IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR MANUEL MUNOZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49227

FILED

AUG 14 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under fourteen years of age. Fourth Judicial District Court, Elko County; Charles M. McGee, Senior Judge. On March 30, 2007, appellant Victor Manuel Munoz was sentenced to serve a prison term of life with parole eligibility after ten years.[1]

Munoz raises eleven issues on appeal. First, Munoz claims that the definition of lewdness with a child, particularly the term "lewd or lascivious act," is void for vagueness. Munoz wholly fails to explain this claim. Nonetheless, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[2]

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[1]Munoz was acquitted of two additional counts of lewdness with a child under fourteen years of age.

[2]Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

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"A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement."[3] In Summers v. Sheriff, this court determined that a previous version of NRS 201.230, which included the term "lewd or lascivious act," was sufficiently definite to survive a constitutional challenge for vagueness.[4] Therefore, we conclude that Munoz's claim lacks merit.

Second, Munoz contends that the district court erred in denying him access to the victim's psychiatric records and prevented him from questioning witnesses about the contents of those records. Specifically, Munoz argues that the district court errors violated the Compulsory Process Clause of the Sixth Amendment. The Sixth Amendment provides a defendant the right to "'offer the testimony of witnesses, and to compel their attendance, if necessary.'"[5] However, the Sixth Amendment does not grant a defendant the "right to offer testimony

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[3]Silvar v. Dist. Ct., 122 Nev. 289, 293, 129 P.3d 682, 685 (2006).

[4]90 Nev. 180, 182, 521 P.2d 1228, 1229 (1974). The statute in effect when Summers was decided was later amended to change the term "rape and the infamous crime against nature" to "sexual assault."

[5]Taylor v. Illinois, 484 U.S. 400, 409 (1988) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)).

that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[6] Doctor-patient, psychologist-patient, and social worker-client communications are privileged in Nevada.[7]

The victim in this case had seen at least two mental health professionals: a social worker named Janelle Anderson in Elko, Nevada, and a psychiatrist named Coralyn Alexander in Twin Falls, Idaho. During pretrial motions, the victim's father claimed the social worker-client privilege on behalf of his daughter pursuant to NRS 49.253. The district court found that the records did not fall into any of the enumerated exceptions to the psychologist-patient or social worker-client privileges and would not be provided to the defense. We conclude that the district court correctly determined that the records Munoz sought to review and use as a basis for cross-examination of the witnesses were privileged. Therefore, we conclude that the district court's actions did not violate his Sixth Amendment rights.

Third, Munoz claims that the victim's psychiatric records may have contained exculpatory evidence and that denying him access to the records was a violation of Brady v. Maryland.[8] In Brady, the United

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[6]Id. at 410.

[7]NRS 49.207-.213 (psychologist and patient), 49.215-.245 (doctor and patient), 49.251-.254 (social worker and client).

[8]373 U.S. 83 (1963).

States Supreme Court held that prosecutorial suppression of evidence favorable to a defendant is a violation of due process "where the evidence is material either to guilt or punishment."[9] Evidence is material for Brady purposes "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[10] The Brady obligation extends beyond the prosecutor and includes investigating agencies of the government.[11]

In Abbott v. State, we reaffirmed that a defendant must show a compelling reason to entitle him to an independent psychological examination of a child victim.[12] Here, Munoz sought access to the victim's privileged records in the hope that he might find something that he could use to demonstrate a compelling reason for an independent psychological evaluation. The district court conducted an in camera review of the social worker's file and denied Munoz's request to see the records. Specifically, the district court stated that it found "nothing remarkable or exculpatory" in the records and told Munoz that there was nothing in the file

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[9]Id. at 87.

[10]Kyles v. Whitley, 514 U.S. 419, 433 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)); United States v. Manning, 56 F.3d 1188, 1198 (9th Cir. 1995).

[11]U.S. v. Blanco, 392 F.3d 382, 392-94 (9th Cir. 2004).

[12]122 Nev. 715, 723, 138 P.3d 462, 468 (2006).

"anywhere near as direct as the exhibits for your motion" to suggest that the victim was a liar.

