IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MICHAEL FARNUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45275

FILED

SEP 11 2006

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of twelve counts of sexual assault of a minor under the age of 14, four counts of lewdness with a child under the age of 14, and one count of attempted lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant John Michael Farnum to serve consecutive and concurrent prison terms totaling thirty years to life.

Farnum first argues that there was insufficient evidence to support his convictions. "The relevant inquiry for this Court 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] "We have repeatedly held that the testimony of a sexual assault victim alone is sufficient to uphold a

[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).



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conviction. However, the victim must testify with some particularity regarding the incident in order to uphold the charge."[2]

Farnum was charged by information with eighteen counts of sexual assault of a minor under the age of 14 years, seven counts of lewdness with a minor under the age of 14, and one count of attempted lewdness with a child under the age of 14. In her testimony, the first victim described with particularity ten acts of oral, anal, and digital penetration by Farnum, as well as one incident where Farnum caused her to touch his penis. Her testimony included the locations where those acts took place, what she was wearing, and what she was doing before the acts occurred. Her testimony thus gave adequate particularity to support convictions for counts 1, 2, 6, 7, 11 to 16, and 21. The second victim described with particularity how Farnum asked her to touch his penis, but she refused; the first victim testified that she witnessed this incident. This testimony gave adequate particularity to support a conviction for count 26, attempted lewdness with a child under the age of 14.

In its closing argument, the State told the jury the victim had not provided information specific enough to support all the counts and advised the jury it would "not be inappropriate" to return not-guilty verdicts on eight of the sexual assault counts (counts 3, 4, 5, 8, 9, 10, 17, and 18) and three of the lewdness counts (counts 22, 23, and 24). Nevertheless, the jury returned a verdict of guilty on all counts.

Farnum's counsel filed a motion for acquittal on all charges. Noting that it was relying on the State's closing argument, the district

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[2]LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992) (citations omitted).

court granted the motion as to counts 4, 5, 8, 9, 10, and 18 (sexual assault). The district court also granted the motion as to counts 19, 20, and 25 (lewdness). We agree that there was insufficient evidence to support those counts. However, the district court did not dismiss counts 3 and 17 (sexual assault) and 22, 23, and 24 (lewdness), although our review of the record reveals that the State said in closing that acquittal would not be inappropriate on those counts. Accordingly, we conclude the district court erred in not entering a judgment of acquittal on counts 3, 17, 22, 23, and 24.

Second, Farnum argues the district court erred in denying his motion for a mistrial. Farnum contends the State violated NRS 174.235(1)(a) by failing to disclose a statement made by Farnum to the victim's brother. The State claims the victim's brother related the statement to prosecutors for the first time immediately before he testified at trial.

NRS 174.235(1) provides in relevant part:

> [T]he prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
>
> (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney[.]

Here, there were no written or recorded statements to inspect and copy or photograph. Rather, the victim's brother's statement was made orally to the State. There was thus no violation of the statute.

Third, Farnum argues the district court erred by refusing to grant a full acquittal pursuant to NRS 175.381(2), which allows the district court to set aside the verdict and enter judgment of acquittal "if the evidence is insufficient to sustain a conviction." As stated above, there was sufficient evidence to support the convictions for counts 1, 2, 6, 7, 11 to 16, 21, and 26.

Fourth, Farnum argues the mandatory life sentence for sexual assault of a minor constitutes cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. "[I]t is the legislature's function to set penalties, a function we will not invade absent constitutional problems."[3] "A sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[4] Farnum appears to argue that NRS 200.366(3)(c) unconstitutionally limits the district court's discretion, but he cites no authority for this proposition. We note that the district court has discretion to set terms to run consecutively or concurrently, and in this case the district court exercised its discretion and set all the sexual assault sentences to run concurrently. Further, we are unable to conclude that a sentence of life with the possibility of parole after twenty years is so

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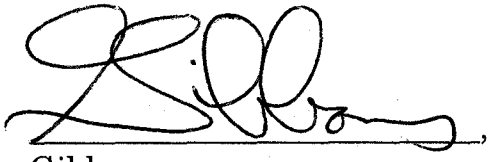
[3]Villanueva v. State, 117 Nev. 664, 668, 27 P.3d 443, 446 (2001).

[4]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

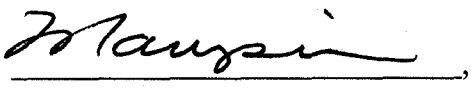
unreasonably disproportionate to the crime of sexual assault of a child under the age of 14 as to shock the conscience.[5]

Having reviewed the record and determined that Farnum is entitled only to the relief described above, we

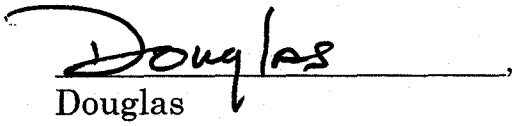
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the sentences for counts 3, 17, 22, 23, and 24 and enter an amended judgment of conviction.



_____, J.
Gibbons



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Donald J. Green
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[5]See Anderson v. State, 92 Nev. 21, 23-24, 544 P.2d 1200, 1202 (1976) (holding that a mandatory life sentence for rape did not constitute cruel or unusual punishment because the sentence imposed was not manifestly disproportionate to the seriousness of the offense).