IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL N. BEASLEY A/K/A SAMUEL NATHANIEL BEASLEY, IV,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45251

FILED

MAY 19 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Samuel N. Beasley met the victim at Arizona Charlie's Casino in Las Vegas in the early morning hours of July 4, 2004. The victim was intoxicated, and eventually she and Beasley left the casino and drove to an apartment belonging to Beasley's friend Badru Kakungulu. Once in the apartment, the victim told the two men that she needed to lie down because she was tired. Beasley and Badru followed her into Badru's bedroom. The victim got on the bed, and Beasley and Badru positioned themselves on either side of her. She then felt someone remove her pants and underwear and digitally penetrate her. Badru got on top of the victim and vaginally penetrated her. She screamed, and Badru told Beasley to get something to put in the victim's mouth to silence her screams. Beasley retrieved a sock and stuffed it in the victim's mouth.

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After Badru finished, Beasley got on top of the victim and vaginally penetrated her.

Beasley testified that he and the victim engaged in some consensual activity prior to going to Badru's apartment and that all sexual contact between him and the victim at Badru's apartment was consensual as well. After the assault, the victim got dressed, and Beasley drove her home.

Beasley was charged with three counts of sexual assault, two of which he was alleged to have committed as an aider and abettor. On April 15, 2005, the district court convicted Beasley, pursuant to a jury verdict, of all three counts. The district court sentenced him to three concurrent terms of life in prison with the possibility of parole after ten years.

Beasley raises numerous issues on appeal. First he argues that the use of the word victim by witnesses and the State violated his due process rights and denied him a fair trial. However, Beasley never objected to any instance where the word victim was used. Although he objected to an instruction that included the challenged term, the basis of his objection was not that it included the word victim. Failure to object precludes appellate review of an alleged error unless it rises to the level of plain error.[1] In conducting a plain error analysis, we must consider

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[1]See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights.[2] The burden rests with Beasley to show actual prejudice or a miscarriage of justice.[3]

Here, the use of the word victim was not as pervasive as Beasley suggests. Rather, the record reveals that it was used less than two dozen times and not every use was a reference to his accuser. We therefore conclude that Beasley fails to demonstrate plain error. Even assuming error, Beasley fails to show that the infrequent use of the challenged word affected his substantial rights.

Beasley next contends that several jury instructions were erroneous. First, he challenges the language in jury instruction no. 10, which advised the jury, "The crucial question is not whether the victim was penetrated by physical force, but whether the act was committed without her consent." Beasley objected to this language and requested that it be stricken because it was misleading. He argued that the challenged language could lead the jury to believe that if it decided that the victim was penetrated without her consent, it need not determine whether the charged acts were done willfully, unlawfully, and knowingly to convict him. The district court overruled the objection stating that the

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[2]See Anderson v. State, 121 Nev. ___, ___, 118 P.3d 184, 187 (2005); Kaczmarek v. State, 120 Nev. 314, 328, 91 P.3d 16, 26 (2004).

[3]See Green, 119 Nev. at 545, 80 P.3d at 95.

instruction was not misleading in light of all the instructions that would be provided.

Beasley now argues that the instruction violated Carter v. State,[4] in which we addressed this court's decision in Honeycutt v. State.[5] In Honeycutt, this court held that "because a perpetrator's knowledge of lack of consent is an element of sexual assault, we conclude that a proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration."[6] However, this court further concluded that such an instruction was incomplete and properly refused if it did not include a proviso that the defendant's belief is not reasonable when based upon conduct produced by such things as violence or fear.[7] In Carter, we retreated from Honeycutt and held that when a defendant proffers such an incomplete instruction, the district court must provide a complete Honeycutt instruction and not reject the proffer per se as incomplete.[8]

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[4]121 Nev. ___, 121 P.3d 592 (2005).

[5]118 Nev. 660, 56 P.3d 362 (2002), overruled in part by Carter, 121 Nev. ___, 121 P.3d 592.

[6]Id. at 670, 56 P.3d at 369.

[7]Id. at 671, 56 P.3d at 369.

[8]Carter, 121 Nev. at ___, 121 P.3d at 595-96.

Carter is not apposite here. Beasley requested that certain language be excised from the challenged instruction but did not request the district court to instruct the jury that a reasonable and good faith belief that the accuser consented to the charged sexual acts was a defense to sexual assault. Counsel argued this theory in his closing argument. "Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."[9] The district court was not presented with the issue Beasley now raises before this court. The district court did not err in rejecting the objection to jury instruction no. 10. Further, Carter, does not require the district court to instruct the jury on a defense theory if counsel does not request an instruction on that theory. Consequently, we reject Beasley's contention.

Beasley next complains that the instruction advising the jury of the elements of sexual assault was erroneous. The district court

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[9]McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998); cf. Ross v. Giacomo, 97 Nev. 550, 556, 635 P.2d 298, 302 (1981). In Ross, this court stated:

> Appellant now contends, for the first time on appeal, that this instruction was also erroneous in view of the district court's failure to instruct the jury as to the elements of undue influence. Appellant did not object to the instruction on this ground at trial, nor did she offer an instruction defining undue influence. Therefore, we decline to consider this contention on appeal.

instructed the jury that the State must establish that Beasley knowingly, willfully, and unlawfully "subjected, that is without consent, another person" to sexual penetration of any kind. (Emphasis added.) He argues that the underlined language directed the jury to find that an absence of consent was proven as long as the sexual act was committed upon the body of another person and that nothing in the instruction explained to the jury how to evaluate his affirmative consent defense. Beasley failed to object to the challenged instruction; therefore, we review this claim under a plain error analysis.

The instruction clearly required the State to prove that Beasley unknowingly, willfully, and unlawfully sexually penetrated the victim without her consent. We conclude that no reasonable person would interpret the instruction as he suggests, i.e., that lack of consent was established merely upon proof that a sexual act had been committed upon the body of another. Moreover, Beasley provides no relevant authority suggesting that the instruction was misleading or erroneous. Accordingly, we conclude no error, let alone plain error, occurred.

Additionally, Beasley argues that the use of the word victim in several instructions was prejudicial because it undermined the jury's fact-finding role by advising the jury that the accuser was recognized by law as a victim. Beasley did not object to any of the challenged instructions; therefore, we review this claim under a plain error analysis. Beasley provides no relevant authority it support his position. Moreover, the jury was properly instructed regarding the presumption of innocence, the

State's burden of proof, reasonable doubt, and other relevant matters. We conclude that he fails to demonstrate plain error.

Beasley next contends that the district court erred in giving an instruction regarding the uncorroborated testimony of a sexual assault victim because such instructions are inapplicable in cases where the only disputed fact is consent.[10] Beasley acknowledges that we have held that the uncorroborated testimony of a victim is sufficient to uphold a sexual assault conviction.[11] He argues, however, that this standard has never applied to sexual assault cases where the accused asserted the affirmative defense of consent. He further contends that the instruction prejudiced him because it advised the jury that the district court had decided that his accuser was a victim and that a crime occurred.

Initially, we note that the uncorroborated testimony standard has been applied in circumstances where consent was contested.[12] Further, we reject Beasley's contention that the instruction conclusively established that the victim was the victim of the charged crime. In

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[10]The district court instructed the jury, "There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty."

[11]See Gaxiola v. State, 121 Nev. ___, ___, 119 P.3d 1225, 1232 (2005); State v. Diamond, 50 Nev. 433, 437, 264 P. 697, 698 (1928).

[12]See Nordine v. State, 95 Nev. 425, 426, 596 P.2d 245, 246 (1979).

addition to the challenged instruction, as noted above, the jury was advised of the presumption of innocence, the State's burden of proof, and reasonable doubt. Considering the instructions as a whole, we conclude that the challenged instruction was not erroneous, misleading, or prejudicial.

Beasley also argues that the district court erred in admitting a photograph of the victim's injuries because it did not accurately depict the injuries she sustained and was cumulative. However, Beasley failed to object to the photograph's admission; therefore, we review this claim for plain error. Beasley complains that State's Exhibit 5 shows the victim's face swollen and with "huge black eyes." He argues that the photograph was prejudicial and irrelevant because the only injury the victim sustained was a minor cut on her lip, while the photograph indicates that the black eyes and swollen face appeared on the same day as the sexual assault, suggesting that she had been subjected to substantial violence. He further argues that Exhibit 5 is cumulative because another photograph was admitted to show the victim's injured lip.

The victim testified that the only injury she sustained during the assault was a cut on her lip. The expert sexual assault nurse, who took the challenged photograph, testified that the victim's face and eyes were red from crying and that the only injury to her face was a small superficial laceration. There was no evidence that the victim suffered any bruising to her eyes or other substantial injury to her face. Moreover, other witnesses testified that the victim cried heavily after reporting the

assault. The State suggests that the victim's "black eyes" were a result of her mascara and makeup running due to her heavy crying. We conclude that the evidence demonstrates that Exhibit 5 merely showed the victim's demeanor shortly after the assault and that it was not cumulative. We further conclude the district court did not err in admitting it.

Beasley further complains that he was prejudiced by the improper admission of an audiotape and written transcript of his statement to police, which he claims referred to possible prior bad acts. Beasley did not object to the introduction of this evidence and, in fact, stipulated to its admission; therefore, we review this claim under a plain error analysis.[13] Beasley argues that admission of the audiotape and transcript constituted plain error and prejudiced him because it overemphasized his trial testimony, and the jury was allowed to read and hear his statement more than once. However, Beasley neglected to include a copy of the transcript of his statement, and he does not describe the potential prior bad act evidence to which he refers. Therefore, it is impossible for this court to determine whether error occurred and, if so, whether it affected his substantial rights. Consequently, we conclude that Beasley has failed to demonstrate that the district court erred.

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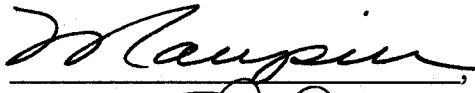
[13]See Anderson, 121 Nev. at ___, 118 P.3d at 187; Kaczmarek, 120 Nev. at 328, 91 P.3d at 26.

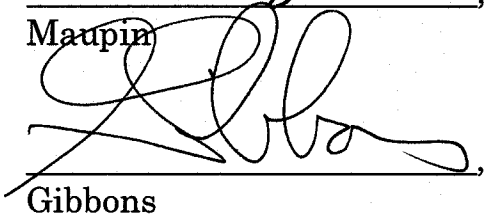
Finally, Beasley contends that the cumulative effect of the foregoing alleged errors warrants reversal. We conclude that he fails to demonstrate cumulative error.

Having considered Beasley's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



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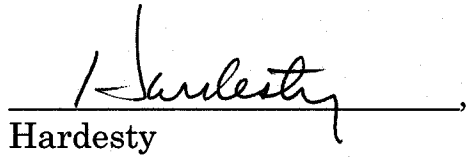

_____, J.
Hardesty

cc: Hon. Joseph T. Bonaventure, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk