IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE D. JAMES, SR. A/K/A TYRONE D. JAMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57178

FILED

OCT 31 2012

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 two counts of sexual assault of a minor under 16 years of age and one count of battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant Tyrone James was accused of sexually assaulting 15-year old T.H., the daughter of a woman with whom he was in a relationship at the time.[1] James was convicted of the above crimes after a jury trial.

On appeal, James argues that the district court erred by: (1) improperly admitting evidence of a prior bad act, (2) admitting impermissible hearsay, (3) excluding evidence of T.H.'s sexual history, (4) admitting evidence that amounted to vouching, (5) denying his motion for mistrial, and (6) allowing the State to commit prosecutorial misconduct. James also argues that (7) use of the word "victim" amounts to reversible

[1]As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

error, and (8) the district court improperly issued multiple jury instructions.[2] We reject James's arguments and affirm.

The district court did not err in admitting evidence of a prior bad act

James argues that the district court's admission of evidence regarding his uncharged, prior sexual misconduct against a minor female was improper under NRS 48.045(2).

The determination of whether to admit or exclude evidence of prior bad acts rests within the sound discretion of the district court and will not be disturbed absent manifest error. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). In order to overcome the general presumption of inadmissibility, the district court must conduct a hearing

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[2]James raises two additional arguments. First, he challenges the sufficiency of the evidence supporting his convictions, arguing that T.H.'s testimony was not reliable. We disagree, as a view of the record in the light most favorable to the prosecution indicates that T.H.'s testimony was consistent and that the State presented sufficient evidence from which any rational trier of fact could have found guilt beyond a reasonable doubt. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

Second, James argues that double jeopardy and redundancy principles protect him from multiple convictions arising from a single encounter. For reference, the jury convicted James of two counts of sexual assault: one for penetrating T.H. with his finger, and the other for using his "penis and/or finger(s) and/or unknown object." He was also convicted of battery with intent to commit a crime for grabbing T.H. by the neck. James's argument fails, as it is well-established in Nevada that "separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon." Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981); see also Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127-28 (2006) ("We discern no error in maintaining the separate charges of sexual assault and battery with intent to commit a crime.").

outside the presence of the jury and determine that: (1) the prior act is relevant to the crime charged for a purpose other than proving propensity, (2) the act is proven by clear and convincing evidence, and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. Bigpond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1250 (2012).

First, the evidence of James's prior sexual misconduct with a minor was properly admitted to support T.H.'s subsequent allegations, as it shed light on his motive to engage in sexual contact with young girls for his own gratification, as well as his opportunity to do so. Ledbetter v. State, 122 Nev. 252, 262, 129 P.3d 671, 678 (2006) (noting that "whatever might motivate one to commit a criminal act is legally admissible to prove motive under NRS 48.045(2)" (internal quotations omitted)). Second, the previously assaulted minor testified consistently regarding the details of the prior incident in both the pretrial hearing and during trial, resulting in clear and convincing evidence that the prior act of sexual assault did indeed occur. Finally, any danger of unfair prejudice based on the other minor's testimony did not substantially outweigh the evidence's probative value. See Ledbetter, 122 Nev. at 263, 129 P.3d at 679 (concluding that "[t]he probative value of explaining to the jury what motivated [the defendant], an adult man who was in a position to care for and protect his young stepdaughter . . . from harm [but who] instead repeatedly sexually abuse[d] her over so many years[,] was very high").

Thus, we conclude that the district did not abuse its discretion in admitting the other minor's testimony regarding James's prior bad act.

The district court did not admit impermissible hearsay

James next argues that the district court erred in allowing the hearsay testimony of multiple witnesses regarding what T.H. purportedly told them following the incident.[3] We disagree.

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Hearsay is inadmissible unless it falls within one of the exceptions to the general rule. NRS 51.035; NRS 51.065.

T.H.'s statements to her mother

Following the incident, James drove T.H. to school. T.H. immediately texted her sister about the incident, who in turn contacted their mother. At trial, T.H.'s mother testified that when she arrived at the school, T.H. was crying and "gasping for air" in the nurse's office. The State questioned the mother regarding what T.H. had told her once they left the school, and she responded:

> [T.H.] said . . . [James] came in her room and threw her onto the other bed. . . . He told her he would snap her neck if she screamed. . . . he ripped off her panties . . . took her into the living room . . . where he took his finger and inserted it in her vagina. And then he took it out and rubbed his penis across her vagina.

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[3]We reject James's argument that his rights under the Confrontation Clause were violated, as T.H. was subject to cross-examination at trial regarding her statements to these witnesses. See Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

Over James's objection, the district court admitted the mother's testimony pursuant to NRS 51.095 as an excited utterance.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." NRS 51.095. "The elapsed time between the event and the statement is a factor to be considered but only to aid in determining whether the declarant was under the stress of the startling event when he or she made the statement." Medina v. State, 122 Nev. 346, 352-53, 143 P.3d 471, 475 (2006) (concluding that a rape victim was still under the stress of the event over a day later, when she was found crying, pale, and still in her soiled garments).

Here, the record reveals that the conversation between T.H. and her mother occurred within two hours of the assault, during which time T.H. remained visibly upset. Thus, we conclude that the district court did not abuse its discretion in permitting this testimony as an excited utterance.[4]

T.H.'s statements to a hospital nurse

James argues that testimony from the nurse who interviewed T.H. about the sexual assault was inadmissible hearsay. Because James did not object to this testimony at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

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[4]We also reject James's challenge to the admission of T.H.'s sister's testimony regarding the content of the text messages. James did not object to this testimony at trial, so we review for plain error. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Because T.H.'s statements to her sister occurred before the statements to her mother, they qualified for the excited utterance exception as well. Thus, no error occurred.

At trial, the nurse testified that protocol at the hospital involves interviewing patients about their medical and sexual history, which is used to provide treatment and to obtain evidence for a sexual assault kit. In recapping her interview with T.H., the nurse testified in detail about what T.H. had told her regarding the incident.

We conclude that the testimony was admissible under NRS 51.115, which provides a hearsay exception for statements made for the purpose of medical diagnosis or treatment.

T.H.'s statements to a police officer

During cross-examination, James asked an officer to testify as to the contents of the incident report he prepared after speaking with T.H. Specifically, James sought to confirm that both T.H. and her mother had told the officer that James's penis did not enter T.H.'s vagina. On redirect examination, the State questioned the officer on the remaining portions of his report, which included T.H.'s statements that James wore a glove to digitally penetrate T.H., and that he also rubbed his penis between the lips of her vagina. James objected to this line of questioning as hearsay, but the district court overruled his objection.

On review, the district court did not err in admitting the officer's statements. The questions at issue occurred on redirect examination, after defense counsel had already introduced evidence of the police report to impeach previous testimony regarding the extent of penetration. Because James was using portions of the report to impeach T.H. and her mother with their allegedly inconsistent statements, the State was entitled to introduce the remaining portions of the report as evidence of their prior consistent statements under NRS 51.035(2)(b) to "rebut an express or implied charge against the declarant[s] of recent fabrication."

Evidence of T.H.'s sexual history was properly excluded

James argues that the district court misapplied Nevada's rape shield law and erred by not allowing him to cross-examine T.H. about her prior sexual activity. He sought to offer this history as an alternative explanation for T.H.'s injuries and to educate the jury that she was not a virgin. We conclude that this argument lacks merit.[5]

> Nevada's rape shield law provides:
>
> In any prosecution for sexual assault . . . , the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or

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[5]James also argues that this alleged error amounts to violations of his Due Process and Confrontation Clause rights. We disagree. "'[T]rial judges retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Jordan v. Warden, Lebanon Correctional Inst., 675 F.3d 586, 594 (6th Cir. 2012) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)). Because there was no evidence presented by the prosecution that T.H. was a virgin, evidence showing she was not a virgin would have been irrelevant. Also, because defense counsel was able to present evidence of alternative injury causation, evidence suggesting T.H.'s vaginal injury may have resulted from intercourse with someone else would be repetitive. As such, the district court did not violate James's Confrontation Clause rights. See Jordan, 675 F.3d at 598. Additionally, after reviewing the record, we are not persuaded that evidence of T.H.'s lack of virginity, even if admitted, would have changed the outcome of the verdict. Therefore, we find no violation of due process. See Richmond v. Embry, 122 F.3d 866, 874 (10th Cir. 1997) ("[I[n determining whether the exclusion of testimony violated a defendant's . . . right to due process, we must determine whether the defendant was denied a 'fundamentally fair' trial; . . . looking at the record as a whole, we inquire . . . whether the evidence was of such an exculpatory nature that its exclusion affected the trial's outcome.").

> the victim has testified concerning such conduct, or the absence of such conduct . . . .

NRS 50.090 (emphases added).

A review of the record shows the State did not ask T.H. about her prior sexual conduct, and T.H. did not offer testimony insinuating she was a virgin. Thus, neither the prosecutor through questioning nor the victim through testimony placed her virginity in issue. See Johnson v. State, 113 Nev. 772, 777, 942 P.2d 167, 171 (1997) (noting that NRS 50.090 could allow for cross-examination regarding virginity if and only if the prosecution or victim "opened the door" to the victim's status as a virgin). Because no evidence was introduced to suggest that T.H. had sex prior to the assault, the only purpose of the defendant presenting this evidence would be to attack T.H.'s credibility, which is exactly what NRS 50.090 seeks to prevent.[6]

Thus, the district court did not abuse its discretion by preventing James from cross-examining T.H. about her sexual history.

The district court did not admit evidence that amounted to vouching

James argues that the district court erred by admitting expert testimony that amounted to improper vouching. Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987) (holding that testimony

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[6]We need not analyze James's argument that evidence in violation of the rape shield law should have been introduced to explain an alternative source of injury, as his trial counsel was able to ascertain upon cross-examination of T.H.'s examining doctor that the injury was from a non-specific cause and could have been created by a nonsexual condition. As such, the jury heard evidence that explained other potential sources of injury, and nonetheless, chose to convict James.

amounting to an expert witness vouching for the truthfulness of another witness is improper).

On cross-examination of the doctor who examined T.H. at the hospital, James elicited from the doctor an admission that a number of the medical findings in her report were nonspecific as to their cause. James then asked the doctor about what, other than sexual abuse, could cause a similar injury. On redirect examination, the State asked the doctor to relay her overall impression of this case, and the doctor replied "[t]hat it was probable abuse. . . . [b]ecause the child has given a spontaneous, clear, detailed description of the events."

Because James made no objection to this line of questioning at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477. Here, the State did not ask the doctor to comment on T.H.'s truthfulness, and the record does not demonstrate that she did so. In fact, the doctor expressly stated that abuse cannot be conclusively determined, and she affirmed that her findings were based on both the history provided by T.H. and the medical findings of the exam. While she did draw her conclusion of probable abuse based on T.H.'s description of the events, the doctor did not testify that T.H. was telling the truth when she recounted the events. Thus, we see no error in this line of questioning.

The district court properly denied James's motion for mistrial

James argues the district court erred by not granting his motion for a mistrial after an investigating detective mentioned James's criminal past during his testimony.

During the detective's testimonial explanation of how he became involved in the case, he stated that "a check was done on the alleged suspect and he had some prior felony arrests—." The State immediately interrupted before the detective finished his sentence, and

James did not object. Later, when asked whether James had agreed to meet with law enforcement, the detective stated that James "came to the location. There was a warrant for his arrest for—." Again, the State cut him off and James did not object. After the witness left the stand, James moved for a mistrial. The district court denied James's motion, reasoning that the detective's statements were not so prejudicial so as to warrant a mistrial.

This court will not disturb a district court's determination on whether a mistrial is warranted absent a clear abuse of discretion. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996). Although evidence of a defendant's prior arrest is generally not admissible as character evidence under NRS 48.045, "'[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement.'" Ledbetter, 122 Nev. at 264-65, 129 P.3d at 680 (quoting Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005)).

Here, the record indicates that the State did not intend to elicit the information, and that the State promptly prevented the witness from completing the questionable statements. Moreover, James chose not to object to either reference, and he later declined to admonish the jury to disregard these statements in an effort to avoid further attention to the matter. Thus, there was not enough prejudice to warrant a mistrial, as it was unlikely that the jury had fully grasped the potentially harmful nature of the remarks.[7]

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[7]Even if the jury had understood the remarks, any alleged error was harmless in light of the multiple other witnesses who testified against James. Parker v. State, 109 Nev. 383, 389, 849 P.2d 1062, 1066 (1993).

The State did not commit prosecutorial misconduct

James argues that the State committed misconduct during cross-examination by asking him to comment on the veracity of other witnesses and by asking questions that called for speculation. We disagree.

Questions regarding the veracity of other witnesses

During the State's cross-examination of James, the following exchange took place:

> Q: And you heard [T.H.'s mother] say yesterday that the pitbull wasn't welcome there; she didn't know that [you were dropping it off].
>
> A: That's not true.
>
> Q: Why would she lie about that?
>
> A: I don't know. You would have to ask her that.

At this point, defense counsel objected for speculation, which the district court overruled. The State later asked James who he thought coerced T.H. and the other minor to disclose their allegations of sexual abuse.

On appeal, James argues that the State's questions regarding the credibility of other witnesses were improper under Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890, 903-04 (2003). In Daniel, this court adopted a rule that bars prosecutors from questioning a defendant about "whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses." Id. at 519, 78 P.3d at 904.

Here, the State's initial questioning did not ask James whether the witness had lied, nor did it goad him into saying as much. Instead, the State was asking whether James was aware of the

contradictory testimony. By providing a nonresponsive answer, James invited the second question as an attempt to clarify the discrepancy. As such, the district court did not err by permitting the State to proceed with asking these questions. Moreover, any error in this regard would have been harmless in comparison to the otherwise strong evidence in support of James's guilt.

Questions calling for speculation

James argues that some of the State's questions during his cross-examination improperly called for speculation. For example, the following exchange occurred between the State and James:

> Q: Isn't it true that the reason there was no trial with the [other minor's] case is because [her mother] called Metro and relayed that her daughter would no longer cooperate?
>
> A: I don't know.
>
> Q: That was [the mother's] choice, not [the minor's] choice?

On appeal, James argues that this line of questioning amounted to error because the State's questions related to facts not before the jury. For support, James points to State v. Cyty, 50 Nev. 256, 259, 256 P. 793, 794 (1927), and argues that "[c]ourts have uniformly condemned as improper statements made by a prosecuting attorney, which are not based upon, or which may not fairly be inferred from, the evidence."

Well before the cross-examination of James, the other minor had testified that her mother still had frequent contact with James, as they shared children in common. She also testified that James was still allowed to have visitation with those children, despite her allegations. From this, an inference could be drawn that the other minor's mother was disinterested in holding James accountable for anything he may have done

to the other minor. Thus, the State's questions related to matters that could be inferred from existing evidence.

Accordingly, the district court was within its discretion in allowing the State to briefly question James in an effort to see whether he knew why the previous allegations were not prosecuted.

Use of the word "victim" does not amount to reversible error

At trial, the State and many government witnesses repeatedly referred to T.H. as a "victim." Additionally, Instruction 15 given to the jury contains the word "victim." For the first time on appeal, James contends that this referral presupposes a finding of guilt. Because James did not object to the word "victim" at trial, we review for plain error. Valdez, 124 Nev. at 1190, 196 P.3d at 477.

For support, James points to other jurisdictions that prohibit use of the word "victim" where the main issue at trial is whether a crime occurred. Primarily he relies on State v. Nomura, where the Hawaii Appellate Court reasoned that "the term 'victim' is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged." 903 P.2d 718, 721 (Haw. App. 1995).

We review Nomura only as it relates to Instruction 15, since that case focused solely on a jury instruction and not on prosecution or witness characterizations. We reject Nomura, as this court has previously approved of a jury instruction containing the term "victim," specifically in the context of describing the very sexual assault corroboration requirement discussed in Instruction 15. See Gaxiola v. State, 121 Nev. 638, 647-49, 119 P.3d 1225, 1231-33 (2005).

As for use of the word "victim" by State witnesses, we note that all of James's objections relate to portions of testimony by either detectives or patrol officers. "[T]he term 'victim' to law enforcement

officers, is a term of art synonymous with 'complaining witness.'" Jackson v. State, 600 A.2d 21, 24-25 (Del. 1991). Accordingly, we decline to require law enforcement officers to alter their commonly practiced terms of art. As to the prosecutors' use of the word "victim," we rely on the Ninth Circuit Court of Appeals opinion, United States v. Gibson, which held that because evidence had been presented that the parties did suffer a loss as a result of the defendant's actions, the word "victim" as used by the prosecution was fair comment on the evidence presented. 690 F.2d 697, 703 (1982). We find Gibson instructive and hold the prosecutors made use of fair comment in describing T.H. as a "victim," since evidence had been presented that James sexually assaulted T.H. Additionally, Nevada has never held that the State's use of the word "victim" is inappropriate, and thus, there is no plain error.

The district court did not err in issuing jury instructions

James contends that the district court erred in issuing several jury instructions. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). This court applies de novo review to issues of law, including whether a jury instruction is the correct statement of the law. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Jury Instruction 15: "no corroboration"

At trial, the district court instructed jurors that:

> There is no requirement that the testimony of a victim of sexual assault be corroborated, and her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

As a threshold matter, James failed to object to this instruction at trial, which precludes appellate review absent plain error. Gaxiola, 121 Nev. at 647, 119 P.3d at 1232.

On appeal, James acknowledges that this court has repeatedly approved the verbatim language of this instruction. See, e.g., id. at 647, 119 P.3d at 1231-32. However, James urges this court to overturn its precedent by citing to other jurisdictions which hold that the instruction causes prejudice to defendants. See, e.g., Ludy v. State, 784 N.E.2d 459, 461 (Ind. 2003) (concluding a similar instruction was problematic because it unfairly highlights a single witness's testimony and because the technical term "uncorroborated" may mislead or confuse the jury).

Because all of the cases cited by James were published prior to our decision in Gaxiola, we decline to revisit that analysis here. Moreover, because the instruction comports with Nevada law, the district court did not commit plain error in issuing the "no corroboration" instruction.

Jury Instruction 12: "multiple acts as part of a single encounter"

In informing the jurors on when multiple offenses may arise out of a single sexual encounter, the district court issued the following instruction:

> Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act. . . .
>
> Where a defendant commits a specific type of act constituting [a crime], he may be found guilty of more than one count of sexual assault and/or open or gross lewdness if: . . . (3) a separate object is manipulated or inserted into the genital opening of another.
>
> Only one sexual assault and/or open or gross lewdness occurs when a defendant's actions were of one specific type and those acts were continuous

and did not stop between the acts of the specific type.

(Emphases added.)

On appeal, James relies on Crowley v. State and argues that this instruction misstated the law by telling the jurors that a single sexual assault occurs only when an accused commits a single, specific type of sexual assault. 120 Nev. 30, 33, 83 P.3d 282, 285 (2004) (holding that where one act (lewdness) is incidental to another (sexual assault), a defendant cannot be convicted of multiple acts arising from a single, uninterrupted encounter). James argues that absent this instruction, the jury would have likely found that the digital penetration was merely incidental to the subsequent penile penetration. We disagree, as this line of reasoning equates convictions of lewdness and sexual assault (which are redundant) with two separate convictions of sexual assault (which are proper). See Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981) ("[S]eparate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon.").

Here, the instruction correctly states that separate convictions are proper where "a separate object" is used to commit the different sexual acts, but that "[o]nly one sexual assault . . . occurs when a defendant's actions were of one specific type[.]" Thus, it was appropriate for the jury to decide that the digital penetration was a separate offense from the penile penetration. Further, even if, the jury had not been convinced penile penetration occurred and instead found two instances of digital penetration, the instruction would still have been legally sound, as it instructs the jury that only one conviction would be proper in that circumstance.

Jury Instruction 20: "no unanimity required"

James argues the district court erred in issuing the following:

> Although your verdict must be unanimous as to the charge, you do not have to agree on the theory of guilt. Therefore, even if you cannot agree on whether the facts established penetration by finger or penis or an unknown object, so long as all of you agree that the evidence establishes penetration for purposes of Sexual Assault on a Minor Under the Age of Sixteen.

(Emphasis added.)

At trial, James objected and argued that the jury must unanimously agree on the facts in order to convict. The district court disagreed, noting that the State had pleaded multiple theories of penetration.

It is well-established that jurors do not have to agree on the preliminary factual issues which underlie a verdict, so long as they agree that the crime occurred. Tabish v. State, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003). On appeal, James urges this court to overturn this precedent by citing two United States Supreme Court cases that stand for the proposition that any element of a crime which enhances a sentence must be charged and proven to a jury. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Blakely v. Washington, 542 U.S. 296, 301 (2004). Because the State did not seek an enhancement to James's convictions, and instead charged him with two separate counts of sexual assault pleaded in three different ways, this argument fails.[8]

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[8]James challenges two additional instructions. First, he argues that Jury Instruction 5 was improper because it contained language that the "Defendant is presumed innocent until the contrary is proved." This is substantially the same argument that this court rejected in Blake v. State,

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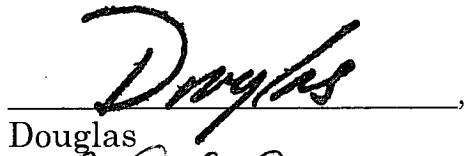
Accordingly, we reject each of James's contentions on appeal, and we

ORDER the judgment of the district court AFFIRMED.



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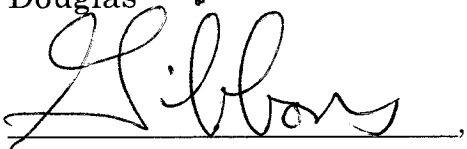

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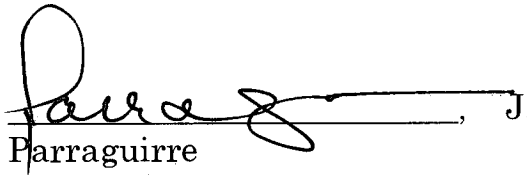

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cc: Hon. Linda Marie Bell, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Jury Instruction 5 plainly incorporates language from NRS 175.191 and NRS 175.211, and thus was proper.

Second, James challenges Jury Instruction 6, which stated: "You are here to determine the guilt or innocence of the Defendant from the evidence in the case." James argues that this language undercuts the burden of proof. This argument lacks merit, as the instruction continues to expressly state: "[s]o, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find. . . ."