IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL BURTON COTHRAN A/K/A PAUL B. COTHRAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48917

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Paul Burton Cothran appeals his judgment of conviction, after jury trial, of five counts of sexual assault of a child under the age of 14, seven counts of lewdness with a child under the age of 14, and one count of use of a minor in the production of pornography. Eighth Judicial District Court, Clark County; David Wall, Judge. We affirm the judgment of conviction on all counts. We reverse for resentencing as to the count of use of a minor in the production of pornography, however, because Cothran was sentenced on that count using an uncharged sentencing enhancement.

Notice of the charges

Cothran was charged with and convicted of sexual assault and lewdness with his step-granddaughter, ~~beginning when she was as young as five years old and continuing into her early teens~~ which occurred on or between 1999 and 2004, when the minor child was 14-years-old or younger. Cothran's principal challenge on this appeal is that the information failed to give him sufficient notice of the exact dates and locations of the acts charged.[1]

modified per order filed 7-31-09. SC

[1]Cothran also argues his constitutional rights were violated by: (1) the district court's failure to exclude Cothran's involuntary statements, (2) the district court's improper jury selection method, (3) the State's discriminatory dismissal of three Hispanic jurors, (4) the district court's

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An indictment or information must contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1). The charging document may be amended, "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005) (quoting NRS 173.095(1)). Prejudice depends on whether "the defendant had notice of the State's theory [or various theories] of prosecution." Id. at 162-63, 111 P.3d at 1082. "[R]eversible error exists only where the variance between the charge and proof" affects the defendant's substantial rights. State v. Jones, 96 Nev. 71, 73-74, 605 P.2d 202, 204 (1980) (a variance does not affect the substantial rights of the defendant if it does not impair the defendant's ability to prepare his defense); see also NRS 178.598.

. . . continued

error in dismissing jurors for cause, and (5) the district court's failure to exclude evidence produced after the child, then a teenager, consented to a search of the home she shared with the defendant. Cothran further argues that the district court erred by failing to properly instruct the jury on his theory of the case, and improperly admitting evidence of (6) prior bad acts, (7) Nurse Phyllis Suiter's testimony and report related to her medical examination of the child, and (8) pictures of Cothran and the child's genitalia. We conclude that each of these challenges lacks merit, or if any error exists, it was is harmless in light of the overwhelming evidence of Cothran's guilt. See Knipes v. State, 124 Nev. ___, ___, 192 P.3d 1178, 1183 (2008).

The charging documents, as amended, adequately specified the acts charged. Based on the child victim's recollection, the state alleged that the incidents of sexual abuse occurred between 1999 and 2004. "Unless 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." Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). Like Cunningham, this case involves sexual abuse of a child by a family member. Given the "special problems" such cases involve – shame, secrecy, and fear of retaliation, among them—it clearly cannot be said that the state had an absolute obligation to draft an information with . . . more particularity than was done here." Id. at 400-01, 683 P.2d at 502.

Nor did the district court abuse its discretion by allowing the State to file an amended information after the close of evidence. In its closing argument, the State presented a demonstrative chart that clarified the evidence presented and correlated that evidence with each charge, dismissing several on jurisdictional grounds. Any variance that remained did not affect Cothran's substantial rights because it did not impair his ability to defend himself against the substantive charges, the elements of which remained the same.

Failure to provide discovery

Cothran also challenges the State's failure to provide complete discovery before trial, as required by NRS 174.235, NRS 174.295 and, ultimately, due process. As was his right, Cothran obtained discovery of the audiotape and transcript of his police interrogation well before trial. However, the State did not provide Cothran with a videotape the police made of the same interrogation until the first day of trial; when

transcribed, the videotape proved to include a previously undisclosed final segment that added six pages of new dialogue to the 50 pages already transcribed. During trial the prosecution also produced transcripts of an audiotape that caught snippets of conversation between Cothran and the transporting officer on their way to the police station and an earlier recording of the victim speaking on her cellular phone to a third party and briefly to Cothran before his arrest. The transcripts of this second audiotape have a number of blanks.

The prosecution acknowledges Cothran should have received the videotape earlier. It explained that, while the State maintained an open file policy in this case, the prosecuting attorney did not have the videotape in his file, or know of its existence, until shortly before trial, when the officer who had the videotape turned it over. Upon learning about the videotape, the prosecution immediately advised the district court, copied the videotape and gave it to the defense, as NRS 174.295(2) requires. As for the second audiotape, both the prosecution and the defense knew about it some time before trial, but both believed it either had been lost or was completely unintelligible. Cothran's surprise claim as to the second audiotape is that the State was able to get anything in the way of transcripts from it. This production, too, came during trial.

Cochran complained to the district court about the late production. The district court gave the defense an opportunity to review the tapes and to make a record respecting Cothran's objections to them. After review, Cothran acknowledged the videotape was "damaging," not exculpatory, and that the audiotape was largely inaudible. Of note, Cothran did not seek a continuance or move for a mistrial and, as to the

video and audiotape transcripts, appears ultimately to have stipulated to their admission.

NRS 174.235(1)(a) entitles a defendant to pretrial discovery of "[w]ritten or recorded statements or confessions made by the defendant . . . within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney. . . ." While Cothran legitimately questions the state's "due diligence" with respect to the videotape, on this record we do not find reversible error in the district court's admission of the late-produced evidence. Cf. Buckley v. State, 95 Nev. 602, 604, 600 P.2d 227, 228 (1979) (declining to reverse based on state's alleged discovery violation when the defense did not move for a continuance). The videotape largely replicated the audiotape and transcript Cothran received long before trial. Although Cothran argues that the last seven to nine minutes of his interrogation were the most damaging, other evidence, including the statements contained in the disclosed portion of the detective's interrogation, provide "overwhelming evidence of guilt." Donovan v. State, 94 Nev. 671, 673, 584 P.2d 708, 710 (1978).

It is unclear whether Cothran separately challenges the admission of the video and audiotape evidence under Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady requires the state to disclose all evidence favorable to the defendant if "the evidence is material either to guilt or to punishment." Here, the tapes either duplicated evidence already disclosed or were unfavorable and inculpatory, not exculpatory. Further, they were not argued as relevant to sentencing. Cothran's Brady challenge, if any, fails.

Sufficiency of the evidence

Cothran next challenges the sufficiency of the evidence, describing the child victim as a "liar and perjurer" who changed her story over the course of the investigation. Cothran confuses this court's role with that of the jury. The jury decides credibility. If "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the jury verdict stands. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (citation omitted) (emphasis added).

"A sexual assault victim's uncorroborated testimony is sufficient evidence to convict." State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996). Although there was evidence that the victim withdrew her accusations at least once and changed her story over the course of the investigation, at trial she explained to the jury why she had done so. Even if her statements were inconsistent, the jury was properly tasked with evaluating her credibility and whether she was truthful in explaining the pressures that led to the conflicts in her testimony. See Hutchins v. State 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994).

What is more, the victim's testimony was not uncorroborated. Cothran's own statement incriminated him. He admitted during the police interview that, on more than one occasion, he engaged in inappropriate touching and other behavior with the child victim. The evidence was sufficient to support the jury's verdict.

Use of minor in the production of pornography

Finally, Cothran claims that the State did not present sufficient evidence to prove count 12—use of a minor in the production of pornography—because the photograph was not seen by another witness or admitted into evidence at trial. He further argues that even if there was

sufficient evidence to support the conviction, he was improperly sentenced because the state failed to allege the victim's age as part of the count.

NRS 200.710 criminalizes the use of a minor in the production of pornography.[2] But it does not expressly require the State to admit direct evidence of a "performance"—in this case, a photograph. See NRS 200.710(2). At trial, the child victim recounted a time Cothran took a Polaroid picture of her while she was naked. She recalled Cothran telling her that there was no film in the camera, but testified that, when he took the picture, the camera printed a Polaroid filmcard. In addition, Cothran's wife testified that she and Cothran owned a Polaroid camera. This evidence sufficiently supported Cothran's conviction on count 12.

Nevertheless, we conclude that the district court erred when it sentenced Cothran under count 12 because it enhanced his sentence using the victim's age as an aggravator without the state having pleaded age in this count of the information. See State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998) (providing that the indictment, standing alone, must contain each element of the charge). The age of the minor at the time of the production of pornography determines the defendant's eligibility for parole. See NRS 200.750. If the minor is 14 or older, the defendant will be eligible for parole after five years. Id. If the minor is younger than 14, the defendant is not eligible for parole until he has served ten years. Id.

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[2]NRS 200.710(2) provides: "A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual portrayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance."

Here, the State alleged that the act occurred on or between 1999 and 2004. The child victim was 14 years old for at least part of 2004. Although count 12 identified the necessary mental state and act required to convict the defendant of the use of a minor in the production of pornography, it did not contain the essential age element.

We recognize that jury instruction number 11 explains to the jury that one of the elements of count 12—use of a minor in the production of pornography—required the jury to find that the minor was under 14 years old. Nonetheless, because the element of age was not included in the information, it failed to include the essential facts and elements of the crime charged. See Hancock, 114 Nev. at 164, 955 P.2d at 185. The state amended the information in other respects but it failed to do so as to the age aggravator used to sentence Cothran on count 12. The information cannot be supplemented by jury instructions that increase the seriousness of the crime charged. See Hancock, 114 Nev. at 164, 955 P.2d at 185. Since the information failed to include the essential age element of the crime, it was improper for the district court to sentence Cothran under count 12 to life with eligibility for parole beginning in 180 months, and that sentence must be vacated.

For the foregoing reasons, we

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

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. David Wall, 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