IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY EUGENE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49634

FILED

APR 10 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 one count of lewdness with a child under the age of 14 years. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. The district court sentenced appellant Larry Eugene Smith to serve a term of life in prison with the possibility of parole after 10 years.

Smith argues that his conviction should be reversed upon four bases. First, Smith argues that there was insufficient evidence to prove the element of intent. Smith contends that the evidence presented to the jury was insufficient to prove that he touched the victim with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child. In particular, Smith contends that the evidence presented at trial was that he was "curious," rather than seeking sexual gratification from touching the victim.

This court will not overturn a verdict on appeal if it is supported by sufficient evidence.[1] "There is sufficient evidence if the

[1]Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998).

evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."[2] Additionally, "'it is for the jury to determine what weight and credibility to give various testimony.'"[3] Further, "[i]ntent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."[4]

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. In particular, the victim testified to Smith's actions leading up to the touching and the actual touching and that Smith asked her not to tell anyone. Additionally, Smith admitted to the touching in the interview with Detective Eric Stroshine. Although Smith argues that being "curious" does not confer the necessary intent for a conviction, it is for the jury to determine the inferences that may be made from the evidence. We conclude that a rational jury could infer the requisite intent from the evidence adduced at trial.

Second, Smith challenges the district court's denial of a motion for mistrial because one witness vouched for the credibility of another witness and stated her opinion that Smith committed the acts at issue. At trial, Martha Smith, Smith's wife and the victim's grandmother, stated

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[2]Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[3]Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (quoting Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994)).

[4]Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (citing Mathis v. State, 82 Nev. 402, 406, 419 P.2d 775, 777 (1966)).

that upon hearing of the abuse, she "knew it actually happened. I believe her." She further stated that Larry Smith "should have kept his hands to himself. He shouldn't have never touched her, not a little girl . . . . Not a little girl." Smith objected to the statements, and the district court instructed the jury to disregard them. Smith made a motion for mistrial, and the district court reserved ruling until the close of evidence. Upon the close of evidence, the district court denied the motion, stating that while it was a close case, the evidence was "sufficiently strong" to allow the trial to continue.

Both parties agree that the challenged statements were improper. When a motion for mistrial regarding a witness' improper statements has been denied, the "appellant must prove that the 'inadvertent statement was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury.'"[5] The denial of a motion for mistrial will not be disturbed on appeal absent a clear showing of abuse of discretion.[6] We conclude that Smith has failed to show that the statements by Martha Smith meet that level of prejudice. While the statements were improper, the jury was admonished to disregard them and the statements were not referred to again. Additionally, Smith admitted to touching the victim during the interview with Detective Stroshine; therefore, Martha Smith's statements that she believed that the touching occurred did not unduly prejudice Smith. Therefore, we

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[5]Parker v. State, 109 Nev. 383, 388, 849 P.2d 1062, 1065 (1993) (quoting Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983)).

[6]Id. at 388-89, 849 P.2d at 1066.

conclude that the district court did not abuse its discretion in denying the motion for mistrial.

Third, Smith contends that the statutorily mandated reasonable doubt instruction given in this case is unconstitutional.[7] In particular, Smith argues that the instruction improperly quantifies reasonable doubt by forcing the jurors to undertake an improper risk taking analysis. This court has repeatedly upheld the statutory reasonable doubt instruction against similar constitutional challenges.[8] Accordingly, we decline Smith's invitation to revisit this issue.

Fourth, Smith argues that the prosecutor's closing argument diluted the reasonable doubt standard. In particular, Smith challenges the prosecutor's statement that "[r]easonable doubt is one that answers the totality of the evidence." Smith concedes that no objection to the statement was made at trial, but argues that misstating the reasonable doubt standard should be reviewed for plain error. We conclude that Smith has failed to demonstrate that the prosecutor's comments affected his substantial rights or prejudiced him in any way amounting to reversible error.[9] When the challenged statement is viewed in context, the prosecutor simply argued that the jury should consider all of the evidence in determining whether reasonable doubt as to Smith's guilt existed. We

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[7]See NRS 175.211.

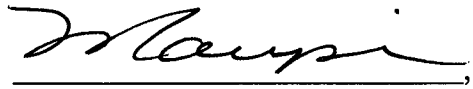
[8]See, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995).

[9]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

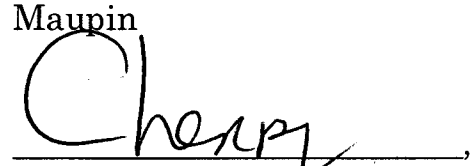
further note that the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence and that the jury was properly instructed on the reasonable doubt standard. Therefore, we deny relief on this claim.

Having considered Smith's contentions and concluded that they are without merit, we

ORDER the judgment conviction AFFIRMED.



_____, J.
Maupin



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Robert H. Perry, District Judge
Washoe County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk