

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALVIN GRESHAM,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48474

**FILED**

APR 01 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction on twenty-five counts of sexual assault with a minor under the age of sixteen and one count of destroying evidence. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The parties are familiar with the facts and we do not recount them except as pertinent to our disposition.

While appellant Michael Alvin Gresham raises several claims for our review, we conclude that all but two are without merit. As to Gresham's prevailing arguments, he first contends that the district court erred in denying his motion for an independent psychological examination of the child victim. Additionally, Gresham contends that the district court erred in refusing to allow an instruction as to the defense's theory of the case.

Independent psychological evaluation

"The decision to grant or deny a defendant's request for a psychological examination of a child-victim is within the sound discretion of the district court and will not be set aside absent an abuse

of discretion.”<sup>1</sup> In exercising its discretion, “[t]he district court should base its decision on the facts and circumstances of each case.”<sup>2</sup>

In Abbott v. State,<sup>3</sup> this court concluded that the test set forth in Koerschner v. State<sup>4</sup> governs as to whether a defendant is entitled to request an independent psychological examination of a victim in a child sexual assault case.<sup>5</sup> Under Koerschner, the following factors are weighed, though not necessarily equally, to determine whether there is a compelling reason to order an independent psychological examination of the child victim:

whether the State actually calls or obtains some benefit from an expert in psychology or psychiatry, whether the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis for believing that the victim’s mental or emotional state may have affected his or her veracity.<sup>6</sup>

While the State did not call a designated expert of psychiatry to testify, the State did call Patricia Chess, the employee

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<sup>1</sup>Chapman v. State, 117 Nev. 1, 4, 16 P.3d 432, 434 (2001).

<sup>2</sup>Id. (quoting Keeney v. State, 109 Nev. 220, 226, 850 P.2d 311, 315 (1993), overruled in part by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000)).

<sup>3</sup>122 Nev. 715, 723, 138 P.3d 462, 467 (2006).

<sup>4</sup>Koerschner, 116 Nev. at 1117, 13 P.3d at 455.

<sup>5</sup>Abbott, 122 Nev. at 723, 138 P.3d at 467.

<sup>6</sup>Koerschner, 116 Nev. at 1116-17, 13 P.3d at 455.

from child protective services who met with the victim. As set forth in Abbott, a witness may qualify as an expert “when [s]he does more than merely relate the facts and instead analyzes the facts and/or states whether there was evidence that the victim was coached or biased against the defendant.”<sup>7</sup> Here, Chess testified about her discussions with the victim, including the allegations surrounding Gresham, and discussed the victim’s demeanor during these interviews. However, Chess did not testify as to “behavioral patterns and responses associated with victims of child sexual abuse.”<sup>8</sup> Additionally, Chess did not describe techniques used to indicate whether the victim’s allegations were credible.<sup>9</sup> Furthermore, the focus of Chess’s investigation and contact with the victim involved the instances of sexual abuse by the victim’s father, not Gresham. As a result, Chess did not provide any means for the jury to assess the victim’s credibility or state of mind. Accordingly, we conclude Chess’s testimony was not that of an expert for the purposes of Koerschner; however, “[w]hether the State utilizes . . . [an] expert, is merely a factor to be considered with whether there is little or no corroboration evidence.”<sup>10</sup>

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<sup>7</sup>Abbott, 122 Nev. at 728, 138 P.3d at 471.

<sup>8</sup>Id. at 727, 138 P.3d at 472 (quoting Marvelle v. State, 114 Nev. 921, 927, 966 P.2d 151, 154-55 (1998), abrogated on other grounds by Koerschner, 116 Nev. 1111, 13 P.3d 451 (2000)).

<sup>9</sup>Id.

<sup>10</sup>Id. at 724, 138 P.3d at 468.

In Koerschner, the State was able to present sufficient physical evidence to corroborate the charges of sexual assault.<sup>11</sup> In the instant case, however, the evidence presented by the State failed to sufficiently corroborate their case.<sup>12</sup>

The record suggests that “there was a reasonable basis for believing that the victim’s mental or emotional state may have affected her veracity.”<sup>13</sup> Similar to Abbott,<sup>14</sup> the victim here was previously exposed to sexual abuse, made and later retracted unsubstantiated allegations of sexual abuse, and admitted to lying on the stand about specific sexual encounters.

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<sup>11</sup>See Koerschner, 116 Nev. at 1117, 13 P.3d at 455 (holding that evidence of “a four centimeter internal laceration and the need to use an adult procedure to examine the victim,” as well as the testimony of both a doctor and a nurse that “this type of injury was indicative of a sexual assault and atypical of a fall down a flight of stairs” was “ample corroboration of the victim’s testimony to support the charges against [the defendant]”).

<sup>12</sup>The conflicting evidence presented by the State in the instant matter includes the testimony by Gresham’s therapist regarding his alleged “grooming” of the victim and the calendar presented by the victim at the second preliminary hearing, which allegedly indicated the dates that the sexual encounters occurred.

<sup>13</sup>Abbott, 122 Nev. at 731, 138 P.3d at 473.

<sup>14</sup>Id. (finding “[t]he fact that the victim made prior unsubstantiated allegations, engaged in sexual behavior, and had been exposed to sexual activities demonstrate[d] that there was a reasonable basis to believe that [the victim’s] mental or emotional state may have affected her veracity”).

Although a child victim's testimony "alone is sufficient to uphold a conviction," this testimony requires "some particularity regarding the incident[s] in order to uphold the charge[s]."<sup>15</sup> Here, the victim provided inconsistent testimony at the first and second preliminary hearings as to when the various sexual encounters with Gresham occurred and admitted to changing parts of her testimony.<sup>16</sup> Furthermore, the victim provided inconsistent statements regarding previous sexual abuse by her father. Therefore, we conclude that the victim's character for veracity was questionable; thus, the district court abused its discretion in denying Gresham's motion for an independent psychological examination of the child victim because the circumstances in this case warranted providing Gresham the opportunity to have the child victim undergo an independent psychological examination, as provided under Abbott.

Defendant's theory of the case

Gresham also contends that the district court erred in denying his request for an instruction on the "theory of the defense case."<sup>17</sup> We agree.

"[T]his court will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error."<sup>18</sup> A

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<sup>15</sup>LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

<sup>16</sup>See id. (holding that, while a child victim may not recall the specific number of instances of sexual abuse, there needs to be "some reliable indicia that the number of acts charged actually occurred").

<sup>17</sup>See Carter v. State, 121 Nev. 759, 766, 121 P.3d 592, 596 (2005).

<sup>18</sup>Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

district court abuses its discretion to settle jury instructions if a “decision is arbitrary or capricious or if it exceeds the bounds of law or reason.”<sup>19</sup>

In Crawford v. State,<sup>20</sup> we held that “the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be”<sup>21</sup> provided, however, that the instructions are not “misleading, inaccurate, or duplicitous.”<sup>22</sup> This court “recognized that specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request.”<sup>23</sup> Finally, the proffered instructions must correctly state the law<sup>24</sup> and be supported by evidence that has been presented to the jury.<sup>25</sup>

Gresham’s proffered instruction, in pertinent part, alleged that the sexual encounters with the child victim were consensual. In McDonald v. Sheriff, this court concluded that “consent of the alleged victim is a matter of defense.”<sup>26</sup> Although the State alleges Gresham’s

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<sup>19</sup>Id.

<sup>20</sup>121 Nev. 744, 121 P.3d 582 (2005).

<sup>21</sup>Id. at 751, 121 P.3d at 586 (quoting Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002)).

<sup>22</sup>Id. at 754, 121 P.3d at 589.

<sup>23</sup>Id. at 753, 121 P.3d at 588.

<sup>24</sup>Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

<sup>25</sup>Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 697 (1995).

<sup>26</sup>89 Nev. 326, 327, 512 P.2d 774, 774 (1973) (citing NRS 200.363).

proffered instruction was a mere recitation of the facts, the underlying inference drawn from this instruction is that the victim consented to the alleged sexual abuse, which was a valid defense for Gresham to raise and for the jury to consider.<sup>27</sup> Therefore, we conclude that the district court abused its discretion in refusing to include Gresham's proffered instruction for the defense's theory of the case.

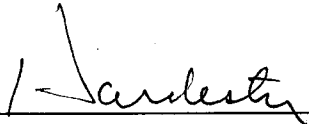
As to the remaining issues raised by the parties, we conclude that they are without merit.<sup>28</sup> Accordingly, we

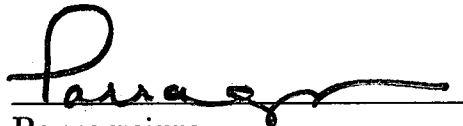
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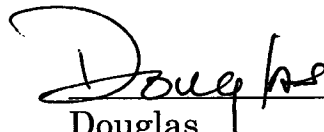
<sup>27</sup>Moreover, to the extent that the instruction was incomplete we note that the State was free to request additional language and that the district court had a sua sponte duty to complete the instruction or assist the parties in so doing. Carter, 121 Nev. at 765-66, 121 P.3d at 596-97.

<sup>28</sup>On appeal, the parties raise the following additional issues: (1) whether the district court erred in admitting evidence of Gresham's prior convictions, (2) whether the district court erred in denying Gresham's second petition for writ of habeas corpus, (3) whether there was sufficient evidence to establish probable cause for the sexual assault counts, (4) whether the district court erred in denying Gresham's motion to suppress; and (5) whether Gresham's search clause as a condition of probation applied to his former residence. Based on our review of the record, we conclude that: (1) the district court did not err in admitting evidence of Gresham's prior convictions on two counts of attempted lewdness with a minor, (2) the district did not err in denying Gresham's second petition for writ of habeas corpus, (3) Gresham's failure to petition this court for writ of mandamus regarding the sufficiency of the evidence precluded his right to assert the issue of probable cause on appeal, (4) the district court did not err in denying Gresham's motion to suppress certain evidence seized at his residence, and (5) Gresham's home residence was subject to the search clause.

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

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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