The exhibits to which the district court referred included a statement to investigators by the victim's father describing the victim as a "habitual liar and manipulator." At trial, the victim's father was called as a witness for the State and clarified that this statement was intended to ensure that the police proceeded with caution because of the seriousness of the charges. He testified that his daughter had lied about things like whether she had taken food and hidden it in her bedroom, taken a bath, brushed her teeth, or done her homework. He further testified that his daughter had never lied about other people or lied to get someone else in trouble and that he believed his daughter was telling the truth regarding the allegations of abuse.

Based on the foregoing discussion, we conclude that Munoz has failed to demonstrate a reasonable probability that the result of the trial would have been different had he been given access to the victim's counseling records. Therefore, we conclude that the records were not material for Brady purposes.

With respect to the psychiatric records of Dr. Alexander, Officer Kevin McKinney testified that he secured a signed release from the victim's mother and contacted the doctor's office, but the doctor never returned his phone calls and he was unable to obtain the records. During cross-examination, Officer McKinney testified that there was no subterfuge or purposeful effort not to obtain those records and that he did

not know what the records contained. Because neither the prosecutor nor law enforcement had possession of those records or knowledge of their contents, we conclude that failure to provide that material to the defense did not violate Brady.[13]

Fourth, Munoz contends that the district court erred when it determined that the State would be able to cross-examine him using a wire intercept that was illegally obtained. Originally, the wire intercept was obtained after an application by a deputy district attorney. The district court, applying our decision in Price v. Goldman,[14] determined that NRS 179.460 did not permit a deputy district attorney to apply for a wire intercept. The district court held that the intercept would not be admissible but that it could be used to cross-examine Munoz if he took the stand. At trial, Munoz preemptively introduced the wire intercept into evidence during cross-examination of Officer McKinney. Munoz then testified on his own behalf at trial and was cross-examined regarding the contents of the intercept. The fact that Munoz was the first to introduce

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[13]See Brady, 373 U.S. at 87 (stating that "suppression by the prosecution of evidence favorable to an accused upon request violates due process"); State v. Bennett, 119 Nev. 589, 603, 81 P.3d 1, 10 (2003) (stating that for Brady purposes, "'the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents, such as law enforcement officers'" (quoting Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 688 (1996))).

[14]90 Nev. 299, 301-03, 525 P.2d 598, 600 (1974).

evidence of the wire intercept does not defeat his claim because we have held that when a district court rules on a motion in limine that certain evidence will be admissible for cross-examination purposes, a defendant does not waive his appellate right to challenge that ruling when he preemptively introduces the evidence himself.[15]

Munoz admits that typically, inadmissible confessions can be introduced to cross-examine a defendant who takes the stand. The established rule is that illegally obtained evidence is admissible to impeach false testimony by a defendant.[16] Munoz asserts that his circumstance is different because restrictions on wire intercepts are created by statute rather than by constitutional limitations, and therefore the wire intercept secured by the deputy district attorney was void. Munoz cites no authority in support of this distinction. Nothing in the statute explicitly precludes the use of an illegally obtained wire intercept for impeachment purposes. We see no reason to limit this rule without express legislative intent to do so. Therefore, we conclude that the district court did not err in this regard.

Fifth, Munoz contends that the district court committed judicial misconduct during voir dire. Prior to questioning the potential

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[15]Pineda v. State, 120 Nev. 204, 209, 88 P.3d 827, 831 (2004).

[16]United States v. Havens, 446 U.S. 620, 624-28 (1980); Oregon v. Hass, 420 U.S. 714, 721-22 (1975).

jurors as to whether any of them or their family members had been victims of sexual abuse, the district court stated, "I have seen credible reports that one in four women have had an unconsented or unwanted sexual encounter before they reach the age of consent. That is 25 percent." The comment was made early in voir dire in an apparent attempt to assuage any fears of embarrassment among the potential jurors and place them at sufficient ease to honestly answer the questions put to them. Thereafter, seven potential jurors came forth and admitted that their experiences would not allow them to be impartial jurors. The State claims that this error inured to Munoz's benefit.

Munoz failed to object to the district court's comment; therefore we will review his claim for plain error.[17] Munoz has not claimed that any other misconduct occurred, and the record does not reveal the repetitive and prejudicial misconduct that we have, on occasion, found to be plain error warranting reversal of a conviction.[18] Also, Munoz failed to explain his claim other than to state that "the district court committed error." Considering the district court's comment and the context in which it was made, we conclude that Munoz failed to establish

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[17]Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998).

[18]See id. at 623-24, 960 P.2d at 338-39; Randolph v. State, 117 Nev. 970, 985, 36 P.3d 424, 433-34 (2001) (concluding that unlike the misconduct in Oade, the district court's improper comments numbered only two and were not extreme, and thus were not grounds for a mistrial).

that the district court violated his substantial rights. Therefore, we conclude that no relief is warranted on this claim.

Sixth, Munoz asserts that it was error to dismiss a Native American juror on the basis of his juvenile record. Munoz describes himself as Hispanic. Munoz raised a challenge pursuant to Batson v. Kentucky[19] after the State exercised its first peremptory challenge against the juror. The State explained that the juror had a criminal record and was close to his first cousin who was an incarcerated felon. The district court noted that during questioning the juror had a "contemptuous look on his face about the issues that faced his cousin." The district court determined that the Batson test had been satisfied and upheld the peremptory challenge.

When ruling on a Batson challenge, a trial court should follow a three-step analysis: (1) the party making the Batson objection must make out a prima facie case of discrimination, (2) the proponent of the preemptory challenge then has the burden to assert a neutral explanation for the challenge, and (3) the trial court then decides whether the party raising the Batson challenge "has proved purposeful discrimination."[20] "Under step two, the State's neutral reasons for its peremptory challenges

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[19]476 U.S. 79 (1986).

[20]Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006).

need not be persuasive or even plausible."[21] The persuasiveness of the State's proffered reason becomes relevant in step three, when "the district court must determine whether the opponent of the peremptory challenge has met the burden of proving purposeful discrimination."[22] Other than stating that the juror was a Native American, Munoz offers no evidence in support of his claim that the State's peremptory challenge was purposefully discriminatory. Rather, he argues that "[t]he standard for reviewing such matters is wrong" and "[t]his court should reconsider its prior holdings." We decline to do so, and conclude that the district court did not err by overruling Munoz's Batson challenge.

Seventh, Munoz argues that the prosecution engaged in misconduct when it commented on the penalties he was facing. During the trial, Munoz introduced a wire intercept that included statements he made to the victim that her accusations could put him in jail for life. During closing argument, the State noted to jurors that they were not to concern themselves with the sentence that Munoz might receive. The prosecutor stated that "there has been a lot of talk in this case about sexual assault, the penalties for sexual assault. He is not charged with sexual assault; he is charged with lewdness." The State urged the jurors not to be misled by any sentence they had heard about in testimony,

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[21]Id. at 403, 132 P.3d at 577-78.

[22]Id. at 404, 132 P.3d at 178.

explained that the sentence was for the district court to decide, and told the jury that its obligation was to decide the facts. Munoz contends that the prosecutor "misstated the law when he assured the jury that Munoz would not receive a life sentence" and engaged in prosecutorial misconduct by arguing that Munoz was motivated to lie because of the severe nature of the possible penalties.

Munoz did not object at trial to the challenged comments. Failure to raise an issue with the district court generally precludes appellate consideration of that issue absent plain error.[23] Contrary to Munoz's assertions, the record reflects that the State did not argue that Munoz must have lied because of the severe penalty. The State argued that Munoz had "a huge interest in the outcome of the case" and that the jury should consider his bias when weighing his testimony. Nor did the State assure the jury that Munoz could not get a life sentence. Rather, the prosecutor's comments were consistent with jury instructions explaining that sentencing was within the province of the district court. In any case, the district court later informed the jury that a lewdness conviction carried a possible life sentence. Therefore, we conclude that no relief is warranted on this claim.

Munoz also claims that the prosecutor engaged in prosecutorial misconduct when he argued in rebuttal that Munoz was

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[23]Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997); NRS 178.602.

"sunk if he didn't [testify]," and that his decision to take the stand was "a last ditch attempt to avoid a conviction." The prosecutor's comment was made in response to Munoz's argument that he should be given credit for taking the stand. Munoz did not object to the prosecutor's statement. However, the district court sua sponte admonished the jury not to interpret Munoz's decision to testify "as some kind of last ditch strategy, because he has the absolute constitutional right to elect whether to testify or not to testify." The district court further cautioned the jury not to speculate why Munoz elected to testify and instructed the jury to disregard the prosecutor's statement. "There is a presumption that jurors follow jury instructions."[24] Immediately following the State's improper comment and the district court's admonishment of the jury, the prosecutor apologized. Because Munoz did not object to the challenged comment, we review it for plain error.[25] Based on the circumstances in this case, we conclude that no relief is warranted.

Eighth, Munoz claims that there was insufficient evidence to support his conviction. We have repeatedly held that the uncorroborated testimony of a sexual assault victim, without more, is sufficient to uphold

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[24]Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

[25]Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005).

a conviction.[26] Here, the victim testified at trial about the conduct for which Munoz was convicted. This evidence alone was sufficient to support the conviction. However, the record includes other evidence to support the jury's verdict. In particular, Detective Kevin McKinney testified that although Munoz denied that a sexual assault occurred, he admitted to committing other sexually related acts with the victim and that Munoz told him that "he had lost control and . . . it had gone too far."

Additionally, a wiretapped conversation revealed that the victim told Munoz that she was pregnant and Munoz encouraged her, more than once, to tell her parents that she had had sex with some kids at school. Munoz told the victim to tell her mother that she wanted an abortion. During the phone conversation, Munoz stated that "we didn't have sex, we just played around." He expressed his fear about possibly going to jail and repeatedly pleaded with the victim not to say anything about it. Munoz testified in court that if there is no vaginal intercourse, he did not consider it sex. He further testified in court that he expressed fear during the phone call because he believed that he was being set up. However, he also admitted that during the conversation he did not think anyone was listening other than the victim. During the conversation he stated, "If you tell anybody what we were doing, I am going to go to jail."

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[26]Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996).

We conclude that the evidence adduced at trial sufficiently established Munoz's guilt beyond a reasonable doubt as determined by a rational trier of fact.[27]

Munoz also asserts that there was no "substantive" difference between the three counts of lewdness with which he was charged and thus there was no reason for the jury to convict him of one count and acquit him of the other two. Therefore, according to Munoz, the evidence is insufficient to convict him. However, he fails to adequately explain this claim, and as described above, sufficient evidence supports his conviction. Therefore, we conclude that no relief is warranted.

Ninth, Munoz contends that because he had a favorable psychosexual evaluation, his life sentence is in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. "A sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."[28] Munoz does not claim that the statute is unconstitutional, and the imposed sentence is

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[27]See Wilkins v. State, 96 Nev. 367, 374-75, 609 P.2d 309, 313-14 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[28]Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

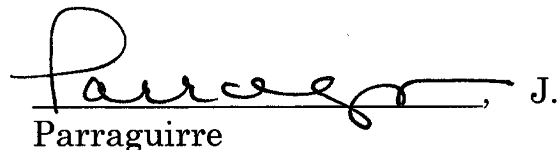
within the statutory limits. Therefore, we conclude that Munoz's claim lacks merit.[29]

Finally, Munoz argues that the district court should have more discretion when sentencing. Munoz believes it was wrong that the district court was forced to give him a life sentence and that we should revisit our holding in Botts v. State.[30] We decline to do so.

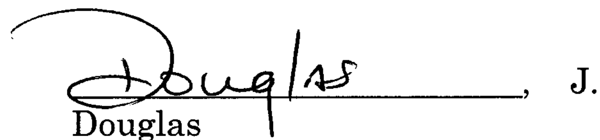
Having considered all of Munoz's contentions and found that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____________________________, J.
Hardesty



_____________________________, J.
Parraguirre



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Douglas

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[29]See id.

[30]109 Nev. 567, 854 P.2d 856 (1993) (holding that the district court had no discretion to depart from the terms of the statute affixing criminal punishment).

cc: Chief Judge, Fourth Judicial District
Hon. Charles M. McGee, Senior Judge
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