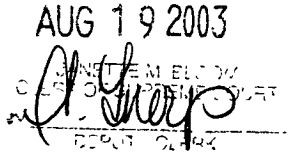
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICCARDO SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39197

FILED

AUG 19 2003



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery causing substantial bodily harm and one count of sexual assault causing substantial bodily harm with the use of a deadly weapon.

Appellant Riccardo Smith was sentenced to serve a term of 12 to 48 months for the count of battery causing substantial bodily harm and a consecutive term of life in the Nevada State Prison without the possibility of parole for the count of sexual assault causing substantial bodily harm, plus an equal and consecutive term of life in prison as an enhancement for using a deadly weapon during commission of the crime. Smith now raises several issues on direct appeal.

Smith first contends that the State presented insufficient evidence to support his conviction for sexual assault causing substantial bodily harm. Specifically, Smith argues that the evidence supports a finding that his sexual intercourse with the victim was consensual, amounted to "sexual play," and that the physical injuries the victim suffered were the result of his bad temper—not a sexual assault. We disagree.

The standard of review for a challenge to the sufficiency of the evidence to support a criminal conviction 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.'"[1]

NRS 200.366(1) provides that

> A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature or his conduct, is guilty of sexual assault.

Substantial bodily harm to the victim of a sexual assault occurs when the actions of the defendant causing the harm are committed "in connection with or as part of the sexual assault."[2]

The use of overt physical force is not required to support a conviction under NRS 200.366.[3] Rather, the statute "only requires the commission of the act of sexual penetration against the will of the victim."[4] An inquiry into the issue of non-consensual sexual intercourse, as an element of sexual assault, considers whether the victim reasonably

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[1]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[2]See NRS 200.366(2)(a).

[3]McNair, 108 Nev. at 57, 825 P.2d at 574.

[4]Id.

demonstrated a lack of consent and whether a reasonable person, from the defendant's view, would have concluded the victim manifested consent.[5]

However, "[a] rape victim is not required to do more than her age, strength, and the surrounding facts and attending circumstances would reasonably dictate as a manifestation of her opposition."[6] We have held that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction,"[7] and that "[t]here is no consent where the victim is induced to submit to the sexual act through fear of death or serious bodily injury."[8]

Here, Smith admitted to having sexual intercourse with the victim, and conceded that he was guilty of committing battery. At trial, the victim testified to the following: she was in Smith's regular hotel room on the morning of March 21, 2001; she had taken "a lot of medicine," including three Vicodin and two "other pills" the previous night; Smith severely and repeatedly beat her that morning; Smith forced her to undress and to assume a sexual position; Smith held a knife to her throat and threatened to kill her; and, thereafter, Smith engaged in nonconsensual sexual intercourse with her.

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[5]Id. at 56-57, 825 P.2d at 574.

[6]Id. at 57, 825 P.2d at 574.

[7]Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

[8]Dinkens v. State, 92 Nev. 74, 77, 546 P.2d 228, 230 (1976) (affirming a conviction for rape pursuant to NRS 200.363, which was later replaced by NRS 200.366).

The victim's testimony was corroborated by the testimony of Registered Nurse Maire Nerberg; Washoe County Sheriff's Office's Forensic Investigators Lisa Harris, Susan Harmon, and William Stevenson; Reno Police Department Detective David Fogarty; Michael Lien, the Super Pawn manager; the managers of the In Town Motel and European Hotel; and, the expert testimony of Dr. Ellen Clark. The victim's testimony was also corroborated by the evidence of physical injuries she suffered to her body, including four tears in her vaginal area, as well as multiple fractures, bruises, hemorrhaging, and over fifty separate wounds. Physical evidence included knives gathered from Smith's hotel room.

The weight and credibility to give to admitted evidence and testimony is within the province of the jury.[9] A reasonable conclusion drawn from the evidence in this case is that the severe, and repeated, beatings Smith inflicted on the victim had the effect of placing her in such a state of fear that she was unable to resist Smith's sexual advances and that the sexual intercourse occurred against her will. As such, the injuries the victim suffered at the hands of Smith prior to the sexual assault were sufficiently connected with, or a part of, the sexual assault itself. We conclude, therefore, that sufficient evidence supports the jury's finding beyond a reasonable doubt that Smith committed sexual assault causing substantial bodily harm against the victim in violation of NRS 200.366.

Smith also argues that, even if sufficient evidence was admitted at trial to convict him of committing sexual assault causing

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[9]See McNair, 108 Nev. at 56, 825 P.2d at 573.

substantial bodily harm, insufficient evidence was admitted to support a sentence enhancement pursuant to NRS 193.165 for using a deadly weapon in the commission of the crime.[10] Specifically, Smith argues that the deadly weapon was not used in the commission of, or with a nexus to, the sexual assault. We disagree.

To use a deadly weapon for purposes of NRS 193.165, "there need only be conduct which produces a fear of harm or force by means or display of a deadly weapon."[11] Here, the victim testified that a knife was held to her throat and Smith threatened to kill her prior to engaging in sexual intercourse. The victim testified that she did not resist the sexual intercourse because she was afraid. The victim's testimony relating to the knife was corroborated by knives recovered from Smith's hotel room, one of which was identified by the victim as the one used by Smith. We conclude that this evidence was sufficient to support the jury's finding beyond a reasonable doubt that Smith used a knife as a deadly weapon in the commission of the sexual assault pursuant to NRS 193.165.

Finally, Smith argues that the district court committed reversible error when it gave the jury a supplemental instruction on sexual assault pursuant to our holding in McNair v. State.[12] We conclude that this issue has not been properly preserved for appeal. The record

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[10]NRS 193.165 provides that a defendant who uses a deadly weapon in the commission of a sexual assault shall be punished with a term in prison equal to that imposed for the underlying offense and shall not be granted probation or receive a suspended sentence.

[11]Carr v. Sheriff, 95 Nev. 688, 690, 601 P.2d 422, 424 (1979).

[12]108 Nev. at 57, 825 P.2d at 574.

reveals that the district court consulted with, and read the instruction to, counsel for both the State and Smith prior to providing it to the jury. This occurred in chambers and on the record. After reviewing the instruction, both counsel expressly stated that they had no objections.

We have repeatedly held that the failure to object to a jury instruction precludes appellate review.[13] Smith does not proffer any reason why an objection to the supplemental instruction was not made to the district court. In fact, Smith concedes in his brief that the supplemental instruction was an "accurate statement of the law." Therefore, we conclude that Smith has failed to properly preserve this issue for review on appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[14]

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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[13]See Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991); McCall v. State, 91 Nev. 556, 540 P.2d 95 (1975); Clark v. State, 89 Nev. 392, 513 P.2d 1224 (1973).

[14]We have considered all other arguments raised by both Smith and the State and we conclude that the relief requested is not warranted.

cc: Hon. Brent T. Adams, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk