IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY JAMES ESPARZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47294

FILED

JUL 24 2007

LETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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 sexual assault on a minor under the age of 14 years and two counts of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Anthony James Esparza to three concurrent life terms in prison with the possibility of parole.

First, Esparza argues that the evidence is insufficient to sustain his convictions. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1] In particular, the victim testified that: Esparza demanded that she remove her pants and underwear; Esparza pulled down his pants, exposing his penis; Esparza told her to touch his penis and she did so with her finger; he told her to lay down on the bed; Esparza laid on top of her, placing his penis between her legs and moved up and down; he performed cunnilingus on her; and Esparza

[1]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

masturbated and ejaculated on her stomach. The jury could reasonably infer from the evidence presented that Esparza was guilty of the crimes charged despite his argument that the victim's testimony was uncorroborated,[2] that she delayed reporting the incident, and that his confession was coerced. Consequently, we conclude that this claim lacks merit.

Second, Esparza argues that his statement to law enforcement was inadmissible because he was not advised of his Miranda[3] rights during police questioning. However, Esparza did not object at trial to the admission of his confession on this basis,[4] and thus he failed to preserve this issue for appellate review.[5] Nonetheless, we have the discretion to review this matter for plain error.[6] "In conducting a plain-error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights."[7] The burden rests with Esparza to show actual prejudice.[8]

---

[2]See Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (stating that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction").

[3]Miranda v. Arizona, 384 U.S. 436 (1966).

[4]Esparza objected to the admission of a videotape of his statement to police on foundational grounds.

[5]See Archanian v. State, 122 Nev. ___, ___, 145 P.3d 1008, 1021 (2006).

[6]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[7]Archanian, 122 Nev. at ___, 145 P.3d at 1017.

[8]Green, 119 Nev. at 545, 80 P.3d at 95.

The State concedes that the questioning at issue constituted an interrogation, and undisputedly, Esparza was not advised of his Miranda rights. The Fifth Amendment privilege against self-incrimination precludes the admission of a suspect's statements during a custodial interrogation unless the suspect is first advised of his rights. The issue here is whether Esparza was in custody at the time he made incriminating statements.

"Custody," as contemplated by Miranda, "means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[9] Where there is no formal arrest, the question becomes "whether a reasonable person in the suspect's position would feel 'at liberty to terminate the interrogation and leave.'"[10] In Alward v. State, we enumerated several factors relevant to the custody inquiry: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning."[11] No one factor is dispositive.[12]

As to the first and second factors, here the interrogation was conducted at a police station located in a business park, the investigation was focused on Esparza, and the questioning lasted one hour and twelve

---

[9]Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005).

[10]Id. (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

[11]112 Nev. 141, 155, 912 P.2d 243, 252 (1996), overruled on other grounds by Rosky, 121 Nev. 184, 111 P.3d 690.

[12]Id. at 154, 912 P.2d at 252.

minutes. With respect to the third Alward factor—whether objective indicia of arrest were present, we consider:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.[13]

Considering these factors, we conclude that the indicia of arrest were not present. In particular, we note that Esparza was not handcuffed, he was advised that he was free to leave at any time and that he did not have to answer any questions, although the detective who questioned him requested Esparza to remain in the interview room while she "check[ed] on something for a minute." Esparza was further advised several times during the interrogation that he was not under arrest and would not be arrested that day. Although the detective used deception during the vigorous interrogation, her tactics were not impermissibly coercive. Based on the totality of the circumstances, we conclude that Esparza was not in custody for Miranda purposes. Consequently, we conclude that he has not demonstrated plain error in this regard.

Third, Esparza claims that his confession was inadmissible because coercive tactics were used to obtain it, and it was therefore

---

[13]State v. Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998).

involuntary. He argues that the detective used strong-arm tactics and misrepresented the evidence against him. "'To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant.'"[14] Although police deception is a relevant factor in considering the voluntariness of a confession, "an officer's lie about the strength of the evidence against the defendant is, in itself, insufficient to make the confession involuntary."[15] "As long as the techniques do not tend to produce inherently unreliable statements or revolt our sense of justice, they should not be declared violative of the United States or Nevada constitutions."[16] We have reviewed the evidence presented at trial respecting this claim and conclude that the tactics and deception employed in obtaining Esparza's confession were not impermissibly coercive. Accordingly, we conclude that Esparza has not demonstrated plain error in this regard.

Fourth, Esparza argues that his conviction for sexual assault (count I - cunnilingus) and lewdness (count III - penis touching) are redundant because these acts were incidental to his act of rubbing his penis between the victim's thighs and masturbating to the point of ejaculation (count II). Therefore, according to Esparza, counts I and III must be reversed.

---

[14]Sheriff v. Bessey, 112 Nev. 322, 324, 914 P.2d 618, 619 (1996) (quoting Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987)); see Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

[15]Bessey, 112 Nev. at 325, 914 P.2d at 619.

[16]Id. at 328, 914 P.2d at 622.

In Braunstein v. State, we held that "[t]he crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand."[17] However, the facts of a particular case may support convictions on separate charges "'even though the acts were the result of a single encounter and all occurred within a relatively short time.'"[18] Here, although the alleged offenses stem from a single encounter, the evidence shows that the acts charged in counts I and II were separate and distinct acts of sexual assault and lewdness respectively. Accordingly, we conclude that separate convictions for these acts are not redundant and may be upheld. However, we conclude that the act constituting the lewdness charged in count III was incidental to the lewdness charged in count II, i.e., rubbing his penis between the victim's legs. Therefore, we conclude that his conviction on count III must be reversed.

Fifth, Esparza asserts that the prosecutor engaged in improper witness vouching. Esparza did not object to any of the challenged comments, and therefore we review this claim for plain error.[19] Specifically, Esparza argues that the prosecutor's cross-examination of Detective Shannon Tooley and comments during closing argument that

---

[17]118 Nev. 68, 79, 40 P.3d 413, 421 (2002); see Crowley v. State, 120 Nev. 30, 33, 83 P.3d 282, 285 (2004).

[18]Crowley, 120 Nev. at 33, 83 P.3d at 285 (quoting Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 549-50 (1990)); see Gaxiola v. State, 121 Nev. 638, 651, 119 P.3d 1225, 1234-35 (2005).

[19]See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005); Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 57-58 (2005).

Detective Tooley did not exercise coercive tactics in securing his confession misstated the law regarding permissible interrogation techniques and improperly signaled to the jury that in the State's opinion the detective's techniques were sound. Esparza further argues that the prosecutor improperly bolstered the victim's testimony by asking Detective Jeff Dill, who interviewed the victim, if he detected any indication that the victim had been coached. However, considering the challenged comments in context and the overwhelming evidence of guilt in this case, even assuming any of them were improper,[20] we conclude that Esparza has not demonstrated plain error.[21]

Sixth, Esparza argues that the district court erred in refusing to declare a mistrial after his absence from the proceedings. NRS 178.388 requires the defendant's presence "at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." However, in non-capital prosecutions, "[t]he defendant's voluntary absence after the trial has been commenced in his presence must not prevent continuing the trial to and including the return of the verdict."[22] Esparza contends that the district court did not conduct a proper inquiry to determine if his absence was voluntary. He

---

[20]Smith v. State, 120 Nev. 944, 947-48, 102 P.3d 569, 571-72 (2004).

[21]See Anderson, 121 Nev. at 516, 118 P.3d at 187.

[22]NRS 178.388(2)(a); see also Diaz v. U.S., 223 U.S. 442, 455 (1912) (stating that a defendant's voluntary absence after trial has begun in his presence "operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if here were present").

further complains that the district court failed to ascertain whether there existed a compelling reason to proceed with the trial in his absence. Finally, Esparza asserts that even assuming his absence was voluntary, trial had not yet begun because jury selection does not constitute the commencement of trial as contemplated by NRS 178.388(2). Therefore, Esparza argues, the district court erred in denying his motion for mistrial.

After jury selection began but prior to the jury being sworn, Esparza disappeared. During a hearing on the matter, counsel conceded that Esparza's absence was voluntary, but argued that the trial had not yet commenced under NRS 178.388. Esparza has cited no authority suggesting that the district court was required to find a compelling reason to proceed with the trial in his absence. Thus, the critical question here is whether Esparza's trial had commenced as contemplated by the statute. Esparza argues that a trial commences under the statute when jeopardy attaches, i.e., when the jury is sworn.

The statute is silent respecting when a trial is considered to have commenced. Therefore, we must turn to the rules of statutory construction. "When the language of a statute is clear, we will ascribe to the statute its plain meaning and not look beyond its language."[23] If the language of a statute is ambiguous, however, legislative intent controls, and "we will interpret the statute's language in accordance with reason and public policy."[24] We conclude that a reasonable interpretation of the relevant language in the statute is that a trial has commenced at least

---

[23]Lader v. Warden, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005).

[24]Id.

from the time that jury selection begins, regardless of when jeopardy attaches.[25] Accordingly, we conclude that the district court did not err in denying Esparza's motion for mistrial.

Finally, Esparza contends that several of the district court's jury instructions were erroneous; however, he failed to object to any of them. Therefore, we review this claim for plain error.[26] Esparza first argues that the following jury instruction was erroneous: "Where multiple sexual acts occur as part of a single encounter a defendant may be found guilty for each separate or different act of sexual assault and/or lewdness." He asserts that this instruction misstated the law and allowed the jury to render multiple convictions for multiple acts arising out of a single, uninterrupted encounter. We conclude, however, that the instruction was not improper[27] and that Esparza has not demonstrated plain error in this regard.

Esparza next contends that the district court erroneously instructed the jury that a victim's uncorroborated testimony, if believed beyond a reasonable doubt, is sufficient to sustain convictions for sexual assault and lewdness. We recently approved such an instruction in

---

[25]See People v. Granderson, 67 Cal. App. 4th 703 (Cal. App. 3 Dist. 1998) (interpreting a California statute providing that the voluntary absence of a defendant in a non-capital case "after the trial had commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict" contemplated trial commencing at the jury selection stage); see also State v. Tenney, 828 A.2d 755 (Me. 2003).

[26]Green, 119 Nev. at 545, 80 P.3d at 95.

[27]See Crowley, 120 Nev. at 33, 83 P.3d at 285.

Gaxiola v. State.[28] We decline Esparza's invitation to revisit our decision and conclude that he has not shown plain error in this regard.

Esparza also asserts that the following instruction was erroneous because it lessened the State's burden of proof: "Where a child has been the victim of sexual assault or lewdness with a minor, and does not remember the exact date of the act, the State is not required to prove the specific date, but may prove a time frame within which the act took place." We conclude that a precise date of when the offenses occurred was not an essential element of the crime that must be proven beyond a reasonable doubt, and Esparza has not cited any authority suggesting the contrary.[29] Further, the victim testified that the crimes occurred within the time frame alleged by the State, and Esparza does not contend that he was unprepared to defend himself at trial or otherwise prejudiced. Therefore, we conclude that he has failed to demonstrate plain error.

Finally, Esparza argues that the district court erred in instructing the jury that "[a]n involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise

---

[28]121 Nev. at 647-50, 119 P.3d at 1231-33.

[29]See generally Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) (stating that "[u]nless time is an essential element of the offense charged, there is no absolute requirement that the state allege the exact date, and the state may instead give the approximate date on which it believes the crime occurred"); Martinez v. State, 77 Nev. 184, 189, 360 P.2d 836, 838 (1961) (holding that the district court did not err in instructing the jury that time was not a material or essential element of rape and thus did not need to be proved precisely as alleged as long as the jury found that the commission of the offense occurred between the day prior to and within four years of the filing of the Information).

a free and unconstrained will."[30] Specifically, he complains that the underlined phrase improperly defined involuntariness. Considering the instruction as a whole, we conclude that Esparza has not demonstrated plain error on this basis.

Esparza further complains that the district court should have instructed the jury that it must disregard his confession in its entirety should it find that that statement was given involuntarily. Esparza relies on our decision in Carlson v. State, where we considered an instruction that included language similar to that Esparza argues should have been provided to the jury.[31] Although it would have been preferable for the district court to have given the instruction set forth in Carlson, we conclude that any error did not prejudice Esparza in light of his failure to demonstrate that his confession was involuntary. We conclude that Esparza failed to demonstrate plain error in this regard.

---

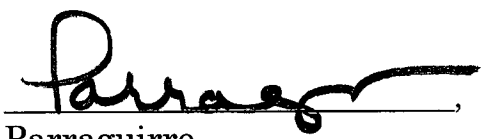
[30]The complete instruction given is as follows:

> The State has the burden of proving the voluntariness of a confession by a preponderance of the evidence means that the existence of the contested fact is more probable than its nonexistence. Voluntariness is a question of fact to be determined from the totality of the circumstances on the will of the accused. An involuntary statement is one made under circumstances in which the accused clearly had no opportunity to exercise a free and unconstrained will. A voluntary confession must be the product of a rational intellect and a free will.

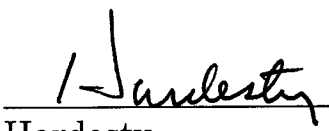
[31]84 Nev. 534, 536 n.2, 445 P.2d 157, 159 n.2 (1968).

Having considered each of Esparza's arguments, we conclude that his challenge to count III warrants relief, but that his remaining arguments lack merit. Accordingly, we

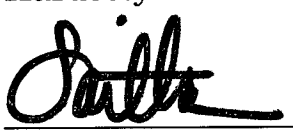
ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[32]



_____, J.
Parraguirre



_____, J.
Hardesty



_____, J.
Saitta

---

[32]Esparza also argues that his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment. The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Regardless of its severity, a sentence that is 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.'" 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)). The sentence imposed was within the parameters provided by the relevant statutes, and is not unreasonably disproportionate to the offense. Thus, we reject this contention.

cc: Hon. Stewart L. Bell, 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