IN THE SUPREME COURT OF THE STATE OF NEVADA

DARREN DEMETRAS HARRIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35498

FILED

OCT 24 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault. The district court sentenced appellant to serve 10 to 25 years in prison.

Appellant first contends that the State adduced insufficient evidence to support the verdict. In particular, appellant contends that the State failed to prove, beyond a reasonable doubt, that appellant knew or should have known that the victim did not consent to the sexual encounter.

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted). Furthermore, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. The jury could reasonably infer from the evidence presented that

appellant subjected the victim to sexual penetration against the victim's will or under circumstances in which appellant knew or should have known that the victim was mentally or physically incapable of resisting or understanding the nature of appellant's conduct. See NRS 200.366(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Next, appellant contends that he was denied his right to a fair trial due to the State's failure to preserve the victim's underpants. We conclude that this contention lacks merit.

As an initial matter, we note that appellant failed to raise this issue below. He therefore failed to preserve this issue for appellate review. Accordingly, we need not consider it. See McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

Nonetheless, even if we were to consider appellant's contention, we would conclude that it lacks merit. There is no indication in the record that the State ever had possession of the victim's underpants and, therefore, this issue is more appropriately addressed as a failure to gather evidence. There is a two-part test for evaluating a claim that the State failed to gather evidence. See Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). First, "the defense [must] show that the evidence was 'material,' meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Id. (quoting State v. Ware, 881 P.2d 679, 685 (N.M. 1994). Then, "the court must determine whether

the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." Id. The answer to the second part of the test determines the appropriate remedy: no sanctions, a presumption that the evidence would have been unfavorable to the State, or dismissal of the charges. See id.

We conclude that appellant cannot meet his burden of showing that the evidence was material. Appellant has not identified how the evidence was material. Appellant's testimony and the DNA evidence establish that appellant had sexual intercourse with the victim. Moreover, appellant testified that the victim was not wearing any underpants. We therefore conclude that the State's alleged failure to gather this evidence does not warrant any relief.

Appellant further contends that he was denied a fair trial when the victim's stepmother called appellant a "rapist" within the hearing of the jury as appellant entered the courtroom. We disagree.

The district court was informed of the incident and admonished the jury to disregard the out-of-court name calling by the victim's stepmother. Appellant did not argue that the admonishment was insufficient to cure any prejudice or seek a mistrial. Additionally, appellant does not cite any authority in support of his argument on appeal that the district court should have sua sponte declared a mistrial. We conclude that the district court was not required to declare a mistrial because the admonishment was sufficient to cure any prejudice. See Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975) (holding that unsolicited and inadvertent references to criminal activity can be cured by immediate admonishment to jury to disregard the statement).

Appellant also argues that the district court abused its discretion in admitting the testimony of the victim's husband, Lance Boston. In particular, appellant argues that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. See NRS 48.035(1). We conclude that this contention also lacks merit.

Appellant objected to Boston's testimony on the ground that it was cumulative, not that its probative value was substantially outweighed by the danger of unfair prejudice. The specific ground of objection must be stated at the time an objection is made. See NRS 47.040(1)(a). Generally, the failure to argue an evidentiary theory in trial court constitutes a waiver of the issue on appeal. See State v. Doody, 930 P.2d 440 (Ariz. Ct. App. 1996). Nonetheless, we conclude that appellant has not demonstrated that the district court clearly abused its discretion in admitting the testimony. See Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1126 (1996) (stating that district court has "considerable discretion" in determining relevance and admissibility of evidence and its decision will not be disturbed on appeal absent a clear abuse of that discretion).

Finally, appellant contends that the district court abused its discretion in allowing the victim to testify as to appellant's prior drug use. Appellant argues that this testimony was inadmissible under NRS 48.045(2). We conclude that this contention lacks merit.

Once again, appellant did not object to this testimony and therefore has not preserved this issue for appeal. See NRS 47.040(1); Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970). Accordingly, we need not consider appellant's contention unless it rises to the level of plain error affecting appellant's substantial rights. See NRS

178.602. We conclude that the admission of the victim's testimony about appellant's prior drug use does not rise to the level of plain error.

NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." However, such evidence is admissible for other purposes. See NRS 48.045(2).

Here, the evidence was offered to explain one reason why the victim would not have consented to sexual intercourse with appellant: she knew that he had used drugs and was afraid that as a result he might have a sexually transmitted disease. This is not an impermissible use of prior bad act evidence. Moreover, appellant apparently agreed during an off-the-record discussion in chambers that the testimony would be relevant, and the State instructed its witness not to "belabor the point." Under the circumstances, we conclude that appellant cannot demonstrate that the district court abused its discretion. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction.

It is so ORDERED.[1]

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

[1]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Pike & Draskovich
Clark County Clerk