IN THE SUPREME COURT OF THE STATE OF NEVADA

PABLO MONTANTES, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86062

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault and open or gross lewdness.[1] Second Judicial District Court, Washoe County; Tammy Riggs, Judge. Appellant Pablo Montantes raises four contentions on appeal.

First, Montantes argues that insufficient evidence supports his convictions and that this court should reconsider its precedent holding a victim's testimony alone is sufficient to support a conviction. The victim testified that she and Montantes rented a hotel room to celebrate the victim's birthday. After drinking throughout the evening and early morning, the victim and Montantes returned to the hotel room, where they each had their own bed. The victim took half of a sleeping pill and fell asleep. Although her memories were incomplete, the victim recalled waking up with Montantes on top of her. She testified that he digitally penetrated her and fondled her chest. The victim pushed Montantes off and said something like "get off" and "what are you doing," but he did not stop. This evidence, when taken in the light most favorable to the prosecution, was sufficient for any rational trier of fact to find the essential elements of the

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

crimes beyond a reasonable doubt. *See* NRS 200.366(1) (sexual assault); NRS 201.210 (open or gross lewdness); *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (outlining the standard of review for an insufficient evidence challenge and quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Assessing the credibility of witnesses and weighing the evidence are functions of the jury." *State v. Eighth Judicial Dist. Court (Romano)*, 120 Nev. 613, 622, 97 P.3d 594, 600 (2004). Therefore, any inconsistencies or perceived irregularities in the victim's testimony were for the jury to consider and do not constitute insufficient evidence.

Further, Montantes offers no compelling reason for us to reconsider or alter this court's longstanding precedent that the victim's trial testimony alone, if believed, is sufficient to support a conviction. *See, e.g., Hutchins v. State*, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) ("[T]his court has long ago determined that the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction."); *see also Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (recognizing that this court will not "overturn precedent absent compelling reasons for so doing" (quotation marks and alteration omitted)). Montantes cites authority requiring corroborating evidence in cases where the prosecution is based on the victim's repressed memory but does not show that this is such a case. The victim's memory was not recalled years later after therapeutic inducement or other means of memory stimulation; rather, the victim's memory was affected by voluntary intoxication and recalled within days of the incident.

Second, Montantes contends the district court erred by instructing the jury that there is no requirement for the victim's testimony to be corroborated and that her testimony alone, if believed beyond a

reasonable doubt, was sufficient to convict Montantes. Montantes did not object to the given instruction, and we discern no error as it is a correct statement of law. *See Hutchins*, 110 Nev. at 109, 867 P.2d at 1140; *see also Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (reviewing unobjected-to instructional error for plain error).

Third, Montantes argues the district court erred by excluding his expert's retrograde extrapolation analysis of the victim's blood alcohol level. Retrograde extrapolation is a "mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood sample was taken." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (quotation marks and alteration omitted). Such evidence may be admissible, but we agree with the district court that Montantes did not show the expert's extrapolation was reliable. Specifically, no blood sample was taken from the victim from which to work backward; instead, the expert reached his calculation based on his analysis of police reports and the victim's preliminary hearing testimony and text messages. *Cf. id.* at 936, 267 P.3d at 783 (listing various factors to consider when determining whether a retrograde extrapolation is reliable, including the number of samples taken, the time between the offense and the sample, and the time between the last drink and the sample). Accordingly, we conclude that the district court did not abuse its discretion in excluding this testimony. *See Turner v. State*, 136 Nev. 545, 552, 473 P.3d 438, 446 (2020) ("We generally review a district court's decision to admit expert testimony for an abuse of discretion."). And to the extent Montantes contends his constitutional right to present a defense was violated by the district court's evidentiary ruling, we disagree. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998)

(recognizing "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions"); *Jackson v. State*, 116 Nev. 334, 335-36, 997 P.2d 121, 121-22 (2000).

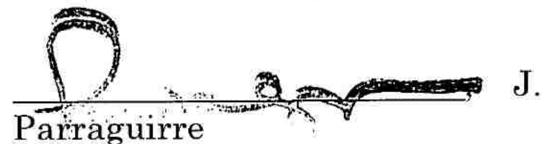
Finally, Montantes contends that his conviction for open or gross lewdness must be reversed because it was a part of the same episode as the sexual assault and is therefore redundant. Montantes relies on caselaw discussing the crimes of sexual assault and lewdness with a child—crimes that are mutually exclusive. *See Townsend v. State*, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987) ("[T]his court has determined that the crimes of lewdness with a child under the age of fourteen and sexual assault are mutually exclusive."); *see also* NRS 201.230(1) (defining, in pertinent part, lewdness with a child as "any lewd or lascivious act, *other than acts constituting the crime of sexual assault*" committed upon or with a child (emphasis added)). The same cannot clearly be said for sexual assault and open or gross lewdness. *Compare* NRS 200.366 (sexual assault), *with* NRS 201.210 (open or gross lewdness). Montantes has not identified authority supporting his argument that sexual assault and open or gross lewdness are redundant, and open or gross lewdness is not a lesser-included offense of sexual assault as each contains elements not included in the other. *See Wilson v. State*, 121 Nev. 345, 359, 114 P.3d 285, 294 (2005) ("Nevada uses the *Blockburger* test to determine whether multiple convictions arising from a single incident are permissible, or to the contrary, if the charges amount to a lesser-included offense that is barred by jeopardy."); *see also Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) ("The *Blockburger* test inquires whether each offense contains an element not contained in the other; if not, they are the same offence and double jeopardy bars additional punishment and successive prosecution." (internal quotation marks

omitted)). Notably, sexual assault requires a penetration against the victim's will or under circumstances where the perpetrator knew or should have known the victim was incapable of resisting or understanding the nature of the conduct, *see* NRS 200.366(1)(a); whereas, open or gross lewdness involves the intent to commit a sexual act that could be observed by another, *see Berry v. State*, 125 Nev. 265, 280-82, 212 P.3d 1085, 1095-97 (2009), *abrogated on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). Accordingly, Montantes has not shown that his convictions constitute impermissible double punishment, and we

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Stiglich

_______________, J.
Pickering



_______________, J.
Parraguirre

cc: Hon. Tammy Riggs, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk