IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE JOSEPH SANDOVAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48017

FILED

AUG 07 2007

JANETTE 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 31 counts of sexual assault of a child under the age of 16, 27 counts of sexual assault, and one count of child abuse. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced Sandoval to serve concurrent and consecutive terms totaling 31 years to life in prison.

Sandoval argues that statements he made to Detective Shannon Tooley should not have been admitted because the statements were involuntary, in that Sandoval was under the influence of methamphetamine and was sleep-deprived when questioned.[1] Sandoval did not file a motion to suppress his statements, did not object at trial to admission of the videotape of the interrogation, and did not object at trial to Detective Tooley's testimony about the interrogation on the grounds that his statements were involuntary. We therefore review admission of

[1]See Miranda v. Arizona, 384 U.S. 436 (1966); Passama v. State, 103 Nev. 212, 735 P.2d 934 (1987).

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this evidence for plain error.[2] We conclude there was no error. When questioned by Detective Tooley, Sandoval denied using drugs at the present time. Detective Tooley testified that Sandoval did not appear to be under the influence of methamphetamine. Our review of the transcript of the interrogation indicates that Sandoval was coherent and understood what was going on.[3] Accordingly, there was no plain error in admitting his statements.

Sandoval also appears to argue that because he was given Miranda warnings at the beginning of the interrogation and Detective Tooley did not ask him specifically if he was under the influence at that time, an unconstitutional irrebutable presumption was created that he was not under the influence when questioned and his statements were therefore voluntary. We disagree. Sandoval had the opportunity to contest the voluntariness of his statements by filing a motion to suppress and/or by objecting to Detective Tooley's testimony on this ground; he declined to do either. He took the opportunity to rebut the evidence at trial, however, by testifying that he was under the influence when questioned.

Sandoval next argues that the State improperly overcharged him. Specifically, he notes that the prosecutor in closing argument asked the jury to return not guilty verdicts on counts 1 through 12 based on the victim's testimony about when the abuse began. Sandoval asserts that the State knew "from the onset" that it could not prove counts 1 through 12,

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[2]See NRS 178.602.

[3]See Chambers v. State, 113 Nev. 974, 980-82, 944 P.2d 805, 809-811 (1997).

but he cites no evidence for this assertion in the record.[4] He claims that the State overcharged him with an additional 68 counts, but he fails to identify what those counts were or provide any cogent argument showing improper overcharging.[5] We therefore decline to consider these arguments.

Sandoval next argues that there was insufficient evidence to support his convictions. "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt."[6]

We have held that a child victim is not required to "specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred," and that such reliable indicia could be established if the child testified that "the incidents occurred every weekend for the period of time [the defendant] resided in the family home or that [the defendant] assaulted her nearly every weekend."[7] That is precisely the kind of testimony the victim gave in regard to these counts: she specified the acts that occurred and testified that each of the acts occurred on a weekly basis during the given time

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[4]See Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980) (holding that this court will not consider matters outside the record, and facts stated in a party's brief will not compensate for a deficiency in the record).

[5]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[6]LaPierre v. State, 108 Nev. 528, 530, 836 P.2d 56, 57 (1992).

[7]Id. at 531, 836 P.2d at 58.

frames for these counts.[8] The victim's testimony that Sandoval hit her with his fists when he was angry with her was sufficient to support a conviction of child abuse. Thus, the evidence was sufficient to support Sandoval's convictions of sexual assault of a child under the age of 16 as charged in counts 13, 16, 19, 20, and 52 to 72, his convictions of sexual assault as charged in counts 75, 79 to 90, and 94 to 99, and his conviction of child abuse as charged in count 115.

However, we agree with Sandoval that the evidence was insufficient to support his convictions of sexual assault of a child under the age of 16 as charged in counts 37 to 42 and his convictions of sexual assault as charged in counts 76 to 78 and 91 to 93. Although the victim previously testified that she had been subjected to sexual intercourse, fellatio, and cunnilingus, the prosecutor's asking her if "this stuff" continued from Easter 2003 to July 2003 and the victim's responding "Yes" was insufficient to support convictions on counts 37 to 42. Similarly, the prosecutor's asking the victim if "things" continued to happen from mid-April 2004 to May 2004 and the victim's answering "Yes" was insufficient to support convictions on counts 76 to 78. The State must establish which particular acts occurred, not simply establish that unspecified acts continued. The victim testified that she was subjected to sexual intercourse, cunnilingus, and fellatio between approximately August 2004 and Halloween 2004, but was not asked how often that conduct occurred; this was insufficient to support convictions on counts 91 to 93. We

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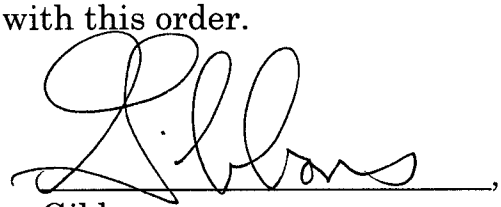
[8]See Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (stating that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction.") We note that when questioned by police, Sandoval admitted to having sexual intercourse with the victim.

therefore conclude that counts 37 to 42, 76 to 78, and 91 to 93 must be reversed.

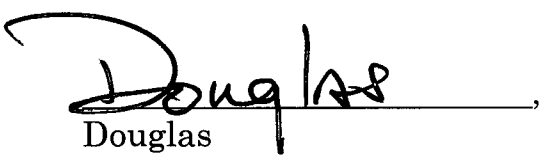
Finally, Sandoval argues that the prosecutor committed misconduct during closing argument. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[9] Sandoval did not object to any of the comments he now cites as improper; therefore, we review them for plain error.[10] We conclude that none of the comments constituted plain error.

Having reviewed Sandoval's claims and concluded he is only entitled to the relief described above, we

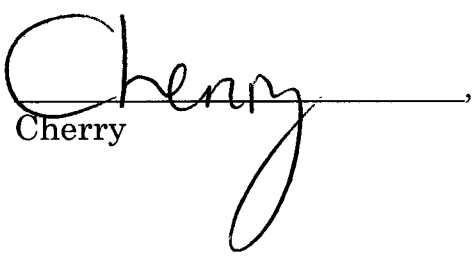
ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

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[9]Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting U.S. v. Young, 470 U.S. 1, 11 (1985)).

[10]See NRS 178.602.

cc: Hon. Donald M. Mosley, District Judge
Michael H. Schwarz
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk