim on that basis for appellate review. I.R.E. 103(a)(1); *State v. Cannady*, 137 Idaho 67, 72, 44 P.3d 1122, 1127 (2002). Absent a timely objection, the appellate courts of this state will review an alleged error only where the defendant demonstrates on appeal “that one of his unwaived constitutional rights was plainly violated.” *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). The allegedly erroneous admission of I.R.E. 404(b) evidence is not the violation of a constitutional

right, but rather it “is a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to his defense.” *Cannady*, 137 Idaho at 72-73, 44 P.3d at 1127-28; *State v. McAway*, 127 Idaho 54, 60, 896 P.2d 962, 968 (1995); *State v. Johnson*, 126 Idaho 892, 896, 894 P.2d 125, 129 (1995); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). Addressing an argument that due process could suffice as a violated constitutional right to allow review of admissibility of trial evidence, this Court recently recognized:

[T]he [Idaho] Supreme Court has consistently refused fundamental error review for evidentiary error that does not encompass a constitutional violation. In our view, the *Perry* Court’s definition of fundamental error as requiring a constitutional violation reflects an intent to frame a more definitive limit upon fundamental error review, not to expand it. To hold that the presentation of evidence and associated argument in violation of an evidentiary rule satisfies the constitutional violation element of *Perry* because all evidentiary error implicates due process would, in our view, virtually eviscerate the first prong of the *Perry* standard and contravene the limits that *Perry* places on fundamental error review.

State v. Jackson, 151 Idaho 376, 379-80, 256 P.3d 784, 787-88 (Ct. App. 2011). Since the question of admissibility of evidence under I.R.E. 404(b) does not rise to the level of a violation of a constitutional right and no objection was raised by Hernandez under I.R.E. 404(b), his argument that reversible error occurred with regard to an alleged violation of Rule 404(b) will not be considered further.

Relevance of evidence is reviewed de novo. *State v. Zichko*, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996); *State v. MacDonald*, 131 Idaho 367, 369, 956 P.2d 1314, 1316 (Ct. App. 1998). To be admissible, evidence must be relevant. Idaho Rule of Evidence 401 recites that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” See *State v. Hocker*, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct. App. 1989). Whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice is a discretionary matter that will be disturbed only if the appellant demonstrates that the district court abused its discretion. *State v. Enno*, 119 Idaho 392, 405-06, 807 P.2d 610, 623-24 (1991); *State v. Birkla*, 126 Idaho 498, 500, 887 P.2d 43, 45 (Ct. App. 1994).

Here, the testimony by Maria concerning the overheard conversation about weapons and Hernandez’s plan to visit Herminio was relevant. The evidence of what Hernandez said shortly

after raping Maria did not go to his propensity to commit bad acts, as Hernandez asserts on appeal, but rather it was admissible to show the effect that overhearing the telephone conversation had on Maria. Her credibility was at issue during the trial and the record shows that part of Hernandez's strategy was to discredit Maria by questioning her delay in reporting the rape to the authorities. *See State v. Diggs*, 141 Idaho 303, 305, 108 P.3d 1003, 1005 (Ct. App. 2005). The testimony also directly supported the State's theory of the case, that the rape was essentially an act directed against both Maria and Herminio. Hernandez's discussion with a friend over the phone within Maria's hearing that they would gather weapons and visit Herminio demonstrated an effort by Hernandez to continue to exercise power and control over both of them, showing them that he could take what he wanted, when he wanted it, and that the rape was for the purpose of degrading and instilling fear in both of them. The district court ruled:

I'm going to overrule the objection on a couple of grounds. Number one, I think it is relevant to a number of things, not just going to her state of mind and why she took the action she took. But appears to me given the State's theory of the assault and the purpose behind the assault that it is part of the entire assault. It's just a continuation of what is going on.

Furthermore under [I.R.E.] 403--and I do recognize it is an exercise of discretion--I do not believe its probative value is unduly--is so prejudicial that it outweighs the relevance of what was occurring.

Finally, I intend to give a limiting instruction to the jury to explain to them--and I will do it as soon as she has testified and I will interrupt her at that time--and say that they are not to consider the statement for the truth of any matter asserted, but they're only to consider it for the purpose of explaining her state of mind.

The district court recognized its discretionary authority to admit relevant testimony after weighing the probative value against prejudicial effect. The court gave to the jury a cautionary instruction concerning the limited use of the evidence of the overheard conversation and it is presumed that the jury followed the court's cautionary admonition. *Diggs*, 141 Idaho at 306, 108 P.3d at 1006; *State v. Hedger*, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989). *See also State v. Scovell*, 136 Idaho 587, 591, 38 P.3d 625, 629 (Ct. App. 2001) (noting the risk of unfair prejudice relating to the admission of uncharged misconduct was reduced by "the trial court's instruction that the jurors were not to consider the uncharged acts as proof that Scovell had criminal propensities or behaved in conformity with them by committing the charged crimes"). We conclude that the district court did not abuse its discretion in admitting the disputed testimony.

B. Sentencing Discretion

Hernandez argues that his ten-year sentence, with two years fixed, is excessively harsh and was an abuse of the district court's sentencing discretion. He acknowledges that his sentence does not exceed the statutory maximum allowed for the crime of rape, but asserts that his lack of a felony criminal record and his history of family support serve as mitigating factors.

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *Hedger*, 115 Idaho at 604, 768 P.2d at 1337; *State v. Stone*, 147 Idaho 330, 334, 208 P.3d 734, 738 (Ct. App. 2009). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under any view of the facts of the case. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *State v. Bowcut*, 140 Idaho 620, 621, 97 P.3d 487, 488 (Ct. App. 2004); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender, and punishment or retribution. *Toohill*, 103 Idaho at 568, 650 P.2d at 710. A sentence need not serve all the sentencing objectives or weigh each one equally. *State v. Mead*, 145 Idaho 378, 382, 179 P.3d 341, 345 (Ct. App. 2008); *State v. Dushkin*, 124 Idaho 184, 186, 857 P.2d 663, 665 (Ct. App. 1993). The primary objective, as a matter of Idaho policy, is the good order and protection of society; all other objectives are subservient to this end. *State v. Hunnel*, 125 Idaho 623, 627, 873 P.2d 877, 881 (1994); *State v. Jensen*, 137 Idaho 240, 245, 46 P.3d 536, 541 (Ct. App. 2002). In evaluating the reasonableness of a sentence, we conduct an independent review of the record, focusing on the nature of the offense and the character of the offender. *Stone*, 147 Idaho at 334, 208 P.3d at 738; *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991).

From our review of the record, we conclude that the district court did not abuse its discretion in sentencing Hernandez because the court properly considered and balanced the objectives of sentencing. The district court noted that in most situations, Hernandez was a law-abiding citizen and that he had a strong character, particularly when dealing with his family. But the court also found that Hernandez failed to acknowledge responsibility for his actions toward the victim, contending at first that no rape had occurred but later asserting that his act of raping the victim was consensual. The court also took into account Hernandez's expression of threats toward other persons as an indication of potential danger to the community. After considering

the facts of the case and applying the objectives of criminal punishment, the court determined that imposing a unified sentence of ten years, with two years fixed, was appropriate given Hernandez's failure to accept responsibility for his actions, the violent nature of the crime, and the court's concern for community safety. We hold that Hernandez has failed to show that the district court abused its sentencing discretion.

III.

CONCLUSION

The district court did not err in admitting the testimony concerning the overheard telephone conversation. The district court did not abuse its discretion by imposing a unified sentence of ten years, with two years fixed. The judgment of conviction and sentence are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**