IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY RICHARD FRUIT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48296

FILED

MAR 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of sexual assault of a minor under the age of fourteen and nine counts of lewdness with a child under the age of fourteen. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Gregory Fruit to life in prison with the possibility of parole after twenty years on the sexual assault counts and life with the possibility of parole after ten years on the lewdness counts, all counts to run concurrently.

Fruit appeals from the judgment of conviction entered pursuant to his trial on charges relating to acts of sexual abuse that he allegedly committed against his granddaughter, K.S. At trial, the district court admitted into evidence a recording of telephone conversations between K.S. and her aunts. K.S.'s parents obtained the recording by surreptitiously recording all incoming and outgoing calls to their Colorado home. K.S.'s parents did not obtain K.S.'s or the aunts' consent before recording the calls. At the time of the calls, K.S.'s aunts lived in Nevada and K.S. lived with her parents in Colorado. On the recording, K.S. accused Fruit of sexual abuse. The State played the recording five times during trial.

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Fruit argues that the recording was intercepted in violation of Nevada's dual-party consent requirement and was, therefore, inadmissible at his trial. The State responds that since the interception occurred in Colorado and complied with Colorado law, the district court correctly admitted it in a Nevada judicial proceeding. Fruit challenges both the district court's decision to admit the recording and the district court's denial of his motion for a new trial. Fruit argues that the district court abused its discretion by admitting the recording of telephone conversations K.S. had with her aunts, in which she accused Fruit of sexual abuse, and that the error violated his constitutional right to due process, a fair trial, and equal protection.

We review a district court's decision to admit or exclude evidence for an abuse of discretion.[1] We also review a district court's decision to deny a motion for a new trial for an abuse of discretion.[2] However, we review issues of statutory interpretation de novo.[3] If the district court erred in its admission of evidence, we will reverse the conviction unless the error was harmless beyond a reasonable doubt.[4]

Under Nevada law, there are two methods by which a communication may be lawfully intercepted. First, both parties to the

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[1]Thomas v. State, 122 Nev. ___, ___, 148 P.3d 727, 734 (2006), cert. denied, 76 U.S.L.W. 3372 (U.S. Jan. 14, 2008) (No. 06-10347).

[2]Steese v. State, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998).

[3]State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

[4]Manley v. State, 115 Nev. 114, 122, 979 P.2d 703, 708 (1999).

communication can consent to the interception.[5] Second, one party to the communication can consent to the interception if an emergency situation exists such that it is impractical to obtain a court order and judicial ratification is sought within 72 hours.[6] Colorado law permits interception of a conversation based on the consent of "either a sender or a receiver" of the communication.[7]

Admission of lawfully intercepted communications in judicial or administrative proceedings is governed by NRS 48.077.[8] Under NRS 48.077, a communication intercepted in accordance with the law of the

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[5]Lane v. Allstate Ins. Co., 114 Nev. 1176, 1179-80, 969 P.2d 938, 940-41 (1998).

[6]NRS 200.620.

[7]Colo. Rev. Stat. § 18-9-303 (2002); see People v. Watson, 53 P.3d 707, 710 (Colo. Ct. App. 2001) ("[T]he [Wiretapping and Eavesdropping Act] does not require suppression of intercepted communications if one party to the communication consented to the interception.").

[8]NRS 48.077 provides, in full:

> Except as limited by this section, in addition to the matters made admissible by NRS 179.465, the contents of any communication lawfully intercepted under the laws of the United States or of another jurisdiction before, on or after July 1, 1981, if the interception took place within that jurisdiction, and any evidence derived from such a communication, are admissible in any action or proceeding in a court or before an administrative body of this State, including, without limitation, the Nevada Gaming Commission and the State Gaming Control Board. Matter otherwise privileged under this title does not lose its privileged character by reason of any interception.

jurisdiction in which the interception was made is admissible in a Nevada judicial or administrative proceeding, even when the manner of interception would violate Nevada law had the interception taken place in Nevada. This is so even if a party to the communication was in Nevada at the time of the interception. Applying the plain language of NRS 48.077, the district court in this case erred by admitting the recording only if the interception was not obtained in accordance with Colorado law.

As noted above, Colorado permits interception based on the consent of one party to a communication.[9] The State concedes that K.S.'s parents did not obtain the consent of K.S. or her aunts before making the interceptions. The State urges this court to hold that the vicarious consent doctrine applies under Colorado law. The doctrine of vicarious consent allows a parent to consent to interception on behalf of his or her minor child.[10] If the doctrine of vicarious consent applies in this case, K.S.'s parents could consent on her behalf, and their consent would satisfy Colorado's single-party consent requirement.

We decline to hold that the doctrine of vicarious consent applies under Colorado law. The State has offered no authority to suggest that Colorado courts are inclined to accept or have even considered the applicability of the vicarious consent doctrine. We decline to decide what

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[9]Colo. Rev. Stat. § 18-9-303 (2002); see Watson, 53 P.3d at 710.

[10]See generally Daniel R. Dinger, Should Parents Be Allowed To Record A Child's Telephone Conversations When They Believe The Child Is In Danger?: An Examination Of The Federal Wiretap Statute And The Doctrine Of Vicarious Consent In The Context Of A Criminal Prosecution, 28 Seattle U. L. Rev. 955, 968 (2005).

appears to be an issue of first impression in Colorado. Absent the application of this doctrine, K.S.'s parents' interception of K.S.'s telephone conversations with her aunts violated Colorado law because neither party to the communication consented. Because the interception was not conducted in accordance with the law of the jurisdiction in which it took place, the recording cannot be properly admitted in a Nevada judicial proceeding under NRS 48.077. The district court therefore abused its discretion by admitting the recorded communication during Fruit's trial.[11]

In determining whether a nonconstitutional evidentiary error is harmless, we consider "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[12] Fruit was charged with lewdness and sexually abusing a minor and faced life in prison. The State played the inadmissible recording five times during trial, and because K.S. recanted her allegations of abuse at trial, the recordings were the only method by which the jury heard K.S. make allegations of abuse in her own words. While the State presented other admissible evidence to support the convictions,[13] we are not convinced that the jury's verdict "was

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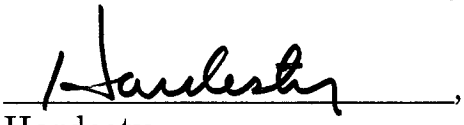
[11]We also note that the State did not provide Fruit with a transcript of the recording as required by NRS 179.500. Because we reverse Fruit's conviction on the ground that the recording was not intercepted in accordance with the law of the jurisdiction in which it was obtained, we do not address whether the State's failure to comply with NRS 179.500 provided a separate basis for excluding the recording.

[12]Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[13]For this reason, we reject Fruit's challenge to the sufficiency of the evidence supporting the convictions. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

not substantially swayed by the error"[14] in admitting the recording. Accordingly, the error in admitting the recording was not harmless, and the judgment of conviction therefore cannot stand.[15] Accordingly, we

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



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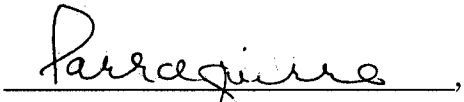

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Valerie Adair, District Judge
Megan C. Hoffman
JoNell Thomas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[14]Kotteakos, 382 U.S. at 764-65.

[15]Fruit makes numerous other assignments of error on appeal. Because we are reversing Fruit's convictions on the basis of the improperly admitted recording, we do not reach the merits of Fruit's additional assignments of error on appeal except to conclude that the charging information adequately put Fruit on notice of the charges against him. See Wilson v. State, 121 Nev. 345, 368-69, 114 P.3d 285, 301 (2005); Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984).