IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL WILLIAM THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43168

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction. Fifth Judicial District Court, Mineral County; Robert W. Lane, Judge.

On July 23, 2003, the district court convicted appellant Daniel William Thomas, pursuant to a jury verdict, of two counts of lewdness with a child under the age of fourteen years. The district court sentenced Thomas to two consecutive life terms with the possibility of parole after serving ten years for each count.

Thomas raises six issues on appeal. First, he argues that the prosecutor committed misconduct during opening statements when he told the jury, "The case is about child sexual abuse and lewdness with a minor." Thomas argues that the challenged comment improperly served to "appeal to the emotions, passions and prejudices of the jurors and "inject[ed] extraneous issues into the case that divert[ed] the jury from its duty to decide the case on the evidence." It appears that Thomas considers the comment improper because it suggested that the case was about child sexual abuse when the case actually concerned lewdness.

"To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[1] The challenged comments "should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[2] Although sexual abuse of a child and lewdness with a child are distinct offenses, we conclude that the prosecutor's comment, considered in context, merely described the general nature of the case and did not confuse or inflame the jury. Therefore, we conclude that this claim lacks merit.

Second, Thomas argues that the district court erred in making the following comment to the jury:

> The defendant and the defense attorney don't have to do anything. The founders very wisely said, In America, a person has to be shown to be guilty, and they can sit over there and not say a word, not testify, not talk to the witnesses, and do nothing, and the State still has the burden to prove beyond a reasonable doubt the defendant committed this crime.

Thomas contends that this statement constituted an impermissible comment on his right against self-incrimination.

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[1]Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

[2]Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

We disagree. In Lakeside v. Oregon, the United States Supreme Court considered an instruction that informed the jury, over the defendant's objection, that an accused may testify on his behalf, that the jury was not to draw a negative inference or presumption if he chose not to testify, and that his decision not to testify must not be considered in determining his guilt or innocence.[3] The Court held that the instruction did not violate the defendant's constitutional right against compulsory self-incrimination.[4] When viewed under Lakeside, we conclude that the district court's comments did not violate Thomas's constitutional right against self-incrimination.

Third, Thomas contends that the district court erred in admitting State expert Lily Clarkson's testimony because he received inadequate notice of her testimony pursuant to NRS 174.234(2).

Several months prior to trial, the State provided Thomas with notice of the substance of Clarkson's testimony, specifically that she would testify regarding the results of the physical examination performed on the two girls, and the presence and/or absence of injuries, including abrasions and/or tears on the girls' genital areas. The notice also included copies of Clarkson's curriculum vitae and medical reports. However, the State inadvertently provided Thomas with an outdated curriculum vitae, which did not reflect Clarkson's training as a forensic pediatric nurse examiner.

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[3]435 U.S. 333, 340-41 (1978).

[4]Id.

Counsel objected to Clarkson's testimony, arguing that the three-year-old curriculum vitae provided him inadequate notice of her testimony. The district court overruled his objection, concluding that the State's representation of Clarkson's testimony and the curriculum vitae provided to the defense were "sufficient . . . to go ahead and qualify her as an expert."

Clarkson testified that she conducted a physical examination of the victim CB, including a vaginal examination with a colposcope. She found an absence of CB's hymenal tissue, two notches on her vagina, and positive vaginal vault exposure. Clarkson concluded that CB suffered hymenal trauma and that the examination revealed "evidence of penetrating injury." Clarkson further testified that a penetrating injury may be caused by "a digit, a penis, any type of object" that repeatedly penetrated CB's vaginal canal. She found no evidence of a penetrating injury to the victim TB's vagina and testified that the absence of an injury, however, did not preclude the possibility that penetration had occurred.

"Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion."[5] Based on the record before us, we conclude that Clarkson's testimony fell within the scope of the State's notice and that the State complied with the requirements set forth in NRS 174.234(2). We

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[5]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

therefore conclude that Thomas fails to demonstrate that the district court erred in allowing Clarkson's testimony.

Fourth, Thomas claims that the district court erred in allowing Clarkson to testify respecting what the victim told her and that the victim's statements were consistent with Clarkson's physical examination. There are two victims in this case, yet Thomas fails to identify which witness he is referring to in this claim. Presumably, his complaint is focused on Clarkson's testimony regarding CB as only CB's physical examination revealed evidence of penetration.

Clarkson testified that after obtaining general medical information, she asked CB if she understood why she was seeing Clarkson and if she had anything she wanted to tell Clarkson. CB responded, "Daniel touched and hurt my private parts for two years." We conclude that Clarkson's testimony respecting CB's identification of Thomas as the perpetrator was inadmissible.[6] The record shows that CB's examination was for investigatory purposes, not diagnosis or treatment. However, Thomas suffered no prejudice from the error. TB's and CB's testimony coupled with the medical evidence introduced and Thomas's admissions to law enforcement personnel that he had engaged in inappropriate sexual contact with the girls overwhelmingly established his guilt.

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[6]See Felix v. State, 109 Nev. 151, 195-96, 849 P.2d 220, 250 (1993), superseded on other grounds as recognized in Evans v. State, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001).

Fifth, Thomas complains that the district court erred in not admitting a social worker's report showing that the complaining witnesses fabricated their stories. Thomas specifically references an excerpt from the social worker's report in which CB and TB's father expressed concern that due to the girls' behavior and unconcern with lying, the girls may have fabricated the allegations against Thomas. However, during counsel's cross-examination, the girls' father acknowledged that he had expressed these concerns to a social worker. Thus, Thomas presented the evidence he wished the jury to hear. We conclude that he fails to demonstrate any prejudice from not having the social worker's report admitted into evidence.

Finally, Thomas contends that the district court erred in deleting portions of his videotaped interview with the Washoe County Sheriff's Department. However, it appears that Thomas is actually referring to a redaction in the videotaped interview of the victims' mother with the Washoe County Sheriff's Office. Over counsel's objection, the district court allowed the State to redact a portion of the interview in which a detective informed the mother that the Washoe County District Attorney declined to prosecute Thomas due to a lack of evidence and because Mineral County was pursuing a case involving similar charges. Thomas argues that allowing the State to establish that some action occurred in Washoe County without explaining the outcome of the case to the jury prejudiced him.

A district court enjoys "considerable discretion in determining the relevance and admissibility of evidence," and we will not disturb a district court's ruling in this regard absent an abuse of discretion.[7] Thomas fails to adequately explain this claim or provide any legal authority to support his contention. Therefore, we conclude that he has not demonstrated that the district court abused its discretion in this regard. Moreover, even assuming error, we conclude that it was harmless in light of the overwhelming evidence of Thomas's guilt.

Having considered Thomas's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Rose

_____, J.
Parraguirre

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[7]See Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

cc: Hon. Robert W. Lane, District Judge
Rick Lawton
Attorney General George Chanos/Carson City
Mineral County District Attorney
Mineral County Clerk