

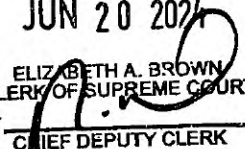
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENT ROBERTSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87378-COA

FILED

JUN 20 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Kent Robertson appeals from a judgment of conviction, pursuant to a jury verdict, of one count of unlawful dissemination of an intimate image of another person and one count of unlawful capture, distribution, display, or publish an image of the private area of another person. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

In 2019, Kent was living in a home in Reno, Nevada, with his then-girlfriend, Randi Robertson, and his friend, Dustin Erickson.¹ In July 2019, Dustin's longtime girlfriend, S.H., moved in with them. At the time, S.H. was recovering from alcoholism, so Dustin offered S.H. a room in the home as a "safe place" for her to detox. However, S.H. was unable to maintain consistent employment, and because Kent worked remotely from home, he and S.H. spent most days alone together while Dustin and Randi were away at work.

In late 2019, Kent and S.H. began an intimate relationship, unbeknownst to their respective partners. The relationship continued even after Kent and Randi got married in January 2020, and after S.H. and Dustin moved into another house together the following summer. While living apart, Kent and S.H. would still see each other four or five times a week. Typically, while Randi and Dustin were at work, Kent would drive S.H. from

¹We recount the facts only as necessary for our disposition.

her house to a bar or liquor store and buy her alcohol. Then, Kent would take S.H. back to his home and, while S.H. was inebriated, the two would engage in sexual conduct. During the affair, Kent recorded their sexual activity using video surveillance cameras he had installed throughout his home.

In March 2021, S.H. was hospitalized for several weeks due to her alcoholism, and upon discharge, she decided that she wanted to maintain her sobriety. Because Kent had enabled her alcoholism by providing her alcohol before their sexual encounters, S.H. texted Kent that she wanted to end their affair. Kent responded by threatening to “show evidence and proof of what has been going on between us to your best friend that is floating your bill [Dustin] and my innocent wife [Randi] to make a point.” He then sent a second text telling S.H., “I’d make a humble attempt to fix what’s possible with me.”² Following these communications, S.H. preemptively told Dustin about the affair, but claimed she had been “blackout drunk” during her sexual encounters with Kent.

Shortly thereafter, on March 19, Kent also told Dustin about the affair and offered to send evidence of his sexual conduct with S.H. First, Kent texted Dustin nude photos of S.H. that she had previously taken of herself and sent to Kent. Kent also emailed Dustin 28 video files depicting his sexual encounters with S.H. For several days, Kent continued to text both Dustin and S.H. and drive by their house. On March 23, S.H. applied for, and obtained, a temporary protective order (TPO) against Kent. In her application for the TPO, S.H. stated that Kent had sexually assaulted her.³

²At trial, Kent acknowledged sending these texts but denied that they could be construed as threatening.

³At trial, S.H. testified that the application stated she was sexually assaulted because she believed that she was unable to consent to sexual

In January 2023, the State charged Kent with one count of unlawful dissemination of an intimate image (unlawful dissemination), a category D felony, and one count of unlawful capture, distribution, display, or publish of a private area of another person (unlawful capture), a gross misdemeanor. The information alleged that Kent captured and disseminated “one or more” such images of S.H. without her consent. Kent’s three-day jury trial commenced in June 2023.

At trial, Kent testified that he sent the videos to Dustin solely to prove that his affair with S.H. was consensual and to protect himself from litigation. He acknowledged, however, that he sent the photos and videos before S.H. filed the TPO application which accused him of sexual assault. Kent further testified that the videos were not prepared or disseminated to harass or harm anyone, but stated that he was “upset” and “hurt” because he felt S.H. had used him.

Kent also testified that the video surveillance cameras which recorded his sexual encounters with S.H. were installed to protect himself from theft and false allegations. He claimed that S.H. knew about the cameras because he installed them inside the home and posted a video surveillance notice at the home’s entrance while S.H. was still living there in February 2020.⁴ He also claimed that he watched one of the videos with S.H. between December 2020 and February 2021. Relatedly, Kent testified that S.H. told him to send Dustin that video for “treating her like crap” but did not suggest that Kent send Dustin her nude photos.

conduct with Kent given the amount of alcohol she had consumed before their encounters.

⁴At trial, both S.H. and Dustin testified that they did not recall ever seeing notices of video surveillance at the home entrance.

S.H. testified that she did not discuss filming any sexual encounters with Kent, nor did she consent to their sexual conduct being filmed or to Kent sending any videos or nude photos to Dustin. S.H. further testified that she did not know about the recordings until Kent sent the videos to Dustin. S.H. added that, after she ended their affair, Kent became very angry and aggressive, and “he would not take no for an answer.”

During cross-examination, Kent attempted to impeach S.H. with a prior statement from her TPO application indicating that a few months earlier, Kent told her that he had a video of their sexual conduct and that he “used it as a tool to threaten my partner [w]henver he would get angry that I was not available or willing to go to his house.” Her application additionally stated that Kent promised to delete the video and to not record any more. S.H. testified that although she could not remember when exactly Kent told her about the video, he promised to delete it and remove the camera.

Kent also asked S.H. about her testimony from his preliminary hearing when she acknowledged that Kent “at one point” had a camera in the room where they engaged in sexual conduct. S.H. testified, “I knew he had a camera. I did not know there was a camera on that was recording and . . . I did not ever see a camera in the room. But I knew that he owned a camera, just like I know he owned a pair of boots.”

The parties rested, and when settling jury instructions, they agreed to jury instruction 7, which read:

The crime of UNLAWFUL CAPTURE, DISTRIBUTION, DISPLAY OR PUBL[ISH] IMAGE OF PRIVATE AREA OF ANOTHER PERSON, FIRST OFFENSE consists of the following elements:

- (1) The Defendant knowingly and intentionally;
- (2) Capture an image of the private area of another person;
- (3) Without the consent of the other person; and

- (4) Under circumstances in which the other person has a reasonable expectation of privacy.

After the jury began deliberations, it submitted a question about instruction 7: “On charge two, it reads unlawful capture, distribution, display or publish image of private area of another person, first offense, consists of the following elements. Line two of the elements only mentions capture. The above charge reads all capture, distribution, display or publish. Is it one element or all 4?” Over Kent’s objection, district court answered:

The phrase: “The crime of UNLAWFUL CAPTURE, DISTRIBUTION, DISPLAY OR PUBLISH IMAGE OF PRIVATE AREA OF ANOTHER PERSON, FIRST OFFENSE . . .” is the title of the count alleged. The elements of Count II are listed in numbers 1 through 4 of Instruction No. 7.

The jury ultimately found Kent guilty of both unlawful dissemination and unlawful capture. The district court sentenced Kent to 19 to 48 months in prison for the felony and 364 days in jail for the gross misdemeanor, to be served concurrently. Kent timely appealed.

The district court adequately answered the jury’s question

Kent first argues that the district court erred by inadequately answering the jury’s question about instruction 7. Whether the trial judge gave adequate clarification in response to the jury’s question during deliberations is reviewed for an abuse of discretion. *Gonzales v. State*, 131 Nev. 991, 996, 366 P.3d 680, 683 (2015). “[I]n situations where a jury’s question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a duty to give additional instructions on the law to adequately clarify the jury’s doubt or confusion.” *Id.* at 994, 366 P.3d at 682; *see also id.* at 997, 366 P.3d at 684 (concluding that the district court abused its discretion by refusing to give *any* guidance in response to the jury’s element-related question).

Here, Kent does not demonstrate how the district court's response was inadequate so as to constitute an abuse of discretion. On the contrary, the record shows that the district court directly answered the jury's element-related question. The court clarified that "unlawful capture, distribution, display or publish" was the title of the count alleged, whereas the elements of the crime were "listed in numbers one through 4" of the instruction. Thus, we conclude that the district court did not abuse its discretion.

Kent's convictions are supported by sufficient evidence

Next, Kent argues that neither of his convictions are supported by sufficient evidence. Evidence is sufficient to support a jury verdict if "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Because it is the function of the jury to weigh the evidence and pass upon the credibility of the witness, a verdict supported by sufficient evidence will not be disturbed on appeal. *Id.*; *Collman v. State*, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) ("The jury determines what weight and credibility to give conflicting testimony.").

Unlawful capture

Kent contends that the State failed to prove the essential elements of unlawful capture because no reasonable juror could credit S.H.'s testimony that she was unaware of the video cameras' existence. To obtain a conviction for unlawful capture, the State had to prove that Kent "knowingly and intentionally capture[d] an image of the private area of [S.H.] . . . [w]ithout [her] consent" and "[u]nder circumstances in which [she had] a reasonable expectation of privacy." NRS 200.604(1). A person has a

reasonable expectation of privacy under circumstances when they “would believe that [they] could disrobe . . . without being concerned that an image of [their] private area would be captured” or “would not be visible to the public, regardless of whether the person is in a public or private place.” NRS 200.604(8)(e)(1)-(2).

Here, the State presented sufficient evidence at trial for a rational juror to conclude that images of S.H.’s private area were captured without her consent under circumstances where she had a reasonable expectation of privacy. S.H. repeatedly testified that she never consented to recording her sexual encounters with Kent. She further testified that she did not see video cameras when engaging in sexual conduct, much less know that she was being recorded. To the extent that Kent argues no reasonable juror could have credited S.H.’s trial testimony based on her allegedly inconsistent statements in her TPO application and at the preliminary hearing, this court does not reassess witness credibility or conflicting testimony on appeal. *McNair*, 108 Nev. at 56, 825 P.2d at 573; *Collman*, 116 Nev. at 711, 7 P.3d at 441. Thus, Kent’s unlawful capture conviction is supported by sufficient evidence.

Unlawful dissemination

Kent also contends that insufficient evidence supports his unlawful dissemination conviction because no reasonable juror could conclude that he had an intent to harass S.H. when he shared the videos. Rather, Kent maintains that he sent the videos to Dustin to confirm the actuality and consensual nature of the affair. Kent further asserts that his dissemination was not “unlawful” because S.H. gave him permission to send Dustin a video and, additionally, because NRS 200.780(3)(e) permitted him to send the intimate images in anticipation of litigation.

To obtain a conviction for unlawful dissemination, the State had to prove that Kent electronically disseminated an intimate image of S.H. “with the intent to harass, harm or terrorize” her; that the image was disseminated without her consent; and that she had a “reasonable expectation” the image would be kept private. NRS 200.780(1). The statute, however, permits the lawful electronic dissemination of intimate images for the purpose of “[p]reparation for or use in any legal proceeding.” NRS 200.780(3)(e).

There was sufficient evidence presented for a rational juror to conclude that Kent sent intimate images of S.H. with the requisite criminal intent. At trial, Kent testified that he was “upset” and “hurt” by S.H. ending their affair. Before disseminating the photos and videos, Kent sent S.H. a text message threatening to show “evidence” of the affair to Dustin and advising S.H. to “make a humble attempt to fix” their relationship. Kent also acknowledged that he sent Dustin the photos and videos after S.H. said she no longer wanted to see him but before she accused him of sexual assault in her TPO application. From this, the jury could reasonably infer that Kent disseminated the images in anger over their breakup, with the intent to harm or harass S.H.

Additionally, the jury had sufficient evidence to conclude that the images were disseminated without S.H.’s consent. Even though Kent testified that, at one point, S.H. gave him permission to send a *video* to Dustin, such permission did not extend to her nude *photos*.⁵ Further, S.H.

⁵Kent fails to distinguish between photos and videos on appeal and only addresses his dissemination of the videos. However, the statutory definition of intimate images includes both photos and videos. NRS 200.770(1) (“Intimate image . . . includes, without limitation, a photograph, film, videotape or other recorded image . . .”).

testified that she neither consented to Kent sending the videos nor expected him to share her nude photos. She also testified that Kent had previously threatened to send Dustin a video of their sexual conduct, which Kent then assured he would delete. The jury could reasonably infer from this evidence that S.H. did not consent to the dissemination of her intimate images.

Finally, Kent's contention that NRS 200.780(3)(e) permitted him to send the intimate images in anticipation of litigation is unpersuasive. As noted, NRS 200.780(3)(e) allows for the disclosure of intimate images in "[p]reparation for or use in any legal proceeding." However, at the time Kent disseminated the images, there was no legal proceeding in existence where the images could have been used, or for which preparation was required. Kent does not provide any authority to support his assertion that dissemination of intimate images is lawful when litigation is potential and anticipated, rather than having already commenced. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (noting that this court need not consider issues for which the appellant does not "present relevant authority" or "cogent argument"). Accordingly, we

ORDER the judgment of conviction AFFIRMED.⁶


Gibbons, C.J.


Bulla, J.


Westbrook, J.

⁶Insofar as Kent has raised other issues which are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Egan K. Walker, District Judge
Orrin Johnson Law
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk