IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID RODRIGUES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46745

FILED

MAR 08 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of lewdness with a child under the age of 14. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant David Rodrigues to a prison term of life with parole eligibility after 10 years.

Rodrigues first contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1]

In particular, we note that the victim testified that Rodrigues took her pajama pants off and rubbed her vaginal area with his hand. The jury could reasonably infer from the evidence presented that Rodrigues committed an act of lewdness. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not

[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

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be disturbed on appeal where, as here, substantial evidence supports the verdict.[2]

Rodrigues next argues that prosecutorial misconduct warrants a new trial. Specifically, Rodrigues argues that the prosecutor goaded Rodrigues into accusing other witnesses of lying.[3] Our review of the record, however, shows that the questions by the prosecutor did not constitute misconduct, but were efforts to clarify Hall's testimony and the theory of the defense.[4]

Rodrigues next contends that the statutorily mandated reasonable doubt instruction given in this case impermissibly reduced the State's burden of proof.[5] This court has repeatedly upheld the statutory

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[2]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[3]See Daniel v. State, 119 Nev. 498, 519, 78 P.3d 890, 904 (2003) (holding prosecutors are prohibited "from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses").

[4]See Pascua v. State, 122 Nev. ___, ___, 145 P.3d 1031, 1035 (2006) (holding that a prosecutor is permitted to inquire into the veracity of witnesses in an effort to rebut the defendant's theory of the case).

[5]NRS 175.211(1) provides that the district court must give the following reasonable doubt instruction:

> A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they

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reasonable doubt instruction against similar constitutional challenges.[6] Accordingly, we conclude that this contention is without merit.

Rodrigues also contends that the prosecutor impermissibly diluted the standard of reasonable doubt in her closing argument. Specifically, Rodrigues argues that the prosecutor should not have directed the jury to consider the totality of the evidence and that in order to qualify as "reasonable doubt," the jury's doubt had to be something that could be clearly articulated. However, Rodrigues failed to object to the prosecutor's statements and he has not demonstrated that the prosecutor's comments were patently prejudicial.[7]

Finally, Rodrigues contends that this case should be remanded for a new sentencing hearing. Specifically, Rodrigues argues that the district court erroneously based the sentence on the fact that appellant was originally charged with molesting a second victim. "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable

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. . . continued

> can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

[6]See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995).

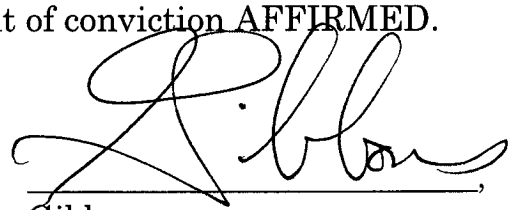
[7]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (holding that when appellant fails to object below, this court reviews alleged prosecutorial misconduct only if it constitutes plain error, i.e., if it is shown to be patently prejudicial).

or highly suspect evidence, this court will refrain from interfering with the sentence imposed."[8]

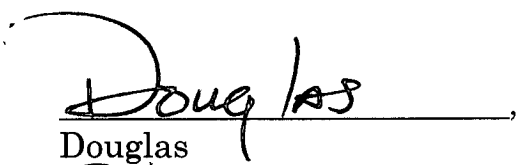
In this case, the district judge stated that he was sentencing Rodrigues to prison, rather than probation, because the psychosexual evaluation stated that Rodrigues was not a good candidate for probation. Rodrigues has therefore failed to demonstrate that the sentence was based on the district judge's belief that he had molested a second victim, and we conclude that re-sentencing is not warranted.

Having considered Rodrigues' contentions and concluded that they are without merit, we

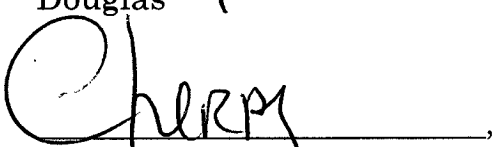
ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[8]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).