IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID J. TIFFANY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49817

FILED

APR 13 2010

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 two counts of lewdness with a child under the age of 14, eight counts of sexual assault of a minor under the age of 14, three counts of solicitation of a minor to engage in acts constituting infamous crimes against nature, and five counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

The charges in this case stem from appellant David J. Tiffany's sexual abuse of T.T., the solicitation of J.M. to engage in sexual acts, and the abuse and neglect of T.T., J.M., and three other minors. On appeal, Tiffany argues that: (1) the district court erred when it denied his motion for fees to hire an investigator; (2) the district court abused its discretion when it set and maintained bail at $570,000; (3) his constitutional right to a speedy trial was violated; (4) the State suppressed evidence favorable to him; (5) the district court abused its discretion when it denied his motion for a psychological examination of T.T.; (6) the district court abused its discretion when it denied his motion for a mistrial and refused to give a curative instruction with respect to Detective Lomprey's testimony; and (7) the verdict was not supported by sufficient evidence.

We conclude that the district court abused its discretion when it denied Tiffany's motion for fees to hire an investigator, but determine

that the error was harmless beyond a reasonable doubt due to the overwhelming evidence presented at trial. We further conclude that Tiffany's remaining arguments are without merit. As the parties are familiar with the facts, we do not recount them except as necessary to our disposition.

Tiffany's motion for fees to hire an investigator

Tiffany argues that the district court erred in denying his motion for fees to hire an investigator.

Pursuant to NRS 7.135, counsel appointed by the district court to represent a defendant may employ, subject to the district court's prior approval, "such investigative, expert or other services as may be necessary for an adequate defense." We review a district court decision to grant or deny fees for an investigator for an abuse of discretion. State v. District Court, 85 Nev. 241, 245, 453 P.2d 421, 423-24 (1969). Where a district court abuses its discretion, we will not overturn a judgment if the error is harmless. Williams v. State, 121 Nev. 934, 948, 125 P.3d 627, 636 (2005). An error is harmless when it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,'" Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000) (quoting Neder v. United States, 527 U.S. 1, 18 (1999)), or when the evidence of guilt is overwhelming. Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002).

We determine that the district court abused its discretion in denying Tiffany's motion for fees to hire an investigator. We conclude, however, that the error was harmless beyond a reasonable doubt given the overwhelming evidence of guilt presented at trial.

The State presented overwhelming evidence of Tiffany's sexual abuse of T.T. K.T. testified that T.T. would spend the night in

Tiffany's bedroom and that T.T. would occasionally be at the house when she was not there. She testified that one day when she came home, T.T. was in Tiffany's bedroom with the door locked. She testified that upon trying to enter the room she could hear Tiffany putting his belt on. She also testified that T.T. told her that he engaged in sexual acts with Tiffany in exchange for cigarettes. T.T. testified about the specific times Tiffany would touch his penis and perform fellatio on him. He testified that he felt violated when Tiffany performed fellatio on him, but that Tiffany forced and threatened him to allow the act. T.T. testified that he performed the sexual acts in exchange for cigarettes. Detective Lomprey also testified that Tiffany admitted to buying cigarettes for T.T.

The State also presented overwhelming evidence of Tiffany's solicitation of J.M. to engage in sexual acts. K.T. testified that J.M. told her that Tiffany had propositioned him for fellatio. She testified that she observed Tiffany making signals to J.M. that simulated oral sex. J.M. testified that Tiffany propositioned him on two separate days, but on one of those days he had asked him repeatedly. K.D. corroborated K.T.'s and J.M.'s testimony.

Lastly, the State presented overwhelming evidence of Tiffany's child abuse and neglect of K.T., J.M., T.T., K.D., and C.J. All five minors testified that they smoked marijuana in Tiffany's presence. Detective Lomprey also testified that Tiffany admitted to smoking marijuana with all five minors.

Accordingly, although we determine that the district court abused its discretion when it denied Tiffany's motion for fees to hire an investigator, we conclude that the district court's error was harmless

beyond a reasonable doubt given the overwhelming evidence of guilt presented at trial.

The $570,000 bail

Tiffany asserts that the district court abused its discretion when it set and maintained his bail at $570,000. He argues that the amount was excessive and that the district court did not properly consider what constitutes appropriate bail.

Pursuant to NRS 178.498, bail must be sufficient to reasonably ensure the defendant's appearance in court and the community's safety, giving consideration to the factors listed therein. In determining whether there is good cause to release a defendant without bail, a district court must consider the factors set forth in NRS 178.4853. NRS 178.498(4). We review the district court's decision to set and maintain bail at $570,000 for an abuse of discretion. See generally Bergna v. State, 120 Nev. 869, 873, 102 P.3d 549, 551 (2004); NRS 178.498.

The record establishes that the district court properly considered the factors set forth in NRS 178.4853 and NRS 178.498. The district court took into account that Tiffany had been charged with eight counts of sexual assault with a minor under 14 years of age, three counts of solicitation of a minor to engage in acts constituting an infamous crime against nature, and seven counts of child abuse and neglect. The district court considered that the alleged sexual abuse occurred in connection with alcohol and marijuana, and, further, considered the possible length of his prison sentence. The district court also considered that Tiffany had been a resident of Clark County for 12 years, had letters of support from friends, was unemployed, and was receiving social security disability payments. Lastly, the district court considered that Tiffany had a 2003 malicious destruction of property charge where he failed to appear.

Therefore, we conclude that the district court did not abuse its discretion in setting Tiffany's bail at $570,000, in light of the charges and factors contained in NRS 178.4853 and NRS 178.498.

Sixth Amendment right to a speedy trial

Tiffany contends that he was denied his constitutional right to a speedy trial because the State deliberately withheld crucial information and evidence, which ultimately forced him to request a continuance. Tiffany argues that he was prejudiced by the delay because it caused potential defense witnesses and the victims to forget and not accurately recall events from the past.

The Sixth Amendment right to a speedy trial attaches when a defendant is arrested, indicted, or charged in a criminal complaint. Sheriff v. Berman, 99 Nev. 102, 106, 659 P.2d 298, 301 (1983). We consider four factors in determining whether a defendant was denied the right to a speedy trial: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant from the delay." Id. (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). "The[se] four . . . factors must be considered together, and no single factor is either necessary or sufficient." Id. at 107, 659 P.2d at 301.

With respect to the fourth factor, "[w]hile a showing of prejudice to the defense is not essential, courts may weigh such a showing (or its absence) more heavily than other factors." Id. We assess whether the delay prejudices the defendant in light of the purpose of guaranteeing a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532. A defense is prejudicially impaired by a delay "if defense witnesses are unable to recall accurately events of the distant past." Id. However,

"[b]are allegations of impairment of memory, witness unavailability, or anxiety, unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice." Berman, 99 Nev. at 107, 659 P.2d at 301.

Here, just over two years elapsed between Tiffany's arrest in November of 2004 and the start of his trial in January of 2007. The district court continued Tiffany's trial on three occasions. Two of the continuances were requested by Tiffany, while the district court continued the trial a third time due to court congestion. Tiffany initially waived his right to a speedy trial, but later asserted it in August of 2006.

Lastly, Tiffany fails to demonstrate a reasonable possibility that the defense was impaired or suffered significant prejudice by the delay. There is no evidence that the State withheld exculpatory evidence. Rather, our review of the record shows that Tiffany requested the evidence in June of 2005. The State informed Tiffany that they would provide him with the evidence as soon as they acquired it and ultimately did so approximately one and a half months later. Furthermore, we determine that there is no evidence to support Tiffany's contention that the delay resulted in memory loss for key witnesses. The pretrial interviews and preliminary hearing transcripts were available for Tiffany to impeach witnesses about any inconsistencies in their testimony. Tiffany also does not allege any specific exculpatory details the witnesses would have testified to if the trial had occurred sooner. Accordingly, we conclude that Tiffany was not denied his right to a speedy trial.

Brady violation

Tiffany argues that the State suppressed evidence favorable to him in violation of Brady v. Maryland, 373 U.S. 83 (1963). Tiffany asserts

(1) that the district court erred when it denied his motion requesting that the State videotape all discussions with juvenile witnesses and (2) that the State suppressed material information because it did not produce T.T. and J.M.'s juvenile records.

We review alleged Brady violations de novo. Lay v. State, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000). Brady requires that the State "disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment." Id. at 1194, 14 P.3d at 1262. "'[T]here are three components to a Brady violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.'" State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (alteration in original) (quoting Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)). Brady violations, however, cannot be based on speculation. Strickler v. Greene, 527 U.S. 263, 286 (1999).

Further, "[i]f a defendant makes no request or only a general request for information, the evidence is material when a reasonable probability exists that the result would have been different had it been disclosed." Bennett, 119 Nev. at 600, 81 P.3d at 8. "A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial." Lay, 116 Nev. at 1194, 14 P.3d at 1262. Conversely, "if the defense request is specific, the evidence is material upon the lesser showing that a reasonable possibility exists of a different result had there been disclosure." Bennett, 119 Nev. at 600, 81 P.3d at 8.

With respect to Tiffany's request that the State videotape all juvenile witnesses, we conclude that Tiffany has not demonstrated that the State violated Brady by suppressing material or exculpatory evidence.

Tiffany has not identified any evidence that the State failed to disclose. Notably, Tiffany does not allege that the State withheld any formal memorialized statements made by juvenile witnesses.

We also conclude that the State did not suppress material information with respect to T.T.'s juvenile record. Tiffany has not established that T.T. had a juvenile record at the time he was interviewed by Detective Lomprey. Rather, the record demonstrates the opposite. At trial, the State specifically stated on the record that T.T. did not have a juvenile record. Further, no prejudice ensued because Tiffany was permitted to cross-examine T.T. about any potential bias and his relationship with Detective Lomprey.

Lastly, we conclude that no Brady violation occurred with respect to J.M.'s juvenile record. After reviewing the record, we determine that Tiffany failed to request J.M.'s juvenile record. Accordingly, under the applicable law, J.M.'s juvenile record is considered material only if there is a reasonable probability that the result would have been different had the juvenile record been disclosed. Prior to trial, J.M. had a pending juvenile case concerning violence, dishonesty, and narcotic use. At trial, Tiffany cross-examined J.M. about his drug use. Tiffany also questioned K.T. and C.J. about J.M.'s truthfulness. C.J. testified that she considered J.M. to be truthful. K.T. testified that while J.M. might lie about some things, she did not believe he had a reason to lie about Tiffany propositioning him. Therefore, because Tiffany presented evidence regarding J.M.'s drug use and truthfulness, two of the issues in J.M.'s pending criminal case, we conclude that it is not reasonably probable that the result would have been different had the juvenile record been disclosed.

Accordingly, we conclude that Tiffany's arguments are without merit because the State did not violate Brady.

Psychological examination

Tiffany argues that the district court abused its discretion when it denied Tiffany's request for a psychological examination of T.T.

Pursuant to Eighth District Court Rule (EDCR) 3.20(a), "all motions must be served and filed not less than 15 days before the date set for trial. The court will only consider late motions based upon an affidavit demonstrating good cause and it may decline to consider any motion filed in violation of this rule."

We determine that Tiffany failed to comply with EDCR 3.20(a). Tiffany filed his motion for a psychological exam of T.T. on the first day of trial and did not support it with affidavits showing good cause for the late filing. Accordingly, we conclude that the district court did not err in denying Tiffany's request.

Detective Lomprey's testimony

Tiffany argues that the district court erred by denying his motion for a mistrial based upon Detective Lomprey's testimony about a possible third victim. In the alternative, Tiffany asserts that the district court should have granted his motion for a curative instruction admonishing the jurors.

We review a district court's decision to deny a motion for a mistrial for abuse of discretion. Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). "[T]he trial court is justified in denying a motion for a mistrial when a witness inadvertently makes reference to other unrelated criminal activity as long as the testimony is not clearly and enduringly prejudicial and has not been solicited by the prosecution." Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 242 (1983). We also review a district

court's decision regarding jury instructions for abuse of discretion. Rose v. State, 123 Nev. 194, 204-05, 163 P.3d 408, 415 (2007). A district court may properly refuse a jury instruction when other submitted instructions adequately address the point of law in question. Id. at 205, 163 P.3d at 415.

At issue here is Detective Lomprey's response to a juror question. The following is the exchange at issue:

> THE COURT: Were there any other boys that were questioned in this investigation other than [T.T.] and [J.M.]?
>
> [Detective Lomprey:] I believe there was one other.
>
> [The State:] And who was that other if you will?
>
> [Detective Lomprey:] I believe his last name was [McG.] (phonetic).
>
> Do you want me to continue?
>
> I had filed charges with the District Attorney's Office--
>
> [The State:] Actually, that's—
>
> [Defense Counsel:] I'll object. Move to strike.
>
> THE COURT: Okay. That will be stricken.

The district court granted Tiffany's motion to strike. Outside the presence of the jury, Tiffany moved for a mistrial or curative instruction. The district court found that the exchange was not prejudicial based on its determination that Detective Lomprey's statement implied that charges were brought against this other boy—not Tiffany. Therefore, it also denied Tiffany's motion for a curative instruction.

Our review of the record shows that Tiffany has failed to present any evidence that he was clearly and enduringly prejudiced. The

question was asked by a juror. The State's follow-up and Detective Lomprey's subsequent answer were stricken from the record. Moreover, Detective Lomprey was cut off in mid-sentence; he never said that he filed charges against Tiffany as a result of speaking with this other minor.

Because we determine that there was no prejudice and the district court acted within its discretion when it denied Tiffany's motion for a mistrial, a curative instruction was not needed.

Sufficient evidence

Tiffany challenges the jury's verdict, asserting that there was insufficient evidence to convict him of sexual assault, child abuse, and solicitation.

An accused may not be convicted of a crime unless the State proves beyond a reasonable doubt "each fact necessary to constitute the crime with which he is charged." See Rose, 123 Nev. at 202, 163 P.3d at 414. In reviewing challenges to the sufficiency of the evidence on appeal, we ask ""'whether, 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.'"" Id. (quoting Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984))). It is the jury's function to assess the weight of the evidence and credibility of the witnesses. Id. at 202-03, 163 P.3d at 414.

We conclude, in viewing the evidence in the light most favorable to the prosecution, that a rational trier of fact could have found T.T.'s lack of consent. T.T. was 12 years old at the time of the sexual abuse. He testified that he felt "violated" when Tiffany performed fellatio on him and that one time, when he awoke to Tiffany touching his penis, he pretended to stay asleep because he worried that if he woke up, "things

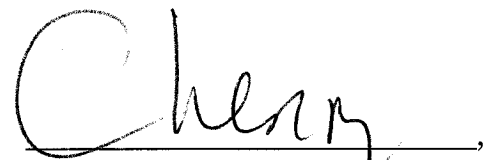
bad would happen, go crazy." T.T. also testified that he was forced and threatened by Tiffany to allow him to perform fellatio.

We also conclude that a rational trier of fact could have found that Tiffany committed child abuse and neglect of five minors. K.T., J.M., T.T., K.D., and C.J. all testified that they smoked marijuana in Tiffany's presence. Detective Lomprey also testified that Tiffany admitted to smoking marijuana with all five minors.

Lastly, we conclude that a rational trier of fact could have found that Tiffany solicited J.M. for fellatio on three occasions. J.M. testified that Tiffany had propositioned him for fellatio on two separate days, but on one day asked him repeatedly. K.T. and K.D. corroborated J.M's testimony.

Having considered Tiffany's claims and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



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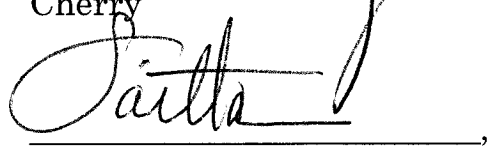
Cherry



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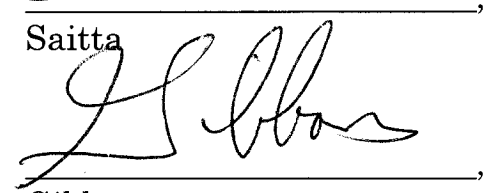

_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk