IN THE SUPREME COURT OF THE STATE OF NEVADA

SAID ELMAJZOUB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53682

FILED

JUN - 7 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 with intent to commit sexual assault resulting in substantial bodily harm, attempted sexual assault, and first-degree kidnapping. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Said Elmajzoub raises three claims.

First, Elmajzoub claims that the district court erred by admitting DNA evidence that his blood was on the inside of the victim's pants without requiring presentation of the swatch of cloth that was tested or pictures of the blood stain before its removal. He also claims that the State either failed to preserve the evidence or withheld it in violation of Brady v. Maryland, 373 U.S. 83 (1963). Elmajzoub fails to show error. He did not object at the time the evidence was admitted. See Brown v. State, 114 Nev. 1118, 1125-26, 967 P.2d 1126, 1131 (1998) (declining to consider claim of error absent contemporaneous objection). Furthermore, the DNA expert testified that the swatch had been preserved and was available for retesting and her report was provided to Elmajzoub well before trial. The pants from which the cutting was taken were admitted at trial, along with crime scene photographs showing blood on them.

Accordingly, Elmajzoub fails to show that the evidence was destroyed, lost, or withheld by the State.

Second, Elmajzoub claims that there is insufficient evidence to support his conviction for first-degree kidnapping.[1] However, the victim testified that she was attacked on the street and had vague memories of rolling on the ground among rocks, gravel, and bushes. The next thing she clearly remembered was running from a desert area waving her arms. She was found without pants or underwear and had suffered severe facial injuries. Elmajzoub's blood was found on the inside of her pants lying in the desert 200 yards from the street. His blood was also found on the ground 50 yards away from the clothing, and a PDA case with both his and the victim's blood was found nearby. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Elmajzoub attacked the victim and moved her away from the street for the purpose of sexually assaulting her. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 200.310(1). Even if the movement was incidental to the attempted sexual assault, the jury was properly instructed on the requirements for dual convictions involving kidnapping, and we conclude that moving her into an unlit desert area at 3:00 in the morning substantially increased her risk of harm. See Mendoza v. State, 122 Nev. 267, 275-76, 130 P.3d 176, 181 (2006); Hutchins v. State, 110 Nev. 103, 108-09, 867 P.2d 1136,

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[1]He also claims that the district court erred by denying a pretrial petition for a writ of habeas corpus challenging the kidnapping count. Any error was rendered harmless when the jury convicted him of first-degree kidnapping. See United States v. Mechanik, 475 U.S. 66, 70 (1986); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998).

1140 (1994) (movement of victim to more secure setting for sexual assault where she was "less apt to be heard by passerby" was sufficient to support kidnapping conviction), modified on other grounds by Mendoza, 122 Nev. at 273-75, 130 P.3d at 180-81.

Finally, Elmajzoub claims that his sentence of life without the possibility of parole violates the Eighth Amendment's prohibition on cruel and unusual punishment. Recognizing that his sentence is within statutory bounds, he argues that (1) the district court relied on impalpable and highly suspect evidence in imposing the sentence and (2) NRS 200.400 is unconstitutional because "it allows for grossly disproportionate sentences among defendants." We reject Elmajzoub's first argument because we conclude that police reports detailing prior uncharged criminal conduct are relevant at sentencing and do not constitute impalpable and highly suspect evidence. See Silks v. State, 92 Nev. 91, 94 n.2, 545 P.2d 1159, 1161 n.2 (1976). Furthermore, the district court's comments at sentencing indicate that its primary consideration was the brutality of the crime. We also reject Elmajzoub's challenge to the constitutionality of NRS 200.400 because he fails to demonstrate that his sentence shocks the conscience or that the statute permits sentences grossly disproportionate to the relevant crime.[2] See Harmelin v. Michigan, 501 U.S. 957, 957

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[2]To the extent that Elmajzoub claims the statute permits grossly disproportionate sentences because battery with intent to kill carries a maximum penalty of only 20 years in prison, the claim is without merit. Battery with intent to kill does not include the element of substantial bodily harm that was present in this case. Compare NRS 200.400(3) with NRS 200.400(4)(a).

(1991) (upholding sentence of life without parole for drug offense); Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Draskovich & Oronoz, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk