IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER BYRNES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38075

FILED

DEC 13 2001

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 one count of open or gross lewdness. The district court sentenced appellant Peter Byrnes to serve one year in the Clark County Detention Center, suspended execution of the sentence, and placed Byrnes on probation for two years.

Byrnes first contends that the State presented insufficient evidence to support the jury's verdict. We disagree.[1]

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.'"[2] 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."[3]

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. Suzette Healea testified that, while training with a client at a gym, she saw Byrnes grab his erect penis through his clothes and pull it. At the time, Byrnes was standing in front of a mirror and muttering to

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[1]Byrnes also argues that the evidence presented at trial did not match the State's theory as alleged in the information. We have considered this contention and conclude that it lacks merit.

[2]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).

[3]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

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himself, sometimes uttering vulgarities. According to Healea, Byrnes appeared to be stimulating himself. Healea further testified that Byrnes later approached her from behind and whispered in her ear regarding sexual acts that he wanted to perform on her. The individual with whom Healea was training, Dina Dalessio, testified that she observed Byrnes standing in front of the mirror and muttering vulgarities. Dalessio further testified that she saw Byrnes touch his penis a few times. According to Dalessio, Byrnes appeared to have an erection and was looking at her and Healea in the mirror during the incident. Dalessio testified that she did not see Byrnes later approach Healea and did not hear him say anything to Healea until after Healea turned and confronted him. Both Healea and Dalessio demonstrated for the jury how Byrnes touched himself.

The jury could reasonably infer from the evidence presented that Byrnes committed an act of open or gross lewdness when he manipulated his penis in a sexual manner while in a public place.[4] 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.[5]

Next, Byrnes argues that the district court erred by failing to suppress his statement to Detective Love because it was taken in violation of his Miranda[6] rights. Byrnes, however, failed to file a motion to suppress or otherwise raise this issue in the district court. As a general rule, we will not consider issues raised for the first time on appeal. There is a narrow exception to this rule for plain errors.[7] We have also sometimes considered constitutional errors raised for the first time on appeal.[8] We decline to consider the issue raised in this case because the issue of whether Byrnes was in custody involves factual and credibility

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[4]See NRS 201.210; Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (discussing definition of open or gross lewdness).

[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[6]Miranda v. Arizona, 384 U.S. 436 (1966).

[7]See NRS 178.602.

[8]See McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

determinations[9] that cannot adequately be made for the first time on appeal based on the record before this court.

Having considered Byrnes' contentions and concluded that they either lack merit or have not been properly preserved for appeal, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Lee A. Gates, District Judge
Attorney General/Carson City
Clark County District Attorney
Wolfson & Glass
Clark County Clerk

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[9]See Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (noting that a district court's determination as to whether a defendant was "in custody" will not be disturbed where there is substantial evidence in support of its determination).