IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNEST SUNRHODES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54191

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 two counts of sexual assault of a minor under the age of 14 and lewdness with a minor under the age of 14. Eighth Judicial District Court, Clark County; David B. Barker, Judge. Appellant Ernest Sunrhodes raises two issues.

First, Sunrhodes claims that the justice court's decision to close the courtroom during the 13-year-old victim's testimony violated his Sixth Amendment right to a public preliminary examination. The United States Supreme Court has suggested, but not held, that the public trial right extends to preliminary examinations. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10 (1986) (concluding that the public has a qualified First Amendment right of access to preliminary hearings); Presley v. Georgia, ___ U.S. ___, ___, 130 S. Ct. 721, 724 (2010) (suggesting without deciding that accused's Sixth Amendment right to public trial may be coextensive with First Amendment right). Nevertheless, the vindication of that right is dependent upon lodging a contemporaneous objection, which Sunrhodes failed to do. See Waller v. Georgia, 467 U.S. 39, 47 (1984) (Sixth Amendment requires any closure of suppression

hearing over defendant's objection to pass Press-Enterprise balancing test).[1] Because (1) Sunrhodes did not object to the closure and (2) a jury subsequently found Sunrhodes guilty beyond a reasonable doubt of the crimes alleged in a fair and open proceeding, we conclude that he would not be entitled to relief even if he had a Sixth Amendment right to a public preliminary hearing. See U.S. v. Mechanik, 475 U.S. 66, 70 (1986); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998); see also Waller, 467 U.S. at 50 (concluding that new trial warranted only if new, public hearing would result in "material change in positions of the parties"); People v. Pompa-Ortiz, 612 P.2d 941, 947 (Cal. 1980) (holding that, when first raised on appeal, constitutional violations at preliminary hearing require defendant to show deprivation of a fair trial or other prejudice that resulted from irregularities at preliminary examination), (citing Coleman v. Alabama, 399 U.S. 1, 11 (1970))).

Second, Sunrhodes argues that the statutory reasonable doubt instruction is unconstitutional and 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, 339-40, 113 P.3d 836, 844 (2005); Noonan v. State, 115 Nev. 184, 189-90, 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, 934, 59 P.3d 1249, 1256 (2002). We decline to revisit the issue here.

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[1]Sunrhodes did, however, file a post-hearing motion in district court to remand the case to the justice court for a new preliminary hearing based in part on the grounds of improper closure he raises here.

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. David B. Barker, District Judge
Law Office of Patricia M. Erickson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk