IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN GRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53465

FILED

MAR 11 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery domestic violence, victim being 60 years of age or older and sexual assault, victim being 60 years of age or older. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. Appellant raises five issues on appeal.

First, appellant challenges the sufficiency of the evidence supporting his sexual assault conviction. The evidence shows that shortly after appellant hit the victim in the face several times, he pushed her onto a bed and sexually assaulted her, despite her protestations. Additionally, an examination of the victim revealed injuries consistent with nonconsensual sex. Considering the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find appellant guilty of sexual assault, despite his claim that the sexual contact was consensual. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, appellant argues that the prosecutor committed misconduct during opening statement and closing argument by

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misrepresenting the evidence adduced at trial. Because appellant did not object to any of the challenged comments, we review this claim for plain error affecting his substantial rights. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008). Considering the challenged comments in context, along with the evidence presented, we conclude that any imprecision in the prosecutor's language was not so significant as to affect appellant's substantial rights.

Third, appellant argues that the reasonable doubt instruction was unconstitutional and that the district court erred by not instructing on the essential elements of each offense and that the jury's verdict must be unanimous on each count. Because appellant failed to object to any instructions given, we review this claim for plain error, see Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003), which we conclude appellant has failed to demonstrate. As to the reasonable doubt instruction, we have repeatedly upheld the constitutionality of the statutory instruction. See, e.g., Garcia v. State, 121 Nev. 327, 340, 113 P.3d 836, 844 (2005); Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004). As to the instructions on the elements of the offenses, we conclude that the jury was adequately instructed, despite appellant's contention that the instructions lacked sufficient detail. As to appellant's challenge to the unanimity-of-the-verdict instruction, we conclude that the instruction was not unconstitutionally ambiguous or confusing.

Fourth, appellant contends that his right to a fair and impartial jury was denied because four jurors expressed bias based on personal circumstances, feelings, or identified health issues that would affect their ability to serve. Because appellant failed to object to any of

those jurors, he has not preserved this claim for review. See generally, Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1041 (2008) ("[G]enerally, unobjected to errors are not preserved for appellate review."). Having reviewed the record, we conclude that appellant has not shown that any of the challenged jurors were biased or otherwise unfit to serve as jurors.[1] Therefore, we conclude that appellant failed to establish plain error.

Fifth, appellant argues that the district court abused its discretion by adjudicating him a habitual criminal because the district court ignored that his prior convictions, which were remote and nonviolent, stemmed from his substance abuse and focused rather on the victim's testimony that "[n]obody should be done this way." Although the district court's explanation of its sentencing decision is not detailed, the record sufficiently demonstrates that the district court did not abuse its discretion in adjudicating appellant a habitual criminal. See Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998); see also Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.").

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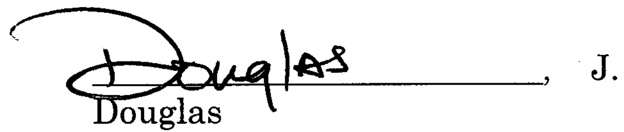
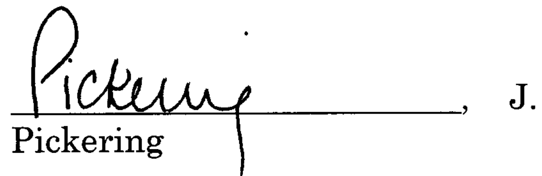
[1]Appellant argues that counsel was ineffective for not challenging the four jurors. However, claims of ineffective assistance of counsel are appropriately raised in a timely, first post-conviction petition for a writ of habeas corpus. Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

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

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Hardesty


_______________, J.
Douglas


_______________, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Mario D. Valencia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk