IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS LAUER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50032

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault with a minor under 14 years of age, two counts of lewdness with a child under the age of 14, and one count of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

The district court sentenced appellant John Lauer to: two prison terms of 240 months to life for sexual assault with a minor under 14 years of age, two prison terms of 120 months to life for lewdness with a child under the age of 14, and one prison term of 64 to 160 months for battery with intent to commit a crime. The sentences were ordered to run concurrently. Lauer appeals these convictions on multiple grounds. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition. We determine that all of Lauer's contentions are without merit. Therefore, we affirm the lower court's judgment of conviction.

Double jeopardy

Lauer challenges his convictions for lewdness with a minor on double jeopardy grounds, alleging that these convictions were based on the same acts of touching that support his convictions for sexual assault. We disagree. At trial, M.S. testified to four specific instances of touching: two

involving penetration, and two without penetration. The State, therefore, presented sufficient evidence to demonstrate that two separate instances of sexual assault occurred in addition to two separate instances of lewdness.[1] Accordingly, we conclude that Lauer's convictions are not redundant.[2]

Separately, Lauer raises a similar double jeopardy challenge to his conviction for battery with intent to commit a crime because the actions constituting the battery were necessary to, and therefore part of, the crimes of sexual assault or lewdness. In Estes v. State, however, we held that there is no error in maintaining separate charges of sexual assault and battery with intent to commit a crime since battery requires proof of physical force or violence, and sexual assault does not.[3] M.S. testified to instances where Lauer had held her down, slapped her face, and slammed her head into the wall. Since slapping M.S.'s face to silence her protests was not necessary to proving sexual assault, Lauer's conviction for battery with intent to commit a crime was not improper.

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[1]Wright v. State, 106 Nev. 647, 799 P.2d 548 (1990).

[2]Lauer additionally challenges the information based on the same grounds. This argument is without merit since Lauer failed to challenge the sufficiency of the information at trial, the information put Lauer on notice of the charges, and the State presented sufficient evidence to support the separate convictions. Larsen v. State, 86 Nev. 451, 456, 470 P.2d 417, 420 (1970) ("When not raised until after a conviction or upon appeal, a reduced standard will be applied in testing the sufficiency of the indictment or information."); see also NRS 173.075(1) (the charging document is sufficient if it gives the criminal defendant adequate notice of the charges against him).

[3]122 Nev. 1123, 1143, 146 P.3d 1114, 1127-28 (2006).

Prosecutor's comments on Lauer's pre-arrest silence

While Lauer concedes that he did not object to the testimony at trial, Lauer challenges the following colloquy that took place between the State and Detective Tracy Smith on the ground that it was an impermissible comment on Lauer's Fifth Amendment right to remain silent:

> Q. Did you also at some point attempt to conduct an interview with the Suspect John Lauer?
>
> A. Yes, I did.
>
> Q. Were you ever able to conduct a face to face interview with him?
>
> A. No, I was not.
>
> Q. Did you ever interview him at all? Were you—
>
> A. No, sir. I did not.

We disagree that this statement is a comment on Lauer's silence.

"Generally, the failure to object [at trial] precludes appellate review absent plain error."[4] To constitute plain error, the error "'must be so unmistakable that is apparent from a casual inspection of the record.'"[5] Because this line of questioning was not a comment on Lauer's Fifth

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[4]Browning v. State, 124 Nev. ____, ____, 188 P.3d 60, 71 (2008).

[5]Nelson v. State, 123 Nev. ____, ____, 170 P3d. 517, 524 (2007) (quoting Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)).

Amendment privilege, this challenge does not rise to the level of plain error and reversal is not warranted.

Sexual Abuse Investigative Team Nurse Phyllis Suiter's testimony

Lauer also challenges Nurse Suiter's testimony that the lack of physical findings was not inconsistent with the abuse alleged and that M.S.'s behavior in not reporting the abuse for over a year was common. Lauer argues such statements amount to impermissible witness vouching. We disagree.

This court has held that it is improper for an expert witness to testify directly regarding the truthfulness of another witness's testimony.[6] However, it is often the role of an expert witness to validate another witness's testimony.[7] Moreover, NRS 50.345 states, "In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault." In this case, Nurse Suiter testified as to her physical findings from M.S.'s examination and statistics based on her personal knowledge and experience in conducting sexual abuse examinations on children. Therefore, we conclude Nurse Suiter's testimony was properly admitted.

Sufficiency of the evidence

Lauer challenges the sufficiency of evidence with respect to all of his convictions. A conviction is supported by sufficient evidence "if the evidence, viewed in the light most favorable to the prosecution, would

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[6]Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

[7]Id. at 118, 734 P.2d at 709.

allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."[8]

Here, Lauer was convicted of two counts of sexual assault with a minor. For each count, the State was required to prove the separate acts of sexual penetration that were against M.S.'s will or under conditions in which Lauer knew or should have known that M.S. was mentally or physically incapable of resisting or understanding the nature of Lauer's conduct.[9] Reviewing the record, the State met this burden as M.S. testified clearly about two separate instances of penetration.[10] M.S. also testified that the incidents occurred when she was seven years old and that she resisted during both instances of penetration. Based on this, we conclude that any reasonable trier of fact could find the essential elements of sexual assault.

Lauer was also convicted of two counts of lewdness with a minor, which required the State to prove that Lauer touched M.S. with the intent to gratify either her or himself sexually.[11] Separate from the sexual assaults in which penetration occurred, M.S. testified that on at least two other occasions Lauer touched her genitals without penetration. Thus, Lauer's lewdness convictions are supported by sufficient evidence.

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[8]Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[9]NRS 200.366(1).

[10]See May v. State, 89 Nev. 277, 279 & n.2, 510 P.2d 1368, 1369 & n.2 (1973) (holding that the testimony of the sexual assault victim alone is sufficient to uphold a conviction), overruled on other grounds by Turner v. State, 111 Nev. 403, 892 P.2d 579 (1995).

[11]NRS 201.230(1).

Regarding Lauer's conviction of battery with intent to commit a crime, the State was required to show that Lauer used "willful and unlawful . . . force or violence" upon M.S. with the intent to commit the sexual assault.[12] The State met its burden based on M.S.'s testimony that while touching her sexually, Lauer held her down and, on one occasion, slapped her twice, apparently to silence her protests. Similar to his other convictions, we therefore conclude that sufficient evidence supports Lauer's battery conviction.

Having considered appellant's contentions and concluded that they are without merit,[13] we

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[12]NRS 200.400(1).

[13]Lauer also raises separate challenges relating to the admission of Nurse Suiter's testimony, testimony concerning Lauer slamming M.S.'s head into the wall, the "no corroboration" and "force and fear" jury instructions, the district court's Allen charge, the use of the term "victim" by the district court and the prosecutor, and the prosecutor's closing argument. Because Lauer failed to object at trial concerning these challenges, we need only review them for plain error. See Browning v. State, 124 Nev. ____, ____, 188 P.3d 60, 71 (2008). After careful review, we conclude that none of these arguments rise to plain error; thus, they do not warrant reversal. We further conclude that Lauer's claim of cumulative error lacks merit.

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk