IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTWON MAURICE BAYARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53854

FILED

SEP 09 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 three counts of sexual assault with substantial bodily harm, battery with intent to commit robbery causing substantial bodily harm, battery with intent to commit sexual assault causing substantial bodily harm, battery causing substantial bodily harm, and robbery. Second Judicial District Court, Washoe County; Charles M. McGee, Judge. Appellant Antwon Bayard raises five issues.

First, Bayard claims that the district court erred in denying his motion for a psychological examination of the victim. We disagree. Bayard failed to prove a compelling need for such an examination where: (1) the State did not call a psychological expert to testify to the victim's credibility, nor is there any indication that the State had some advantage over the defense by having access to psychological evidence; (2) there was significant corroborating evidence of the sexual assault, including the victim's crushed nose and other injuries, witness testimony, and DNA evidence; and (3) there is no "reasonable basis for believing that the victim's mental or emotional state may have affected [her] veracity." Abbott v. State, 122 Nev. 715, 723, 727, 138 P.3d 462, 468, 470 (2006)

(internal quotations omitted); see also Koerschner v. State, 116 Nev. 1111, 1115-17, 13 P.3d 451, 454-56 (2000) (delineating three-part test to evaluate whether proponent has established a compelling need for witness examination).

Second, Bayard argues that the district court erred in admitting a statement, over his objection, under the res gestae exception to inadmissible character evidence. As Bayard was walking away from two female police officers following a brief detention subsequent to the sexual assault, he exclaimed to one of them, "Come visit me with your panties on!" The district court instructed the jury that this statement should be considered only to complete the story of the crime and the State briefly argued in closing that it is evidence of Bayard's consciousness of guilt. We agree with Bayard that admission of this statement was error—it was not so closely related to the sexual assault and battery that the officer could not describe the crimes without referring to the statement. See NRS 48.035(3). In fact, it did not relate to the "criminal transaction" at all. Allan v. State, 92 Nev. 318, 321, 549 P.2d 1402, 1404 (1976); see also Bellon v. State, 121 Nev. 436, 443-44, 117 P.3d 176, 180 (2005). However, because of the gravity of the crimes charged, the significant evidence of Bayard's guilt noted above, and the peripheral position of the statement at his trial, we conclude that the error was harmless. See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Third, Bayard claims that an impermissibly suggestive pretrial identification procedure tainted the victim's subsequent in-court identification of him as her attacker. However, not only did Bayard not object to this evidence at trial, he conceded identification, claimed they had met previously, and argued consent. Accordingly, we conclude no

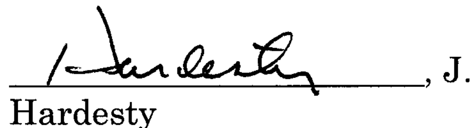
error, let alone plain error, occurred. See Calvin v. State, 122 Nev. 1178, 1184, 147 P.3d 1097, 1101 (2006) (discussing plain error).

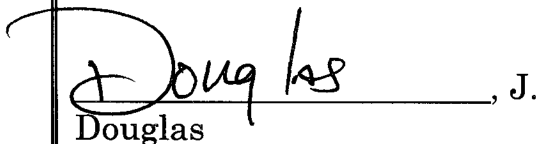
Fourth, Bayard complains that the statutory reasonable doubt instruction is unconstitutional because it lessens the State's burden of proof. We have repeatedly held that the instruction codified in NRS 175.211 is constitutional and that we will defer to the legislature for changes to that instruction. See Garcia v. State, 121 Nev. 327, 345, 113 P.3d 836, 847 (2005); Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002). We decline to revisit the issue here.

Fifth, Bayard urges that the cumulative effect of error in his trial mandates a new trial. We conclude that any error in this case, whether considered individually or cumulatively, does not warrant such relief. See Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717-18 (2000).

Having considered Bayard's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_______________, J.
Hardesty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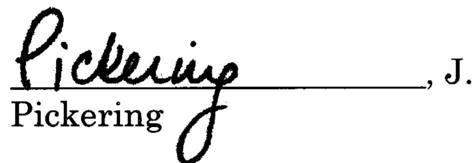
_______________, J.
Pickering

cc: Chief Judge, Second Judicial District
Hon. Charles M. McGee, Senior Judge
Glynn B. Cartledge
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk