

IN THE SUPREME COURT OF THE STATE OF NEVADA

HUBERT WILBER DRAW,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50560

**FILED**

JUL 22 2010

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 one count of sexual assault of a minor under 16 years of age and seven counts of open or gross lewdness. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Speedy trial

Appellant Hubert Wilber Draw claims that he was denied his right to a speedy trial because his trial took place 14 months after the criminal complaint was filed and asserts that the delay was presumptively prejudicial. Draw failed to preserve this issue by objecting in the proceedings below, therefore we review for plain error. See Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). Although Draw's trial took place approximately 14 months after the complaint was filed, the defense was responsible for the majority of the delay, Draw waived his statutory right to trial within 60 days when he requested his first continuance, Draw failed to allege any specific prejudice arising from the delay, and no prejudice is apparent from the record. See Barker v. Wingo, 407 U.S. 514, 530 (1972) (identifying the four factors to be weighed when determining whether a defendant's right to a speedy trial has been

violated). We conclude that Draw's right to a speedy trial was not violated.

Sufficiency of the evidence

Draw claims that the jury's conclusions were inconsistent with the evidence presented and the evidence was insufficient to support his convictions because no physical evidence supported the victim's claims and conflicting evidence was presented at trial.<sup>1</sup> This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish Draw's guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The 15-year-old victim testified that, on more than one occasion, Draw digitally penetrated her and touched and/or grabbed her buttocks, breasts, and genital area and had lain on top of her and touched her breasts and genital area and rubbed his body against hers. Although Draw presented evidence challenging the victim's credibility, it was for the jury to determine the weight and credibility to give conflicting testimony, see Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981), and the evidence was sufficient to establish that Draw sexually assaulted the victim and committed open or gross lewdness, NRS 200.366(1), (3); NRS 201.210. The jury's verdict will not be disturbed on appeal where sufficient evidence supports the verdict. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

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<sup>1</sup>Because Draw was acquitted of all charges relating to one of the alleged victims, his challenge to the sufficiency of the evidence is limited to the convictions relating to the 15-year-old victim.

Draw also claims that the district court erred by denying his motion for a judgment of acquittal or alternative motion for a new trial. However, because sufficient evidence supports his convictions, Draw has failed to demonstrate that the district court abused its discretion by rejecting his claim regarding conflicting evidence and denying the motion. See NRS 175.381(2); State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994); Walker v. State, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (1993).

### Prosecutorial misconduct

#### Golden rule arguments

Draw argues that the prosecutor committed misconduct by asking the jury to put themselves in the place of the victims. We conclude that the prosecutor improperly argued, “How embarrassing, first, to have to go through these acts, to have your father figure doing these things to you. Imagine how just dirty [sic] it makes you feel.” See Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Because Draw did not object to this comment, we review for plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). We conclude that the error did not affect Draw’s substantial rights because the record indicates that the jury reached its verdicts based on a review of the evidence presented at trial rather than on any empathy or sympathy it may have had for the victims.

Draw also argues that the prosecutor made a golden rule argument by asking jurors to “think about over the years where women had been assaulted and nobody believed that.” Draw objected to this comment and the district court overruled the objection. We conclude that this comment was also improper, but we further conclude that the error

did not substantially affect the jury's verdict. See Valdez, 124 Nev. at 1188-89, 196 P.3d at 476-77.

References to facts not in evidence

Draw claims that, because the victims were subpoenaed, the prosecutor referred to facts not in evidence and misrepresented facts to the jury by stating that the two alleged victims “did not have to come here [to trial]” and “[t]hey never had to come here.” We conclude that no misconduct occurred because, when read in context, it is clear that the prosecutor was addressing Draw's theory of defense rather than arguing that the victims appeared at the trial voluntarily. See Floyd v. State, 118 Nev. 156, 172, 42 P.3d 249, 260 (2002) abrogated on other grounds by Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008).

Draw claims that the prosecutor improperly referenced facts not in evidence when the prosecutor stated that the victims' mother “doesn't want them.” Draw objected to this comment and the objection was sustained. Although the prosecutor's comment was improper because it referenced facts not in evidence, see Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), we conclude that there was no prejudice because the district court sustained Draw's objection, see Valdez, 124 Nev. at 1188-90, 196 P.3d at 476-77 (preserved errors are reviewed for harmless error); Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) (we presume the jury follows the district court's orders and instructions).

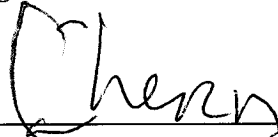
Cumulative error


Draw claims that the cumulative effect of the prosecutorial misconduct warrants reversal. We disagree. Although the evidence against Draw was not overwhelming and the charge of sexual assault of a minor under the age of 16 is grave, sufficient evidence supported his

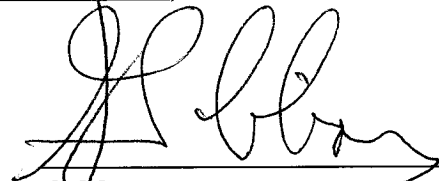
convictions and it does not appear that the errors affected the jury's verdicts. See Valdez, 124 Nev. at 1195, 196 P.3d at 481 (identifying three-part test for evaluating claim of cumulative error).

Having reviewed Draw's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge  
Clark County Public Defender  
Marc Picker  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk