IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN RYAN, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43820

FILED

JAN 31 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant John Ryan, III, to serve a prison term of 10 to 25 years.

Ryan first contends that there was insufficient evidence in support of the sexual assault conviction. Specifically, Ryan contends that there was no evidence that the victim had reasonably demonstrated her lack of consent and, to the contrary, Ryan contends that the evidence shows that the victim mistakenly consented believing that she was engaging in sex with her boyfriend. We conclude that Ryan's contention lacks merit.

The standard of review for a challenge to the sufficiency of the evidence to support a criminal conviction is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1]

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[1]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

NRS 200.366(1) provides that:

> A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.

The use of overt physical force is not required to support a conviction under NRS 200.366.[2] Rather, the "statute only requires the commission of the act of sexual penetration against the will of the victim."[3] An inquiry into the issue of non-consensual sexual intercourse, as an element of sexual assault, considers whether the victim reasonably demonstrated a lack of consent and whether a reasonable person, from the defendant's point of view, would have concluded that the victim manifested consent.[4] "A rape victim is not required to do more than her age, strength, and the surrounding facts and attending circumstances would reasonably dictate as a manifestation of her opposition."[5] Finally, this court has recognized that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction."[6]

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[2]McNair, 108 Nev. at 57, 825 P.2d at 574.

[3]Id.

[4]Id. at 56-57, 825 P.2d at 574.

[5]Id. at 57, 825 P.2d at 574.

[6]Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

In this case, Ryan testified at trial, admitting that he had vaginal intercourse with the victim but insisted that it was consensual. The victim, however, testified that the sexual intercourse was not consensual and that she was asleep at the time of the initial penetration. Although Ryan argues that the victim could not recall the incident and that her testimony was replete with inconsistencies, it is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[7]

Ryan next contends that the district court erred in allowing the sexual assault nurse to give expert testimony because she had not been properly qualified as an expert witness. Specifically, Ryan contends that the nurse's opinion that the victim had been sexually assaulted should have been disregarded because "this opinion evidence was not rooted in science and was merely a superficial opinion of an official doing evidence collection for the police." We disagree.

Preliminarily, we note that Ryan failed to object to the admission of the nurse's testimony on the grounds that she was not a properly qualified expert. Generally, the failure to object below precludes appellate review absent plain or constitutional error.[8] We conclude that no such error occurred here. The decision to admit expert testimony and determine the qualifications necessary to render a witness an expert in a

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[7]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

[8]Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

given field is within the sound discretion of the district court.[9] This court has recognized that a qualified expert witness may render an opinion on whether a particular person has been the victim of a sexual assault, so long as the evidence is relevant and substantially more probative than prejudicial.[10] Such testimony is admissible even when it goes to an ultimate issue in the case.[11] However, in the giving of such testimony, it is improper for an expert witness to bolster the victim's credibility, veracity, or otherwise identify a particular person as the assailant.[12]

Here, the witness was a registered nurse and a certified Sexual Assault Nurse Examiner. She had examined over 1,500 alleged sexual assault victims and testified as a sexual assault expert witness in numerous court cases. The nurse identified the standard procedures she used in examining an alleged sexual assault victim and described the actual medical examination performed on the victim in this case. We conclude that the district court did not err in permitting the nurse to testify as an expert on sexual assault. The nurse's opinion on whether the victim displayed behavior consistent with other sexual assault victims was well within the proper scope of her testimony. Moreover, the nurse did not

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[9]See Childers v. State, 100 Nev. 280, 283, 680 P.2d 598, 600 (1984); see also NRS 50.275; NRS 50.285.

[10]See Shannon v. State, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989); Townsend v. State, 103 Nev. 113, 116-18, 734 P.2d 705, 707-08 (1987); see also NRS 48.035(1); NRS 50.345.

[11]Shannon, 105 Nev. at 787, 783 P.2d at 945.

[12]See Lickey v. State, 108 Nev. 191, 196, 827 P.2d 824, 826-27 (1992); Townsend, 103 Nev. at 118, 734 P.2d at 708.

improperly bolster the victim's credibility and, in fact, stated that she could not say whether the intercourse was consensual or nonconsensual, only that the lack of physical trauma was consistent with the victim's account of the assault.

Finally, Ryan contends that the trial court erred in giving jury instruction no. 8 that states:

> There is no requirement that the testimony of the victim of a sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a guilty verdict.

Ryan argues that he was deprived of his constitutional right to a fair trial because the instruction "inherently forces members of the jury to look to the victim's testimony and put her testimony upon a pedestal higher than the other witness testimony." We conclude that Ryan's contention lacks merit.

The challenged instruction correctly states the law in Nevada that the testimony of the sexual assault victim alone is sufficient to uphold a conviction.[13] We disagree with Ryan that the jury instruction improperly bolstered the victim's testimony, and to the contrary, the instruction served to remind the jurors that before they could convict Ryan based solely on the victim's uncorroborated testimony, they must believe that her testimony was truthful beyond a reasonable doubt. Accordingly, Ryan's constitutional right to a fair trial was not violated.

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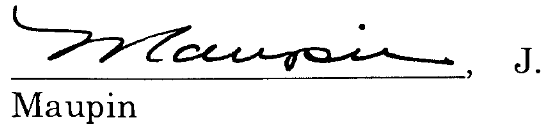
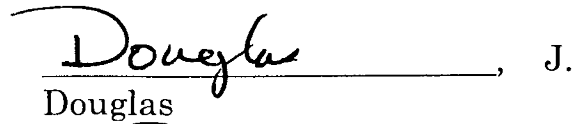
[13]See May v. State, 89 Nev. 277, 279 & n.2, 510 P.2d 1368, 1369 & n.2 (1973), overruled on other grounds by Turner v. State, 111 Nev. 403, 892 P.2d 579 (1995).

Having considered Ryan's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



_______________________, J.
Maupin



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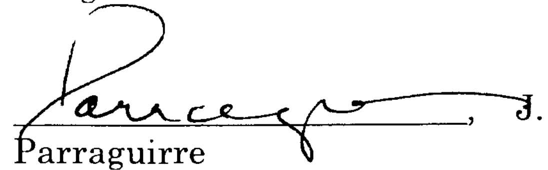
Douglas



_______________________, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
J. Chip Siegel, Chtd.
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk