IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE MATTHEW CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49247

FILED

AUG 13 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a conviction, pursuant to a jury verdict, of one count of sexual assault of a minor under 14 years of age, one count of attempted sexual assault of a minor under 14 years of age, and eight counts of lewdness with a child under 14 years of age. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On March 22, 2007, appellant Joe Matthew Cruz was sentenced to serve a prison term of life with parole eligibility after 20 years for sexual assault, a term of 8 to 20 years for attempted sexual assault, and 8 terms of life imprisonment with parole eligibility after 10 years for the lewdness counts. The district court ordered all of the sentences to run concurrently.

Cruz raises three issues on appeal: (1) the State presented insufficient evidence to support the sexual assault and attempted sexual assault convictions, (2) the district court erred when it refused to give an instruction on open or gross lewdness as a lesser included offense of lewdness with a minor, and (3) the district court erred when it determined that the victim's claim of prior sexual abuse was inadmissible. As explained below, we conclude that these contentions lack merit.

Sufficiency of the evidence

First, Cruz argues that there was insufficient evidence to support his convictions for sexual assault and attempted sexual assault. Specifically, with regard to the conviction for attempted sexual assault, Cruz contends that his own statements to the victim cannot serve as an "act" in furtherance of a sexual assault. He also argues that the victim's statement that she was interested in him is sufficient to establish reasonable doubt.

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1] We have repeatedly held that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction."[2] With respect to the conviction for sexual assault, the 13-year-old victim testified that the 25-year-old Cruz digitally penetrated her against her will. She stated that the next day she felt discomfort and observed blood when she urinated. When interviewed by police, Cruz admitted to the act of digital penetration, but claimed that the victim "came on to him," and blamed her for what had occurred.

The jury could reasonably infer from the evidence presented that Cruz subjected the victim to a sexual assault against her will or

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[1]See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[2]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).

under conditions in which he should have known that the victim was mentally or physically incapable of resisting or understanding the nature of his conduct.[3] We will not disturb the jury's verdict where, as here, substantial evidence supports the verdict.[4]

Cruz also contends that his conviction for attempted sexual assault cannot stand because his statements to the victim do not constitute an act toward the commission of sexual assault. He argues that because he obliged to the victim's requests not to engage in sexual intercourse, there is insufficient evidence to support his conviction. Cruz contends that to uphold his conviction would be to criminalize the acts of "countless men who are told 'no' when they request intercourse."

An "attempt" is "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it."[5] "Specifically, to prove attempted sexual assault, the prosecution must establish that (1) appellant intended to commit sexual assault; (2) appellant performed some act toward the commission of the crime; and (3) appellant failed to consummate its commission."[6] In Nevada, when intent to commit a crime is clearly shown, there need only be slight acts in furtherance of the crime to constitute an attempt.[7]

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[3]See NRS 200.366(1).

[4]See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[5]NRS 193.330(1).

[6]Bell v. State, 105 Nev. 352, 354, 775 P.2d 1273, 1274 (1989).

[7]Larsen v. State, 86 Nev. 451, 454, 470 P.2d 417, 419 (1970).

In State v. Pierpoint, this court stated that "[m]ere indecent advances, solicitations, or importunities do not amount to an attempt."[8] Nevertheless, we upheld a conviction for attempted sexual assault where a 23-year-old man convinced a 13-year-old girl to get in bed with him and asked her to have sex. In doing so, we stated that even though the above rule regarding "mere indecent advances, solicitations, or importunities" applies to children below the age of consent, "nevertheless we are of the opinion that the indictment in this case sufficiently charges an overt act, to wit, procuring the child to get in bed with the defendant, which, together with the alleged solicitation, is sufficient to constitute a sufficient charge under the statute."[9]

Here, the victim testified that Cruz expressed his intent to rape her. Evidence shows that Cruz had already sexually assaulted the victim, fondled her, and compelled her to fondle him, before repeatedly requesting that she engage in intercourse with him. Even if Cruz decided not to proceed due to the victim's persistent refusals, a jury would not be precluded from finding that he intended to commit sexual assault, that he performed an act in furtherance of the crime, and that he abandoned his plan. We conclude that there was sufficient evidence of overt acts in conjunction with Cruz's repeated propositions for a rational juror to find beyond a reasonable doubt that he was guilty of attempted sexual assault

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[8]38 Nev. 173, 174, 147 P. 214, 214 (1915); see Bell, 105 Nev. at 354, 775 P.2d at 1275 (applying Pierpoint).

[9]Pierpoint, 38 Nev. at 174-75, 147 P. at 214.

of a minor. Therefore, we conclude that no relief is warranted on this claim.

Lesser included offense instruction

Second, Cruz argues that the district court violated the United States and Nevada Constitutions when it refused to give an instruction on open or gross lewdness as a lesser included offense of lewdness with a minor. Cruz contends that the common law crime of open or gross lewdness does not require that the criminal act appeal to or gratify the lust, passion, or sexual desires of either party, and thus it is a lesser included offense of lewdness with a minor and he was entitled to a jury instruction to that effect.

A "district court has broad discretion to settle jury instructions," and we will review "the district court's decision for an abuse of that discretion or judicial error."[10] "'An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.'"[11] A "'defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'"[12] In Barton v. State,[13] we determined that lesser included offenses would be

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[10]Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

[11]Id. (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

[12]Rosas v. State, 122 Nev. 1258, 1264, 147 P.3d 1101, 1105-06 (2006) (quoting Keeble v. United States, 412 U.S. 205, 208 (1973)).

[13]117 Nev. 686, 30 P.3d 1103 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006).

determined by the Blockburger[14] test. Under the Blockburger test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense."[15]

Open or gross lewdness is a common law crime historically defined as "'unlawful indulgence of lust involving gross indecency with respect to sexual conduct' committed in a public place and observed by persons lawfully present."[16] The crime no longer requires that the conduct be observed by someone, but merely that it occurred in an open fashion or in a place typically open to the public.[17] This element of "openness" is not included in the crime of lewdness with a child,[18] which can be completed in a secretive manner.[19] Because open and gross lewdness includes an element that lewdness with a child does not, we conclude that open and gross lewdness is not a lesser included offense of lewdness with a child under 14 years.

Cruz argues that there is an alternative distinction between the two crimes that justifies his request for a lesser-included-offense

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[14]Blockburger v. U.S., 284 U.S. 299 (1932).

[15]Barton, 117 Nev. at 692, 30 P.3d at 1107.

[16]Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993) (quoting 3 Wharton's Criminal Law § 315 (14th ed. 1980); 50 Am.Jur.2d Lewdness, Indecency and Obscenity § 1 (1970)).

[17]Id.

[18]NRS 201.230(1).

[19]We note that here, Cruz told the victim not to tell anyone about the sexual activity.

instruction. Cruz contends that open or gross lewdness does not have the intent element required for lewdness with a child: the intent to arouse, appeal to, or gratify the lusts, passions, or sexual desires of one of the parties.[20] He argues that the jury should have had the opportunity to convict him of open or gross lewdness if it determined that the State had not met its burden to prove that he acted with an intent to arouse himself or the victim. Essentially, Cruz claims that the term "indulgence of lust" in the common law definition of open or gross lewdness is not a requirement that the prohibited conduct be made with an intent to arouse either a perpetrator or a victim.

This court has not previously addressed this specific issue. In Young v. State, we determined that public sexual conduct is not criminal unless it is intentional.[21] However, that decision did not address the nature of that intent or the specific question of whether the "indulgence of lust" element of the crime of open or gross lewdness equates to a requirement of sexual motivation. The word "indulge" means "to give free rein to," "to take unrestrained pleasure in," or "to yield to the desire of."[22] "Lust" is defined as an "intense or unbridled sexual desire," "to have an intense desire or need," or "to have a sexual urge."[23] Therefore, the plain language of the term "indulgence of lust" refers to a person giving in to a sexual urge or desire, indicating that the crime does include an element of

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[20]See NRS 201.230(1).

[21]109 Nev. at 215, 849 P.2d at 343.

[22]Merriam Webster's Collegiate Dictionary 594 (10th ed. 1995).

[23]Id. at 694.

sexual motivation. The term "lewd" is itself defined as "sexually unchaste or licentious,"[24] "[o]bscene or indecent; tending to moral impurity or wantonness."[25]

Other jurisdictions have examined the common law meaning of "lewd," "lewdly," or "lewdness." In In re Smith, the California Supreme Court was asked to determine whether a person who sunbathed nude on a remote but public beach was guilty of exposing himself "willfully and lewdly."[26] Just as in Nevada, the statute punishing lewdness with a child defined the requisite intent as "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the persons involved." However, just as here, the California court found no case law defining the term "lewdly" for purposes of the general lewdness statute. After reviewing California case law applying the statute, the California Supreme Court concluded that "the rule clearly emerges that a person does not expose his private parts 'lewdly' within the meaning of [the California statute] unless his conduct is sexually motivated."[27]

In State v. Meyer, the Oregon Court of Appeals was faced with a vagueness challenge to two of Oregon's criminal statutes, one of which prohibited "[l]ewd exhibition of genitals or anus."[28] The term "lewd" was not defined by the statute. Turning to the dictionary definitions of the

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[24]Id. at 669.

[25]Black's Law Dictionary 927 (8th ed. 2004).

[26]497 P.2d 807 (Cal. 1972).

[27]Id. at 810.

[28]852 P.2d 879, 882 (Or. 1993).

word "lewd," the court stated that "[a]lthough the various definitions may not be identical, . . . [a]n examination of the definitions discloses that 'lewd' refers to sexually motivated conduct."[29] The court determined that the phrase "lewd exhibition of the genitals or anus" referred to "exhibition with the intent of stimulating the lust or sexual desires of the person who views it."[30]

Finally, in City of Seattle v. Buchanan, the Washington Supreme Court was faced with a constitutional challenge to a Seattle city ordinance that proscribed the exposure of female breasts as "lewd conduct."[31] The five appellants had been convicted in a municipal court for swimming and sunbathing topless. The appellants argued that their conduct was not "lewd" within the common law meaning of the word.[32] The majority rejected that argument based on the rule that "the legislature may define a word, giving it a broader meaning than its ordinary meaning."[33] Three justices dissented, and argued that "both the legal and lay definitions of 'lewd conduct' consistently require more than exposure of the body."[34] They went on to state that the term "lewd," "is

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[29]Id. at 883.

[30]Id. at 884.

[31]584 P.2d 918, 918-19 (Wash. 1978).

[32]Id. at 927-28.

[33]Id. at 928.

[34]Id. at 932 (Utter, J., dissenting).

intended, given its ordinary meaning, to describe conduct calculated to arose [sic] sexual desire or excite prurient interests."[35]

Consistent with the analysis in those cases and the ordinary meaning of the "lewd," we conclude that the element of "an unlawful indulgence of lust" in the common law definition of open or gross lewdness encompasses an act intended to arouse or appeal to a person's passions or sexual desires, and proscribes conduct that is sexually gratifying to the actor or the victim. Therefore, we further conclude that lewdness with a minor does not include an intent element not reflected in the crime of open or gross lewdness—both require sexual motivation.

However, even if we assume that all of the elements of open or gross lewdness are included in the offense of lewdness with a minor, the district court did not err by not giving a lesser-included-offense instruction to the jury. A defendant is not entitled to an instruction on a lesser included offense in situations where "'the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense.'"[36] If all of the elements of open or gross lewdness are included in the crime of lewdness with a child, the additional elements rendering lewdness with a child the "greater" offense are the requirements that the act is "upon or with the body, or any part or member thereof, of a child" and that the victim is "under the age of 14

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[35]Id. at 933.

[36]Rosas v. State, 122 Nev. 1258, 1265, 147 P.3d 1101, 1106 (2006) (quoting Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966)).

years."[37] There was no evidence presented at trial that the victim was over 14 years of age, and the defendant admitted to the acts with which he was charged. Because no evidence was presented to lessen the proof of these two elements and thus reduce the greater offense, we conclude that the district court acted within its discretion by denying the requested instruction.

Evidence of other sexual conduct or allegations of misconduct

Finally, Cruz argues that the district court violated his constitutional rights and denied him a fair trial when it determined that the victim's statement to a sexual assault nurse that a "12-year-old or 16-year-old boy [had] touched the top of her pants and private area" was inadmissible. The rape shield statute prohibits the presentation of "evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct."[38] In Miller v. State, we held that prior false accusations of sexual abuse or sexual assault are excepted from the statute provided that the defense first files written notice of intent to cross-examine the complaining witness regarding the prior false accusations.[39] Further, the defense "must establish by a preponderance of the evidence," outside the presence of the jury, "that (1) the accusation or accusations were in fact made; (2) that the accusation or accusations were

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[37]NRS 201.230(1).

[38]NRS 50.090.

[39]105 Nev. 497, 501-02, 779 P.2d 87, 89-90 (1989).

in fact false; and (3) that the evidence is more probative than prejudicial."[40] "The trial court has sound discretion to admit or exclude evidence of a victim's prior false allegations or prior sexual experiences."[41]

Following the presentation of opening statements and outside the presence of the jury, Cruz inquired about the victim's statement to the SAINT nurse. In particular, Cruz informed the district court that he desired admission of the victim's statement to show that "she's made prior allegations." The district court determined that the statement was protected by the rape shield law and therefore inadmissible. Cruz never filed written notice, pursuant to Miller, of an intent to cross-examine the victim in this regard, and thus never properly moved for admission of evidence of the victim's prior claims.[42] Nor did he request a Miller hearing. A defendant's Sixth Amendment right to confrontation is not violated by a refusal to permit cross-examination regarding prior accusations or sexual abuse when the defendant has not met his burden at a Miller hearing.[43] Most importantly, Cruz did not allege nor offer any evidence that the victim's statement was false. And the victim never "opened the door" regarding the evidence by testifying to the absence of prior sexual conduct. Therefore, we conclude that Cruz failed to demonstrate that the district court abused its discretion in this regard.

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[40]Id. at 502, 779 P.2d at 90.

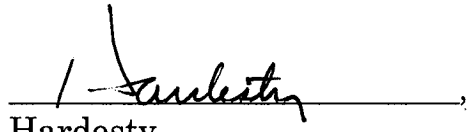
[41]Abbott v. State, 122 Nev. 715, 732, 138 P.3d 462, 473 (2006).

[42]See id.

[43]Brown v. State, 107 Nev. 164, 168-69, 807 P.2d 1379, 1382 (1991).

Having considered Cruz's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.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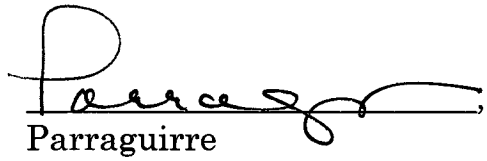
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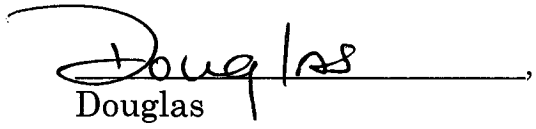
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Douglas

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Clark County Public Defender Philip J. Kohn
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Clark County District Attorney David J. Roger
Eighth District Court Clerk