

IN THE SUPREME COURT OF THE STATE OF NEVADA


ROBERT ANTHONY HIGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53289

FILED

FEB 03 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping, six counts of lewdness with a child under 14 years of age, sexual assault of a minor under 14 years of age, and administering a drug to aid the commission of a felony. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant alleges that three instances of prosecutorial misconduct committed during rebuttal closing argument rendered his trial unfair. Because he failed to object to any of the challenged comments, we review for plain error affecting his substantial rights. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008).

First, appellant asserts that the prosecutor improperly commented on the presumption of innocence by arguing that defense counsel “asked [the jury] to continue with [its] presumption of innocence for the Defendant. The remainder of the instruction is [to] presume he is innocent until the contrary is proved. I submit that has been done in this case.” Although “[a] prosecutor may suggest that the presumption of innocence has been overcome,” she “may never properly suggest that the presumption no longer applies to the defendant.” Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006). We conclude that the comments

were not improper but reflected the prosecutor's contention that appellant's guilt had been proved in response to his argument that the prosecution had failed to meet its burden of proof. See Moore v. Curry, No. C 07-4736 JSW, 2009 WL 3007737, at *5-6 (N.D. Cal. Sep. 17, 2009) (concluding that prosecutor's comment that presumption of innocence disappeared at close of evidence was not improper because prosecutor subsequently explained that prosecution had proved defendants' guilt beyond reasonable doubt).


Second, appellant contends that the prosecutor's statements that the jury should not hold the victim responsible for the mistakes made by the police and her parents and that she deserved the jury's "application of [its] common sense" constituted an improper "Golden Rule" argument. See Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) (noting that "[a] 'Golden Rule' argument asks the jury to place themselves in the shoes of the victims" and is improper), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Considering the comments in context, we conclude that the prosecutor merely argued that the jury should not let the errors made by others affect the victim's credibility and that the State had proved its case. Therefore, the comments were not improper.

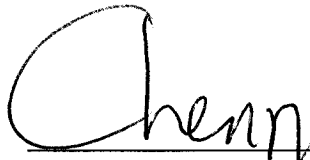
Third, appellant asserts that the prosecutor disparaged defense counsel by arguing that counsel was "throw[ing] balls up in the air and see if he can keep you distracted" and that counsel was creating "a distraction that's meant to make you not focus." Considering the comments in context, we conclude that the prosecutor simply responded to counsel's challenges to the quality of the police investigation and the victim's and her family members' credibility. Accordingly, the prosecutor's argument was not improper.

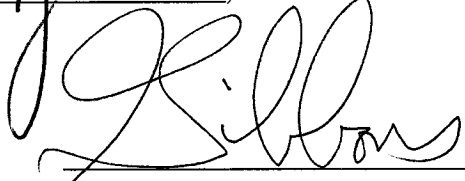
Appellant also challenges his sentence of life in prison with the possibility of parole after 20 years for sexual assault of a minor as constituting cruel and unusual punishment because the offense was a single act of sexual assault and the victim was not physically harmed. Because the sentence falls within statutory limits, see NRS 200.366, and is not unduly disproportionate to the crime, the punishment is not cruel and unusual. See Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, 2154 (2004).

Having considered appellant's arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.¹


_____, J.
Saitta


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Because appellant is represented by counsel in this matter, we decline to grant appellant permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents appellant has submitted to this court in this matter.