IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN OWEN REDENIUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49631

FILED

FEB 26 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under the age of fourteen. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Dustin Owen Redenius to a term of life in the Nevada State Prison with the possibility of parole after a minimum of ten years.

First, Redenius argues that there was insufficient evidence for the jury to find him guilty of lewdness with a minor under the age of fourteen when the jury acquitted him of sexual assault that was alleged to have occurred right after the conduct supporting the lewdness conviction. Redenius contends that pursuant to our holding in Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004), since the jury found that the State failed to meet its burden on the sexual assault charge, and the lewdness was a prelude to the sexual assault, there was insufficient evidence for the jury to find that he committed a lewd act with the victim. Redenius further contends that for a jury to convict on a charge of lewdness and acquit on a charge of sexual assault leads to a verdict, which is inconsistent with the facts of the case.

This court will not reverse a jury's verdict on appeal if that verdict is supported by substantial evidence. Moore v. State, 122 Nev. 27,

35, 126 P.3d 508, 513 (2006). "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998). In Crowley, 120 Nev. at 34, 83 P.3d at 285-86, we overturned a lewdness conviction when the defendant was also convicted of sexual assault for the same act on which the lewdness conviction was based. We determined that Crowley's act of rubbing the young male victim's penis was a prelude to the sexual assault and not a separate lewd act since Crowley never stopped his actions. Id. at 34, 83 P.3d at 285.

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. The victim testified that Redenius first touched her breasts, stomach and vagina. She further testified that Redenius stopped touching her for a short period of time, which led her to believe that the incident was over, before Redenius allegedly had sexual intercourse with her. Redenius did stop, even if it was for a very brief period, in between his lewd touching of the victim and the alleged sexual assault. Further, Redenius' reading of our decision in Crowley is faulty and inconsistent with our actual holding. In Crowley, we held that a defendant may not be convicted of both lewdness and sexual assault when the conduct supporting the lewdness conviction was a mere prelude to a sexual assault that occurs immediately thereafter. Id. at 34, 93 P.3d at 285-86. We did not hold that an acquittal on a charge of sexual assault immediately after lewd conduct necessitated an acquittal for lewdness. Moreover, Redenius' case is distinguishable from Crowley. Id. at 31-32, 83 P.3d at 284. In Crowley, there was no interruption between Crowley's lewd act of touching

the young male victim's penis and the sexual assault which followed. Id. at 34, 83 P.3d at 285. Whereas in the instant case, there was an interruption between the lewd act and the alleged sexual assault. Therefore, we conclude that no relief is warranted on this claim.

Second, Redenius argues that the district court erred by rejecting his proffered jury instruction and verdict form on attempted sexual assault. Specifically, Redenius contends that the district court should have accepted and given the jury instruction and verdict form pertaining to both sexual assault and attempted sexual assault since the evidence presented by the State at trial in support of the lewdness allegation also instructed the jury on a charge of attempted sexual assault. This court affords a district court wide discretion to settle jury instructions and we review a district court's decision for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A district court abuses its discretion if its decision is "'arbitrary or capricious or if it exceeds the bounds of law or reason.'" Id. (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

A criminal defendant, upon request, is entitled to have the district court give the jury an instruction on his or her theory of the case as long as there is some evidence, even if weak, which supports that theory. Rosas v. State, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006). We have held that the "test for the necessity of instructing the jury is whether there is any foundation in the record for the defense theory." Id. at 1268, 147 P.3d at 1108 (citing Allen v. State, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981)). We have also held that a trial court should give an instruction on a lesser-included offense if there is any evidence to support

it. Id. at 1268-69, 147 P.3d at 1108 (citing State v. Millain, 3 Nev. 409, 449-50 (1867)).

A person is guilty of sexual assault if he "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." 2005 Nev. Stat., ch. 507, § 27, at 2874-75 (NRS 200.366(1)). An attempt is "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it." NRS 193.330(1). Therefore, for the district court to have erred in rejecting Redenius' theory of the case instruction and proposed verdict form, the evidence presented at trial must support a theory that Redenius attempted, but failed, to commit sexual assault against the victim.

We conclude that Redenius' argument is without merit. The evidence introduced at trial was that Redenius had first touched the victim's breasts, stomach and vagina. Redenius stopped touching her for a short period of time, and she thought the incident was over, before Redenius allegedly had sexual intercourse with her. The evidence showed that Redenius had touched the victim, stopped, and then later sexually penetrated her. There was no evidence presented at trial that supports a theory that Redenius tried, but failed, to sexually penetrate the victim during the touching. While the jury may have concluded that the State failed to meet its burden in proving sexual assault, this is not a basis for contending that a jury instruction on attempted sexual assault should have been given. Thus, we conclude that Redenius has failed to show that there was some evidence, which would have supported a charge of attempted sexual assault. Therefore, we conclude that the district court

did not abuse its discretion in refusing to give Redenius' proffered jury instruction and use his proposed verdict form.

Third, Redenius argues that the caselaw of this and other jurisdictions does not support the "more weighty affairs of life" instruction for reasonable doubt currently encompassed in NRS 175.211(1).[1] Redenius argues that this court should hold that the reasonable doubt instruction of NRS 175.211(1) is unconstitutional. This court reviews a district court's decision regarding jury instructions for an abuse of discretion. Rose v. State, 123 Nev. 24, ___, 163 P.3d 408, 415 (2007).

We conclude that Redenius' argument concerning the constitutionality of the reasonable doubt instruction as codified at NRS 175.211(1) and given by the district court in this case is entirely without merit. "This court has repeatedly reaffirmed the constitutionality of Nevada's reasonable doubt instruction." Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003). The Ninth Circuit Court of Appeals has also upheld this state's reasonable doubt instruction. Ramirez v. Hatcher, 136 F.3d 1209, 1215 (9th Cir. 1998). Thus, the district court did not abuse its discretion in giving the reasonable doubt instruction codified by NRS 175.211(1).

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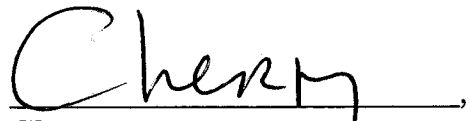
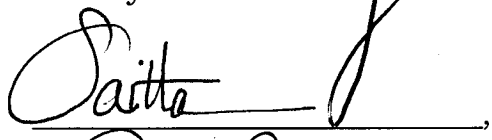
[1]NRS 175.211(1) states "[a] reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they 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."

Having considered Redenius' claims and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



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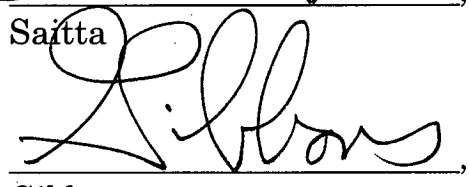

_____, J.
Gibbons

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