

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDDIE D. SAUNDERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38542

FILED

APR 22 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first degree kidnapping (count I), sexual assault with the use of a deadly weapon (count II), attempted sexual assault with the use of a deadly weapon (count III), battery with the intent to commit a crime (count IV), and battery with the use of a deadly weapon causing substantial bodily harm (count V). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for count I, life with the possibility of parole after 5 years; for count II, two consecutive terms of life with the possibility of parole after 10 years; for count III, two consecutive terms of 43 to 192 months; and for counts IV and V, concurrent terms of 35 to 156 months. Counts I-III were ordered to run consecutively, and counts IV and V were ordered to run concurrently with counts I-III. The district court further imposed a special sentence of lifetime supervision upon completion of any term of parole or imprisonment.

Appellant contends that the evidence presented at trial was insufficient to support the jury's findings of guilt on the charges. Appellant asserts that the victim was involved a violent relationship, displayed many attributes of a battered woman, and made inconsistent

statements regarding important aspects of the crime. These factors, appellant argues, coupled with a lack of physical evidence supporting the victim's testimony, "presents a credibility issue such that a rational juror could not have found guilt beyond a reasonable doubt." We disagree.

First, appellant challenges the sufficiency of the evidence supporting the kidnapping charge on the grounds that there were no photographs or physical evidence corroborating the victim's testimony that appellant dragged the victim into the desert. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹ In particular, the victim testified that she and appellant had walked into the desert together with a case of Budweiser beer, and that when the victim stopped to smoke a cigarette, appellant hit her in the face "real hard" with his hand. The victim further testified that when she attempted to escape from appellant by running into the middle of a nearby road, appellant grabbed her by her clothing and dragged her back into the desert where he battered and sexually assaulted her. It is for the jury to determine the weight and credibility to give testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.² The jury could have reasonably inferred from the evidence presented that appellant kidnapped the victim. Accordingly, we reject appellant's challenge to the sufficiency of the evidence supporting the kidnapping conviction.

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

²See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Second, appellant contends that the evidence was insufficient to support the jury's finding of guilt on the counts of attempted sexual assault with the use of a deadly weapon and sexual assault with the use of a deadly weapon. Appellant argues that the sexual assault nurse's examination of the victim was inadequate, and that no physical evidence of sexual assault was produced at trial. The victim testified at trial, however, that after appellant had dragged her back into the desert, he hit her in the forehead with a rock, tore off all of her clothes, and after unsuccessfully attempting to penetrate her with his penis, he penetrated her digitally several times. The crime scene analyst subsequently testified that she observed and photographed a torn brassiere, panties, and several blood-spattered rocks at the crime scene.

Although the medical examination revealed no conclusive physical evidence of a sexual assault, the examining nurse testified to the effect that forty percent of the time there is no evidence of trauma from vaginal penetration. Moreover, the victim's uncorroborated testimony alone would have been sufficient to prove that attempted sexual assault with the use of a deadly weapon and sexual assault with the use of a deadly weapon had occurred.³ Appellant's challenge to the sufficiency of the evidence supporting these convictions is without merit.

Third, appellant contends that the evidence was insufficient to support the jury's finding of guilt on the charges of battery with the intent to commit a crime and battery with the use of a deadly weapon causing substantial bodily harm. Appellant argues that (1) the victim's testimony

³See Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996) (citing Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981)).

was unreliable because she was financially dependent on her abusive live-in boyfriend, Dennis Williams, who "[i]n all probability" caused her injuries, (2) the crime scene investigation was inadequate because no drag marks or shoeprints were recovered, (3) there was insufficient evidence that a deadly weapon was used in the course of the battery because the rock was not impounded from the crime scene, and (4) the latent print examiner made no attempt to match two fingerprints found on the Coors beer cans.

The victim and Williams both testified, however, that the victim and appellant left Williams' apartment together when Williams came home from work. As noted, the victim testified that after walking into the desert with appellant, appellant hit her in the face with his hand while she was smoking and subsequently hit her on the left side of her forehead with a rock. Photographs taken of the victim immediately after the incident and the testimony of the examining nurse confirmed the recent injuries to the victim's face and left side of her forehead.

Additionally, the testimony of the crime scene investigator and photographs of the scene confirmed that blood-splattered rocks, a cigarette butt, and Budweiser and Coors beer cans were found at the crime scene. The latent print examiner testified that the two fingerprints found on the Coors beer cans had no value for identification, but that appellant's fingerprint was identified on one of the Budweiser beer cans. Although the victim and Williams testified that they had been involved in violent domestic disputes with each other in the past, both of them testified that Williams was not the perpetrator in the instant case.

We conclude that the jury could have reasonably inferred from this evidence that appellant committed the crimes of battery with the

intent to commit a crime and battery with the use of a deadly weapon causing substantial bodily harm. Accordingly, we reject appellant's challenge to the sufficiency of the evidence supporting these charges.

Appellant next contends that he was denied the right to a fair trial by prosecutorial misconduct committed when the prosecutor published an allegedly inflammatory and prejudicial photograph of the injured victim to the jury during the opening statement. Preliminarily, we note that at trial, defense counsel failed to object to the publication or the subsequent admission of the photograph into evidence. As a general rule, failure to object below bars appellate review; however, this court may address plain error or issues of constitutional dimension sua sponte.⁴

We conclude that there is no plain or constitutional error because appellant was not prejudiced by the publication of the photograph during the prosecution's opening statement. This court has recognized that a photograph is admissible if its probative value outweighs its prejudicial effect.⁵ Here, the photograph was substantiated by the evidence and, eventually, was admitted into evidence at trial. To the extent that appellant argues that the district court abused its discretion in admitting the photograph, we reject that contention. The photograph was relevant to establishing the battery offenses and the extent of the victim's injuries, was verified by testimony as a fair and accurate depiction of the injured victim, and again, was never objected to at trial by the defense.

⁴See Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991), abrogated on other grounds by Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

⁵Shuff v. State, 86 Nev. 736, 740, 476 P.2d 22, 24-25 (1970).

Having considered appellant's contentions and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Kathy A. Hardcastle, District Judge
Hinds & Morey
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk