IN THE SUPREME COURT OF THE STATE OF NEVADA

SALVANA MARIA FERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48127

FILED

FEB 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of child abuse or neglect resulting in substantial bodily harm under NRS 200.508. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge. The district court sentenced appellant Salvana Maria Fernandez to serve a term of 96 to 240 months in the Nevada State Prison.

Fernandez argues that NRS 200.508 is unconstitutionally void under the vagueness doctrine. This court reviews the constitutionality of a statute de novo.[1] "A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement."[2]

Count six of the amended information charged that Fernandez:

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[1]Sheriff v. Burdg, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

[2]Id. at 857, 59 P.3d at 486-87; (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

> unlawfully abused or neglected a child under the age of 18 years, which abuse or neglect caused the child to suffer unjustifiable physical pain or mental suffering as a result, or to be placed in a situation where the child might suffer physical pain or mental suffering as the result of abuse or neglect. Specifically, [Fernandez] was responsible for the safety or welfare of Monica Uribe, a child aged approximately 7 months old. [Fernandez] negligently or intentionally withheld food and/or drink from the child which resulted in the child's death from malnutrition or from complications resulting from malnutrition.

The allegation in the information that Fernandez "was responsible for the safety or welfare of Monica Uribe" and the information's omission of the term "willfully" indicate that the State charged Fernandez with a violation of NRS 200.508(2). That statute makes it unlawful for "a person who is responsible for the safety or welfare of a child" to permit or allow that child "to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect."

In response to Fernandez's argument that the statute is void for vagueness, the State observes that this court rejected a vagueness challenge to the statute in Smith v. State.[3] In Smith, however, we held the statute to be constitutional in part because we interpreted its provisions in such a manner as to preclude punishment for inadvertent or

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[3]112 Nev. 1269, 927 P.2d 14 (1996), abrogated in part on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. 859, 59 P.3d 477 (2002).

ignorant acts. Specifically, in addressing the definitions of "permit" and "allow," currently found NRS 200.508(4),[4] we concluded:

> We read these provisions in conjunction and conclude that both definitions establish the same requirement: a person acts unreasonably and is therefore criminally liable if she knows or has reason to know of abuse or neglect yet permits or allows the child to be subject to it. This requirement of knowledge and reasonableness adequately defines the state of mind required for a finding of guilt and effectively precludes punishment for inadvertent or ignorant acts.[5]

Thus, under our holding in Smith, a defendant can only be convicted of a violation of what is now NRS 200.508(2), "if she knows or has reason to know of abuse or neglect yet permits or allows the child to be subject to it."[6]

An inadvertent, ignorant, or negligent act cannot sustain a conviction, nor can an act that is reasonable or unknowing. But in Fernandez's case, the wording of the charging documents and the jury instructions may have allowed the jury to convict Fernandez based on just such an act, which would be unconstitutional per Smith. Count six specifically alleged that Fernandez acted "negligently or intentionally." (Emphasis added). Negligence is not a proper theory of violation of NRS

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[4]Under NRS 200.508(4)(b), "'Allow' means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected." Under NRS 200.508(4)(c), "'Permit' means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child."

[5]Smith, 112 Nev. at 1276-77, 927 P.2d at 18.

[6]Id.

200.508, which under Smith requires an intentional, knowing and unreasonable act. And the jury instructions did not advise the jury that to convict Fernandez of count six, it had to find she acted intentionally, unreasonably, and knowingly. Thus, essential elements of this charge per the statute and Smith were not provided to the jury.[7] Although the statute is not unconstitutional if it is interpreted in the manner set forth in Smith, here the jury was not instructed in accordance with that holding and therefore could have convicted Fernandez based on an unconstitutional application of the statute.

The dissent concludes that jury instruction 30 was sufficient to cure the failure to instruct the jury in accordance with our holding in Smith. Instruction 30 provided that, "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose nor criminal negligence, she does not thereby commit a crime." The jury instructions, however, did not otherwise define "criminal negligence" for the jury, and as we explained above, accidental or merely negligent acts alone, are insufficient to support a conviction under Smith's interpretation of NRS 200.508(2). The defendant must act intentionally, by permitting or allowing a child to be placed in a situation that a reasonable person would not and must know or have reason to know that doing so will subject the child to abuse or neglect.

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[7]See Rossana v. State, 113 Nev. 375, 382, 934 P.2d 1045, 1049 (1997) ("An accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error") (quoting Dougherty v. State, 86 Nev. 507, 509, 471 P.2d 212, 213 (1970)).

From our review of the record, we are unable to conclude that that the errors were harmless.[8] The evidence that Fernandez acted intentionally and knowingly was not overwhelming. We note that Fernandez's other two children were also developmentally delayed and had feeding problems, and one, like Monica, was born prematurely. When examined after Monica's death, both children were basically healthy but small. The emergency room physician who saw Monica when Fernandez took her there at the suggestion of a health care worker testified that while Monica's weight at that time was low, it was actually good given her premature birth and birth weight. Fernandez is developmentally disabled, with an IQ two points above mild retardation. She was visited by social and health workers in her home and at local offices, and she took Monica to the emergency room when advised. A social worker visiting Fernandez's home in December 2004 noted that there was infant formula and infant cereal in the home and a bottle of milk in Monica's crib. The detective who responded to the home on the day of Monica's death saw a bottle of milk in the crib as well. Other care workers reported that the home was well-maintained and Fernandez interacted appropriately with Monica and her two other children.

We conclude that NRS 200.508 was unconstitutionally applied in this case because the jury was not properly instructed on the elements of the charge that we held in Smith rendered the statute constitutional.

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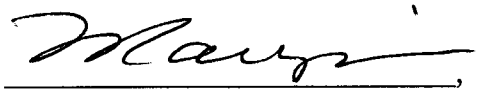
[8]See id. (concluding that the district court committed reversible error in failing to instruct the jury on a necessary element of the charged crime).

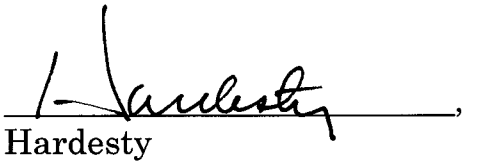
The errors in this regard were not harmless, and, therefore, Fernandez is entitled to a new trial.[9]

Accordingly, we

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



_____, J.
Maupin



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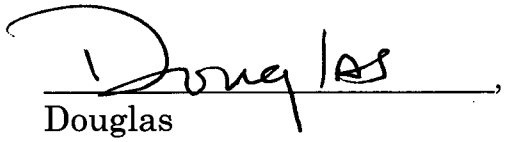

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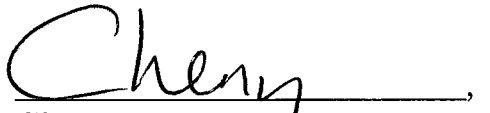

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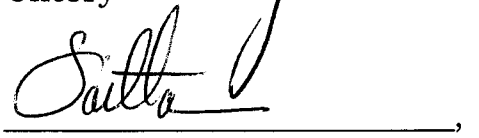
Cherry



_____, J.
Saitta

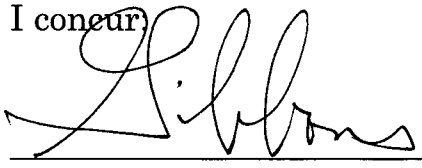
[9]Having so concluded, Fernandez's remaining arguments are moot, and we decline to consider them.

PARRAGUIRRE, J., with whom GIBBONS, C.J., agrees, dissenting:

The majority concludes that Fernandez may have been convicted of child abuse or neglect based on an inadvertent or ignorant act, which would not be permissible under NRS 200.508, as interpreted by Smith. In my view, the jury instructions precluded such a finding. Particularly, instruction 30 advised the jury that it could not convict Fernandez if it found she "commit[ted] an act or m[ade] an omission through misfortune or by accident." This was sufficient to advise the jury that Fernandez's acts of abuse or neglect could not have been inadvertent or ignorant. I would therefore affirm the judgment of conviction.

_____, J.
Parraguirre

I concur:



_____, C.J.
Gibbons

cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk