IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVERETT MICHAEL JOHNSON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83066-COA

FILED

MAY 24 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Everett Michael Johnson, Jr., appeals from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a child under 16 years of age; first-degree kidnaping of a minor; two counts of child abuse, neglect, or endangerment; living from the earnings of a prostitute; statutory sexual seduction; and possession of visual presentation depicting sexual conduct of a child. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

K.M. and A.R., both 15 years old, met Johnson, who was 25 years old and went by the nickname Edeez, at a 7-Eleven in Las Vegas.[1] K.M. and Johnson exchanged phone numbers and, shortly after their meeting, the three began spending time together in Johnson's apartment complex. During this same time, K.M. often ran away from home, and K.M.'s neighbor noticed that K.M. had money. When the neighbor confronted K.M. about the money, K.M. told her that she had a pimp named Edeez and was selling her body. The neighbor called the police.

During his investigation, Las Vegas Metropolitan Police Department Detective Savino found a prostitution advertisement on

[1]We do not recount the facts except as necessary to our disposition.

MegaPersonals, which included a nude photograph of a buttocks and K.M.'s cell phone number. Detective Aliyev, an undercover vice detective, texted the cell phone number posing as a potential customer and received a text back asking to meet. When he arrived at the agreed upon meeting location, K.M. and A.R. walked to his vehicle, voluntarily got inside, and Detective Aliyev drove away. K.M. and A.R. agreed to have sexual intercourse with him for $300 each. Shortly after making this agreement, police officers pulled Detective Aliyev's vehicle over, arrested K.M. and A.R. for soliciting prostitution, and impounded their cell phones.[2]

Detective Savino interviewed K.M. at Clark County Juvenile Hall. He audio-recorded this interview, and the State played the recording for the jury at trial. However, neither a transcript of the audio-recorded interview nor the recording itself was provided to this court on appeal despite the recording being an exhibit. Nonetheless, testimony revealed that the recording contained many incriminating statements by K.M. against Johnson. At trial, Detective Savino testified that during this interview K.M. told him that she worked for Johnson and that she went on multiple "dates" and was paid for sex. He also testified that K.M. informed him that after these dates she would meet up with Johnson and give him the money that she made. Furthermore, Detective Savino testified that K.M identified Johnson in a photo lineup and indicated in her voluntary written statement that "Edeez was my friend at first, but then it became something more. He began to have me make money for him by selling myself." While not directly testified to at trial, we can infer from the testimony provided that during this recorded interview, K.M. told Detective

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[2]K.M. testified that, at the time of trial, the police still had custody of her cell phone.

Savino that she and Johnson had sexual intercourse over 25 times, and that Johnson would follow her on her dates so that he could protect her in case anything went wrong.

Detective Savino also conducted a cursory investigation into K.M.'s cell phone and looked at text messages between Johnson and K.M. Johnson's cell phone number was saved in K.M.'s cell phone under the contact name of "Edeez," followed by "a smiley face emoji with money and a green heart" emoji. In one text message, Johnson asked K.M. where his $300 was. In various other text messages, Johnson and K.M. referred to each other as "love."

One week after arresting K.M., police arrested Johnson and impounded his cell phone. Detective Jones later retrieved a partial extract[3] from Johnson's cell phone and found multiple selfies of K.M. on the phone. The detective also found a photograph "of a person nude [from] the waist down taken from behind." K.M. admitted that she was the individual depicted in the photograph. At trial, the detective testified that because he was able to retrieve only a partial extract, he could not determine when the nude photograph was received on Johnson's cell phone, if it was viewed, if

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[3]The detective testified that most of the data on an iPhone is encrypted. Some of this data can be decrypted with the user's PIN and other data is available without the user's PIN. He noted that he did not know why certain data is available only with the user's PIN while other data is available without the user's PIN. Here, he did not have Johnson's iPhone PIN, so he was able to retrieve only a partial extract. The detective testified that the information he retrieved was the data available when one powers on the iPhone but before the user enters a PIN, and that this data is a very small portion of the overall data that is on the iPhone. In this case, while Johnson's cell phone contained approximately 16,000 image files, the detective was able to download approximately 3,000 of those, and most of those were system files.

Johnson was aware that it was on his phone, or whether Johnson deleted it at some point. The same detective analyzed K.M.'s cell phone and retrieved a two-second video file that was "visually similar" to the nude photograph he extracted from Johnson's cell phone.

At trial, K.M. testified that she did not want to be in court and that she only showed up because the State subpoenaed her. She denied telling Detective Savino that she stayed with Johnson in his apartment and testified that she did not remember being in a relationship with Johnson or having sexual intercourse with him. She did not remember telling Detective Savino that she spoke to Johnson about prostitution and that Johnson told her it would be a fast and easy way to make money. She also did not remember telling Detective Savino that she was Johnson's girlfriend, and that Johnson would follow her on her prostitution dates to protect her.[4] Ultimately, the jury convicted Johnson of sex trafficking of a child under 16 years of age; first-degree kidnaping of a minor; two counts of child abuse, neglect, or endangerment; living from the earnings of a prostitute; statutory sexual seduction; and possession of visual presentation depicting sexual conduct of a child. This appeal followed.

On appeal, Johnson argues that (1) the district court abused its discretion during voir dire by asking improper questions, (2) the State presented insufficient evidence to convict Johnson of possession of visual presentation depicting sexual conduct of a child, and (3) the State presented

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[4]Significant portions of K.M.'s trial testimony were apparently inconsistent with the statements she provided to Detective Savino during her recorded interview, which was admitted into evidence and available to the jury during deliberations. We surmise that the jury did not find K.M.'s trial testimony credible in light of the statements she made during her interview.

insufficient evidence to convict Johnson of first-degree kidnapping of a minor. We disagree.

Johnson's first argument is waived because he did not object to the district court's questioning during voir dire below and did not argue plain error on appeal

Johnson argues that the district court abused its discretion during voir dire by asking improper questions.[5] Johnson waived his challenges because he did not assert them during the proceedings below. *See Jeremias v. State*, 124 Nev. 46, 50, 412 P.3d 43, 48 (2018) ("The failure to preserve an error . . . forfeits the right to assert it on appeal.").

Furthermore, even if the waiver rule does not operate as an absolute bar to Johnson's claim, his claim would still fail because he does not attempt to satisfy the plain-error standard of review. *See Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (noting that an appellant bears the burden of demonstrating that he was prejudiced by the plain error); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (contentions not supported by relevant authority and cogent argument need not be addressed by this court). Therefore, we conclude that Johnson failed to demonstrate reversible plain error.

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[5]We note that Johnson argues that this amounted to structural error. However, we decline to address this argument because Johnson raised it for the first time on appeal. *See Jeremias v. State*, 124 Nev. 46, 50, 412 P.3d 43, 48 (2018) (noting that the failure to preserve a structural error forfeits the right to assert it on appeal and is reviewed for plain error). Additionally, Johnson raises this argument for the first time in his reply brief. *See LaChance v. State*, 130 Nev. 262, 277 n.7, 321 P.3d 919, 929 n.7 (2014) (declining to consider issues raised for the first time in appellant's reply brief).

Johnson's second argument fails because sufficient evidence supports the judgment of conviction as to the count of possession of visual presentation depicting sexual conduct of a child

When reviewing the sufficiency of the evidence, this court must decide "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). It is the jury's role, not the reviewing court's, "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). Thus, "a verdict supported by substantial evidence will not be disturbed by a reviewing court." *Id.* Moreover, "circumstantial evidence alone may support a conviction." *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Johnson argues that the State did not present sufficient evidence to convict him of possession of visual presentation depicting sexual conduct of a child because he did not knowingly and willfully possess such a photograph on his cell phone. Johnson highlights that the detective who analyzed his cell phone testified that he could not determine when K.M. sent Johnson the nude photograph, if Johnson ever viewed the photograph, or if Johnson was ever aware that the photograph was on his cell phone because it could have been sent while police had custody of his cell phone.

NRS 200.730(1) defines possession of a visual presentation depicting sexual conduct of a child as follows:

> A person who knowingly and willfully has in his or her possession for any purpose any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal or engaging in or simulating, or

> assisting others to engage in or simulate, sexual conduct[,] . . . [f]or the first offense, is guilty of a category B felony . . . .

Because Johnson contests only whether he "knowingly and willfully" possessed the nude photograph of K.M., we need not address the other elements of the crime. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

Here, the record supports that K.M. sent the nude photograph to Johnson before her phone was confiscated, and therefore, it had to have been sent at least a week before Johnson's phone was impounded. The jury heard testimony that detectives impounded K.M.'s cell phone on the day that she was arrested and that, at the time of trial, the police still had custody of her cell phone. Police arrested Johnson and impounded his cell phone one week after impounding K.M.'s cell phone. Thus, logically, the nude photograph could not have been sent by K.M. to Johnson after Johnson's cell phone was confiscated. Additionally, the detective testified that he analyzed Johnson's cell phone, where he found the nude photograph, and that he analyzed K.M.'s cell phone, where he found the two-second video that was visually similar to the nude photograph that he found on Johnson's cell phone. The detective also found several of K.M.'s selfies on Johnson's cell phone. The jury also heard evidence that Johnson and K.M. regularly texted each other, were in a dating relationship, had sexual intercourse on multiple occasions, and referred to each other as "love" in their text messages.

From this evidence, a rational trier of fact could have found that Johnson knowingly and willfully possessed the nude photograph of K.M. because K.M. sent the nude photograph to Johnson prior to when police

impounded her phone and, thus, during a time in which Johnson had custody of his cell phone. Additionally, a rational trier of fact could have found that Johnson knowingly and willfully possessed the nude photograph due to the circumstances surrounding the nature of his relationship with K.M. Therefore, we conclude that sufficient evidence was presented at trial to support the jury's finding of guilt for possession of visual presentation depicting sexual conduct of a child.

Johnson's third argument fails as the State presented sufficient evidence to convict Johnson of first-degree kidnapping of a minor

Johnson argues that, while the amended indictment contained all three theories of culpability permitted under the first-degree kidnapping of a minor statute, the State narrowed its theory of culpability during its closing argument by only arguing two of the three theories: that he enticed K.M. with the intent to confine her from her parents or that he led, took, enticed, or carried away K.M. with the intent to perpetrate upon her any unlawful act.[6] Johnson asserts that the State presented insufficient evidence to convict him under the two theories argued by the State during closing argument. As to the first theory of liability, Johnson argues that the State did not present any evidence that he imprisoned or confined K.M., nor that he intended to keep K.M. for a protracted period of time. As to the second theory of liability, Johnson notes that the supreme court defined the legal phrase "perpetrate upon the person of the minor any unlawful act" to mean "a crime upon or against the minor's body." He argues that the unlawful act alleged in the amended indictment is encouraging or causing

[6]The other theory of liability that the State did not directly argue in its closing argument is that Johnson led, took, enticed or carried away K.M. with the intent to hold her to unlawful service.

K.M. to work as a prostitute and asserts that neither encouragement nor causing a subsequent act is a "crime upon or against the minor's body."

The relevant part of NRS 200.310(1) defines first-degree kidnapping of a minor as follows:

> [A] person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

Johnson did not cite any authority to support his position that the State narrowed its theory of culpability when it argued only the two theories during closing argument, and therefore, implicitly abandoned or waived the other charged theory. *Maresca*, 103 Nev. at 673, 748 P.2d at 6 (holding contentions not supported by relevant authority and cogent argument need not be addressed by this court). Furthermore, Johnson waived this argument because he did not assert it during the proceeding below. *See Jeremias*, 134 Nev. at 50, 412 P.3d at 48. Thus, we need not consider this argument.

Here, even if we consider Johnson's argument, we note that the charging document was never amended to omit the theory of unlawful service and the jury was expressly instructed on this theory. Therefore, the charge was not narrowed by the State. Additionally, Johnson does not argue that the evidence was insufficient to support this charge. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. Moreover, sufficient evidence supports the jury's decision to find Johnson guilty by enticing K.M. with the intent to hold her to unlawful service. While K.M. testified that she did not

remember telling Detective Savino that Johnson talked to her about prostitution, told her that it was a fast and easy way to make money, and followed her on her dates so that he could protect her, the State played Detective Savino's audio-recorded interview with K.M. for the jury which contained her prior inconsistent statements in her own words and voice, contrary to her trial testimony.

We recognize that both parties share the responsibility to submit portions of the trial court record to be used on appeal. It is appellant's burden to provide the "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). And, "respondents appendix to the answering brief may contain any transcripts or documents which should have but were not included in the appellant's appendix . . . ." NRAP 30(b)(4). Here, neither party provided this court with either the transcript or the recording of Detective Savino's audio-recorded interview with K.M. Nevertheless, "[i]t is the responsibility of the objecting party to see that the record on appeal before the reviewing court contains the material to which they take exception. If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary." *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991), *reversed on other grounds*, 504 U.S. 127 (1992). As a result, we assume that the audio-recorded interview supports the jury's finding and that K.M. made the statements to Detective Savino incriminating Johnson, upon which a rational trier of fact could have relied in reaching its decision. Furthermore, the Nevada Supreme Court has previously explained that "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection

constitutes a denial of the prior statement [and] makes it a prior inconsistent statement . . . [that] may be admitted both substantively and for impeachment." *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004).

In addition to the audio-recorded interview, K.M.'s neighbor testified that K.M. told her that she had a pimp named Edeez and was selling her body. Detective Savino testified that during his interview with K.M., she told him that she worked for Johnson, that she went on multiple dates and was paid for sex, and that after these dates she would meet up with Johnson and give him the money that she made. In her voluntary written statement, also admitted into evidence, K.M. noted that Johnson had her make money for him by selling herself. Additionally, Detective Savino located numerous text messages between K.M. and Johnson, one text message where Johnson asked K.M. where his $300 was. Detective Jones also found a nude photograph of K.M. on Johnson's cell phone. From this evidence, a rational trier of fact could have found that Johnson enticed K.M. with the intent to hold her out to the unlawful service of prostitution.

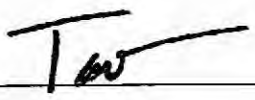
Additionally, the evidence also supports the third theory of culpability, that Johnson perpetrated upon the person of K.M. an unlawful act. While Johnson argues that *Lofthouse v. State*, 136 Nev. 378, 467 P.3d 609 (2020), precludes a finding of guilt for first degree kidnapping of a minor under the third theory of culpability, this case is distinguishable from *Lofthouse*. In *Lofthouse*, the Nevada Supreme Court explicitly reviewed a statute criminalizing sexual conduct between a teacher and a student, who was old enough to consent to sexual conduct, as not sufficient to support a first-degree kidnapping charge. But for the teacher-student relationship, the conduct was both legal and consensual. In contrast, this case involves

sex trafficking of K.M., who was 15 years old at the time, and therefore could not consent to sexual acts. Additionally, unlike *Lofthouse*, the underlying act of sex trafficking is unlawful. Thus, we conclude that *Lofthouse* does not apply here. Furthermore, sufficient evidence supports the jury's decision to find Johnson guilty of perpetrating upon the person of the minor any unlawful act because the jury found Johnson guilty of sex trafficking a child under 16 years of age and child abuse, neglect, or endangerment, both of which are unlawful acts perpetrated upon the person of K.M.

The evidence as a whole supports two theories of culpability. *See Bolden v. State*, 121 Nev. 908, 113, 124 P.3d 191, 194 (2005) ("When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories."). Because sufficient evidence supports Johnson's conviction for first-degree kidnapping of a minor under one or more theories of liability, we must affirm. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



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Tao

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Bulla

cc: Hon. Tierra Danielle Jones, District Judge
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Eighth District Court Clerk