IN THE SUPREME COURT OF THE STATE OF NEVADA

DANNY ANDREW YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54017

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted sexual assault, incest, and two counts of sexual assault. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. Appellant Danny Andrew Young raises seven issues on appeal.

First, Young claims that insufficient evidence supports his convictions for sexual assault and attempted sexual assault.[1] Young's daughter, sixteen years old at the time of the assault, testified that Young climbed into bed with her while she feigned sleep, digitally probed her, tried unsuccessfully to penetrate her with his penis for ten minutes, and was finally successful only after he changed positions—placing her on her back and lifting her buttocks. The victim testified that during the assault she was in shock, could not speak, kept her eyes closed, and did not physically resist. Young's theory at trial was that the victim consented. The victim's mother testified to a subsequent conversation with Young where he admitted, "I'm sorry I hurt my baby," and, "I'm sick and need

[1]At trial, Young conceded that he committed incest.

help." We review the evidence in the light most favorable to the prosecution and conclude that this testimony was sufficient to convict Young of the crimes alleged. See State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 200.366; NRS 193.330.

Second, Young asserts that the convictions for attempted sexual assault and sexual assault are redundant. Distinct assaults that are nevertheless part of a single event may be charged separately. Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981). Here, the digital penetration, the ten minutes of frustrated attempts at genital insertion, and the completed intercourse after a change in position, are distinct acts that each support their respective convictions. See Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-550 (1990); see also Townsend v. State, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987).

Third, Young claims that the district court erroneously rejected a proposed jury instruction explaining that "a single act cannot support multiple counts of liability." We conclude that the instruction given to the jury incorporates Young's theory and properly states the law. Therefore, the district court did not abuse its discretion in rejecting Young's proffered instruction. See Rose v. State, 123 Nev. 194, 204-05, 163 P.3d 408, 415 (2007); Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990).

Fourth, Young contends that the district court erred in admitting evidence that he had sexually assaulted a mentally handicapped woman, S.S., while he worked as an aide at her institution in 1990. The district court admitted S.S.'s testimony and that of her mother, as well as evidence of his subsequent conviction, to prove, inter alia, his

motive and intent in committing the instant assault. Insofar as the evidence showed Young's sexual attraction to those with whose care he has been entrusted, we agree that it is relevant evidence of motive, see Ledbetter v. State, 122 Nev. 252, 262-263, 129 P.3d 671, 679 (2006); NRS 48.045(2), and conclude that the district court was not manifestly wrong in admitting it. See Reese v. State, 95 Nev. 419, 422-23, 596 P.2d 212, 215 (1979).

Fifth, Young alleges reversible error in the district court's decision to preclude him from cross-examining S.S.'s mother as to S.S.'s sexual history in order to prove that S.S. had the capacity to consent. As capacity to consent was not at issue here, we agree with the district court that this evidence was irrelevant, see NRS 48.015; 48.025(2), and further conclude that the State did not "open the door" to its use as evidence to impeach S.S.'s credibility.

Sixth, Young contends that district court committed reversible error by admitting into evidence, without redaction, Tennessee correctional center telephone recordings containing an advisement that the caller was in custody. A defendant is entitled to the presumption of innocence and the indicia of innocence. Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). We conclude that this presumption was violated when the district court allowed the unredacted telephone recordings containing the in-custody advisement to be admitted into evidence over Young's objection, see id. ("[I]nforming the jury that a defendant is in custody raises an inference of guilt."); however, given the substantial evidence of Young's guilt and the nature of the error, we conclude that the error was harmless, see Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008).

Seventh, Young asserts that cumulative error deprived him of a fair trial. Because his trial was subject to a sole harmless error, there is no error to cumulate and we conclude that no relief is warranted. See id. at ___, 196 P.3d at 481.

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

ORDER the judgment of conviction AFFIRMED.

/ Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

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