

IN THE SUPREME COURT OF THE STATE OF NEVADA

JONATHAN M. RICHARDS A/K/A  
JONATHAN MICHAEL RICHARDS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56582

**FILED**

SEP 29 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first degree kidnapping with the use of a deadly weapon, sexual assault with the use of a deadly weapon, and two counts of coercion with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Jonathan Richards contends that there is reversible error arising from: (1) the denial of his proposed jury instructions, (2) the failure of the district court to grant a mistrial, (3) insufficient evidence, (4) prosecutorial misconduct, (5) a violation of the Double Jeopardy Clause, and (6) cumulative error.

First, Richards contends that the district court erred when it refused to approve his proposed jury instruction on battery as a lesser included offense of sexual assault. This court has previously determined that battery is not a lesser included offense of sexual assault. See Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127-28 (2006); see also Peck v.

State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006) (explaining that defendant is not entitled to instructions on lesser-related offenses). Therefore, we find no error.

Second, Richards contends that the district court erred when it denied his motion for a mistrial after the victim commented on his pretrial incarceration. The denial of a motion for mistrial is within the trial court's sound discretion and will not be disturbed on appeal in the absence of a clear showing of abuse. Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980). We conclude that the trial court did not abuse its discretion in denying Richards' motion. The victim's comments were inadvertent and moreover were prompted by Richards' request that the State lay a better foundation before admitting a letter into evidence.

Third, Richards contends that there was insufficient evidence to support the verdict. This claim is based primarily on the absence of evidence corroborating the victim's testimony that she was sexually assaulted. After viewing the evidence in the light most favorable to the prosecution we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). This court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Fourth, Richards contends that the State committed prosecutorial misconduct when they (1) informed prospective jurors that the case related to domestic violence, (2) failed to disclose Brady material,

and (3) made improper comments during closing arguments. “When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal.” Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

We conclude that there was no error in Richards’ first two allegations of prosecutorial misconduct. First, the State’s only comment during voir dire, which was not immediately halted by the district court, was that the case was “domestic violence related.” This comment was an accurate description of the allegations contained in the charging document and was not improper. Second, Richards has not demonstrated any of the three components to a Brady violation. See O’Neill v. State, 123 Nev. 9, 19, 153 P.3d 38, 44 (2007) (explaining that the appellant must show that: (1) the evidence at issue is favorable to the accused, (2) the evidence was withheld by the state, either intentionally or inadvertently, and (3) prejudice ensued, i.e., the evidence was material). Richards admitted during trial that he received a copy of a letter in discovery which referenced a prior temporary protective order hearing. This letter put Richards on notice that a hearing may have been held. Further, Richards does not allege that the State was in possession of a transcript from the hearing nor has he demonstrated its potential to impeach the victim. Therefore, we do not conclude that there was a Brady violation.

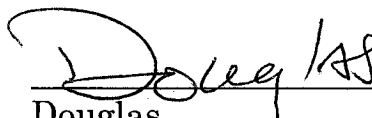
Richards’ third allegation of prosecutorial misconduct has merit. On rebuttal during closing arguments, the State informed the jury

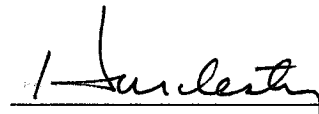
that, “we didn’t charge him with battery. He knew what charges we charged him with at the preliminary hearing . . .” This statement amounts to error because it led the jury to believe that Richards was not charged with battery at the time of his preliminary hearing. Because this error is not of a constitutional dimension “we will reverse only if the error substantially affects the jury’s verdict.” Id. at 1188-89, 196 P.3d at 476. We conclude that it did.

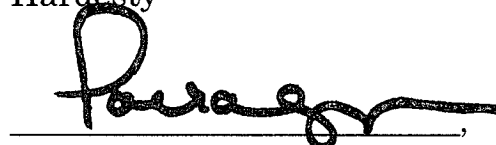
During trial, the State’s only evidence corroborating the victim’s testimony was pictures of the victim’s battered face and a letter written by Richards two weeks after the preliminary hearing in which he apologized to the victim for “put[ting] my hands on you.” On the day of trial the State filed an amended information dropping count three which alleged that Richards committed battery with the intent to commit sexual assault. During closing arguments Richards argued that the only crime he committed was battery and that the jury must acquit him because the State had not charged him with battery. Richards argued that he was apologizing to the victim in the letter for striking her in the face not for sexually assaulting her. On rebuttal, the State argued that he could not be apologizing for the battery when he wrote the letter because he was not charged with battery and he knew what he was charged with at the preliminary hearing. However, at the time Richards wrote the letter charges of battery were still pending against him. We conclude that this

error could have substantially affected the jury's verdict and we therefore reverse and remand for a new trial on all four counts. Accordingly we,<sup>1</sup>

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Michael Villani, District Judge  
Law Office of Betsy Allen  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>1</sup>Because we are reversing and remanding for a new trial on all four counts we need not address Richards' claim of double jeopardy and cumulative error.