IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD VON TOBEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45684

FILED

FEB 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of eleven counts of lewdness with a child under the age of fourteen; four counts of sexual assault of a child under fourteen; one count of open or gross lewdness; two counts of attempted lewdness with a child under fourteen; one count of lewdness with a child under fourteen with the use of a deadly weapon; three counts of child abuse and neglect; and three counts of second-degree kidnapping. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

Appellant Gerald Emmett Von Tobel, Jr. appeals his convictions on several counts arising from his year-long physical and sexual abuse of his live-in girlfriend's three children, who were twelve, eight, and four years old at the time of the abuse.

Juror misconduct

Von Tobel argues that the district court should have granted his motion for a mistrial on the ground that a juror engaged in a conversation concerning the case with his neighbor, an off-duty police officer. This court generally reviews a district court's denial of a motion

for a mistrial because of juror misconduct for an abuse of discretion.[1] When the allegation of juror misconduct involves exposure to extrinsic evidence or influence in violation of the Confrontation Clause, we review de novo the district court's determination regarding the prejudicial effect of the misconduct.[2] We will not disturb the district court's factual findings absent clear error.[3]

Von Tobel argues that the neighbor's comments to the juror constituted extrinsic evidence and thus implicated the Confrontation Clause, which would invoke this court's de novo review. In response, the State asserts that the misconduct does not implicate the Confrontation Clause because the juror did not learn anything new from the neighbor's statements and the conversation did not concern the nature of the case.

The juror was not exposed to any outside information specific to this case; however, he was exposed to the neighbor's outside opinion that anyone on trial as a criminal defendant must have done something wrong. If another juror had expressed this opinion during deliberations, then it would not have been extrinsic evidence because it would have been an exchange of ideas and opinions among the jury. Because the opinion came from a source outside of the trial or the jury, it was extrinsic; therefore, we apply a de novo standard of review.

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[1]Lane v. State, 110 Nev. 1156, 1163, 881 P.2d 1358, 1363-64 (1994), vacated on other grounds on rehearing, 114 Nev. 299, 956 P.2d 88 (1998).

[2]Meyer v. State, 119 Nev. 554, 561-62, 80 P.3d 447, 453 (2003).

[3]Id.

A defendant who moves for a new trial based on allegations of juror misconduct bears the burden of proof to show that misconduct occurred and that the misconduct prejudiced the defendant.[4] To show prejudice, the defendant must prove that "there is a reasonable probability or likelihood that the juror misconduct affected the verdict."[5] "[I]n the most egregious cases of extraneous influence on a juror, such as jury tampering," this court applies "a conclusive presumption of prejudice."[6] However, this court has expressly rejected the proposition that any extrinsic influence requires an automatic presumption of prejudice.[7]

We first determine that it was misconduct for the juror to discuss with his neighbor the fact that he was on a jury for a criminal trial and that the facts of the case were sickening. However, because the conversation with his neighbor, who happened to be a police officer, did not concern the particular facts of this case, the misconduct was not egregious. Therefore, we conclude that a presumption of prejudice does not apply.

When prejudice is not presumed, a defendant must prove prejudice, with admissible evidence. Reviewing the trial as a whole, a defendant must show that there was a reasonable probability that the juror misconduct affected the verdict.[8] To determine if the misconduct by

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[4]Id. at 563-64, 80 P.3d at 455.

[5]Id. at 564, 80 P.3d at 455.

[6]Id.

[7]Id.

[8]Id. at 565, 80 P.3d at 456.

accessing extrinsic materials affected the verdict, courts may consider how the extrinsic material was introduced to the jury, when it was introduced, how long the jury discussed it, whether the information was vague or specific, whether it was cumulative of other evidence, whether it was material, and its weight.[9] A district court's factual investigation is limited to determining which jurors were exposed and the scope of exposure. Then the court must apply an objective test as to whether such exposure would affect a reasonable juror and may not inquire into the actual effects the extrinsic evidence had on deliberations.[10]

Von Tobel has failed to show a reasonable probability that the misconduct affected the verdict. Although the juror's neighbor expressed an opinion regarding the justice system and the juror admitted that he respected his neighbor and the work he did, the conversation did not involve any details of this case. And, while the conversation took place during the trial, the district court instructed the jury regarding the law after the conversation occurred. The court instructed the jury on the presumption of innocence and the jury is presumed to have adhered to that instruction.[11] Although a reasonable juror may have been affected by hearing an opinion regarding the presumption of innocence from a

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[9]Id. at 566, 80 P.3d at 456.

[10]Id. Von Tobel also argues that the district court improperly considered how the conversation affected the juror subjectively. Because we review the district court's determination of prejudice de novo, and we apply the appropriate objective standard, we do not address this contention.

[11]Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

neighbor he or she respected, a district court's instruction could cure any possible prejudice. Therefore, we conclude that Von Tobel has failed to show that exposure to his or her neighbor's opinion would have affected a reasonable juror in such a way as to demonstrate a reasonable probability that the exposure affected the jury's verdict.

Prosecution witness's improper vouching

Von Tobel argues that a prosecution witness, James Meissner, improperly vouched for the children's testimony. He objected to the testimony and moved for a mistrial in the district court. This court reviews a district court's decision to deny a motion for a mistrial for an abuse of discretion.[12] Determining whether a witness is an expert and the scope of witness testimony are within the district court's discretion; we will not disturb such decisions absent an abuse of discretion.[13] Von Tobel moved for a mistrial based on the improper admission of portions of Meissner's testimony. The record reflects significant disagreement over whether Meissner, a forensic interviewer who testified regarding statements the two younger children had given him, was testifying as an expert. The State never offered Meissner as an expert, however, Von Tobel objected to Meissner's testimony as improper expert testimony. In the hearing on the motion for mistrial, the district court stated that it had not found Meissner to be an expert nor had it admitted his testimony as expert testimony.

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[12]Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

[13]DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000).

The State asked Meissner, based on his training and experience, to identify "red flags" that could demonstrate that children had been coached or subjected to external influences. In so far as Meissner's testimony was appropriate lay opinion testimony, we conclude that he improperly vouched for the children's credibility.[14] In so far as Meissner's testimony was based on his specialized skills and training, we hold that it was improper expert testimony from a lay witness.[15] Although we determine that the admission of those portions of Meissner's testimony was error, we hold that it was harmless.

Neither the improper admission of opinion testimony nor the improper admission of testimony in which one witness vouches for another implicates constitutional error;[16] therefore, we consider whether this error substantially affected or influenced the jury's verdict.[17] In this case, the

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[14]See id. at 924-25, 10 P.3d at 112 ("[A] lay witness's opinion concerning the veracity of the statement of another is inadmissible.").

[15]See NRS 50.265 (prohibiting lay witnesses from offering opinions or inferences unless the opinions are "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue"); Mikulich v. Carner, 69 Nev. 50, 56-57, 240 P.2d 873, 876 (1952) ("[W]here expert or special knowledge is essential to the formation of an intelligent opinion which would be of aid to the jury[,] . . . a non-expert witness cannot express his opinion.").

[16]See United States v. Lane, 474 U.S. 438, 446 n.8 (1986) (recognizing that errors that do not directly implicate the Constitution may rise to the level of constitutional error if they "result[ ] in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial").

[17]See Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (holding that non-constitutional error should be analyzed for harmless error under NRS 178.598 by considering "whether the error 'had

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three children, aged seventeen, thirteen, and nine at the time of trial, testified extensively regarding Von Tobel's abuse of them. Von Tobel's own testimony, although he denied the allegations of physical and sexual abuse, corroborated the other aspects of the children's testimony. The children's prior statements to other people, including Meissner, both supported and undermined their testimony. The district court also specifically instructed the jury that it had the sole responsibility to judge witnesses' credibility and that the jury should disregard the testimony of any expert concerning another witness's credibility. We conclude that if district court's error in admitting Meissner's testimony had any effect on the jury's verdict, it was not substantial or injurious and was therefore harmless.

Prosecutorial comment on the reasonable doubt standard and other alleged misconduct

Von Tobel argues that the State engaged in prosecutorial misconduct when it commented on the reasonable doubt standard, and when it asked the jury to "do its job" and convict Von Tobel. We have consistently held that it is improper for either party to comment on or attempt to characterize reasonable doubt beyond using the express language in NRS 175.211, but that any such error is harmless when the court properly instructs the jury regarding the statutory definition of

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substantial and injurious effect or influence in determining the jury's verdict'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))); NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

reasonable doubt.[18] Additionally, we have stated that when an attorney improperly characterizes reasonable doubt, the district court should issue an immediate curative instruction to the jury.[19]

In this case, the district court not only properly instructed the jury concerning the reasonable doubt standard, but the district court also admonished the jury immediately following the improper remarks that the law concerning reasonable doubt was contained within the jury instructions and that attorneys' statements are not evidence. Accordingly, we conclude that any inappropriate representation of the reasonable doubt standard by the State constituted harmless error because the jury was correctly instructed on the definition of reasonable doubt and was immediately admonished to follow that instruction.

We next consider Von Tobel's allegation that the prosecutor committed misconduct by exhorting the jury to "do its job." In Evans v. State, this court recognized that attorneys may not imply to a jury that it has a duty to decide the case a certain way.[20] However, prosecutorial misconduct only warrants reversal if the remarks so influenced the proceeding that it deprived the defendant of a fair trial.[21] The statements should be considered in context, and "a criminal conviction is not to be

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[18]Randolph v. State, 117 Nev. 970, 980-81, 36 P.3d 424, 431 (2001).

[19]Id. at 981, 36 P.3d at 431-32.

[20]117 Nev. 609, 633-34, 28 P.3d 498, 515 (2001).

[21]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

lightly overturned on the basis of a prosecutor's comments standing alone."[22]

We conclude that although the prosecutor's exhortation of the jury to "do [its] job and find [Von Tobel] guilty" was improper, it did not so infect the trial with unfairness as to deny Von Tobel due process–particularly because Von Tobel's objection to the State's argument was sustained and the jury was immediately admonished that it should refer to the jury instruction regarding their duty in the case. Therefore, considering the comment in context, we conclude that the State's comment does not warrant reversal.

Jury instruction

Von Tobel argues that jury instruction no. 21[23] was unduly prejudicial. This court determined in Gaxiola v. State that a "no corroboration" instruction, given in this case as instruction no. 21, "is a correct statement of Nevada law."[24] Additionally, "the instruction does not unduly focus the jury's attention on the victim's testimony."[25] Further, this court unequivocally stated that "it is appropriate for the district court

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[22]United States v. Young, 470 U.S. 1, 11 (1985).

[23]Instruction no. 21 provided:

> There is no requirement that the testimony of a victim of sexual assault and/or lewdness with a minor be corroborated, and his or her testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.

[24]121 Nev. 638, 649, 119 P.3d 1225, 1233 (2005).

[25]Id. at 649-50, 119 P.3d at 1233.

to instruct the jurors that it is sufficient to base their decision on the alleged victim's uncorroborated testimony as long as the testimony establishes all of the material elements of the crime."[26] Thus, Von Tobel's argument that jury instruction no. 21 was erroneous is without merit.

Vagueness of NRS 201.210

Von Tobel argues that NRS 201.210 is unconstitutional on its face because it fails to define "open or gross lewdness." We review a challenge to the constitutionality of a statute de novo.[27] Because we presume that statutes are constitutional, a party challenging the statute must prove that the statute is unconstitutional.[28] In City of Las Vegas v. District Court, this court held that a statute is facially unconstitutional as void for vagueness "if the statute both: (1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement."[29]

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[26]Id. at 650, 119 P.3d at 1233.

[27]Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

[28]Id.

[29]118 Nev. 859, 862, 59 P.3d 477, 480 (2002) (citing City of Chicago v. Morales, 527 U.S. 41, 55-56 (1999) (plurality opinion) (holding that a statute may be unconstitutionally vague for either of the two reasons discussed above)). The City of Las Vegas court specifically noted conflicting lines of Nevada case law regarding facial challenges to statutes, and specifically modified any prior case law limiting facial challenges to statutes affecting conduct protected under the First Amendment. Id. at 862-63, 59 P.3d at 480. Therefore, we reject the State's argument that NRS 201.210 was constitutionally definite as applied to Von Tobel's conduct and consider Von Tobel's facial challenge of the statute. See Morales, 527 U.S. at 72 (Breyer, J., concurring) (describing the rule prohibiting a defendant from challenging a statute for vagueness if it gave

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NRS 201.210(1) provides: "A person who commits any act of open or gross lewdness is guilty: (a) For the first offense, of a gross misdemeanor. (b) For any subsequent offense, of a category D felony and shall be punished as provided in NRS 193.130." When considering a statute's constitutional definiteness, we look not only to the express language of the statute but also to how this court has defined the conduct prohibited by the statute.[30] This court has considered the conduct prohibited by NRS 201.210 in several cases, most notably Young v. State[31] and Ranson v. State.[32]

In Young, this court stated the common-law definition of "open lewdness" as "'unlawful indulgence of lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons lawfully present."[33] The Young court held that although the common-law definition of "open lewdness" required conduct to be observed,

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him notice that his conduct was prohibited, but rejecting application of that rule because the statute was unconstitutionally vague for failing to provide adequate enforcement standards and therefore, allowing a facial challenge to the statute despite the defendant's conduct).

[30]See U.S. v. Lanier, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed.").

[31]109 Nev. 205, 849 P.2d 336 (1993).

[32]99 Nev. 766, 670 P.2d 574 (1983).

[33]109 Nev. at 215, 849 P.2d at 343 (quoting 3 Wharton's Criminal Law § 315 (14th ed. 1980)).

NRS 201.210 had no such requirement.[34] This court further held that the sexual conduct had to be intentionally public and therefore, affirmed the convictions of several consenting adult men who engaged in sexual conduct in a public restroom.[35] In Ranson, this court further explored the definition of "open lewdness" by stating that it did not require the activity to be in a public place but only that such acts be committed in "an 'open' as opposed to a 'secret' manner" and that the perpetrator "intend[ed] that his acts be offensive to his victim."[36]

Under this court's interpretation of NRS 201.210 in Young and Ranson, an ordinary person would understand that NRS 201.210 prohibits masturbating in front of children. Therefore, we conclude that NRS 201.210 gave Von Tobel fair notice. It also provides officers sufficient guidelines upon which to base an arrest and, therefore, does not encourage arbitrary or discriminatory enforcement. Thus, the open or gross lewdness statute is not unconstitutionally vague.

For the foregoing reasons, we

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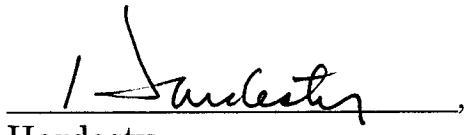
[34]Id.

[35]Id.

[36]99 Nev. at 767, 670 P.2d at 575.

ORDER the judgment of conviction AFFIRMED.



_____, J.
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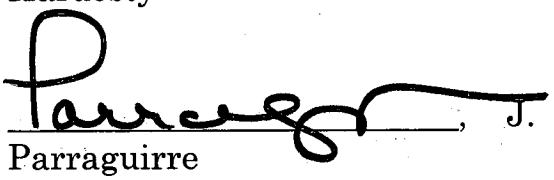

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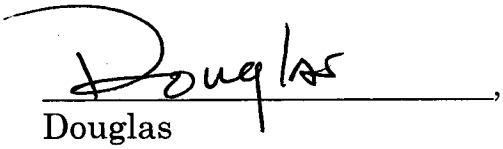

_____, J.
Douglas

cc: Eighth Judicial District Court Dept. 18, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk