IN THE SUPREME COURT OF THE STATE OF NEVADA

OSVALDO LOPEZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49821

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder, one count of child abuse and neglect with substantial bodily harm, and one count of child abuse and neglect. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant raises five arguments on appeal. Having considered each argument, we find that appellant's main challenge to testimony concerning the deceased victim's accusations against him merits discussion.[1] Appellant complains of three instances in which the district court allowed the State to introduce the deceased victim's accusations. Specifically, the accusations were admitted through an investigator's

[1]Appellant makes several additional assertions on appeal: (1) the State improperly joined the offenses against the deceased victim and her brother, (2) there was insufficient evidence to convict of child abuse and neglect, (3) the improper admission of sexual abuse evidence prevented appellant from receiving a fair trial, and (4) cumulative error warrants reversal. Having considered these arguments, we conclude they are without merit.

testimony, during cross-examination of appellant and his medical expert witness, and through the testimony of the victim's mother's friend. It is appellant's contention that these statements were inadmissible hearsay and their admission violated his rights under the Sixth Amendment Confrontation Clause. We disagree and affirm on the grounds that the accusations were properly admitted under NRS 51.035(2)(a), 51.315(1), and 51.385.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. McLellan v. State, 124 Nev. _, _, 182 P.3d 106, 109 (2008); see Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006), U.S. v. Bland, 961 F.2d 123, 126 (9th Cir. 1992).

NRS 51.035 defines hearsay as an out-of-court "statement offered in evidence to prove the truth of the matter asserted." However, subsection 2(a) of that statute also excludes from the hearsay definition a statement that is inconsistent with a declarant's testimony if the declarant is subject to cross-examination concerning the statement. Additionally, in Crowley v. State, we held that "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a)." 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). Prior inconsistent statements are not hearsay and may be admitted both substantively and for impeachment. Id.

NRS 51.315(1) also provides a hearsay exception when the nature and special circumstances under which the statement was made offer strong assurances of accuracy and the declarant is unavailable as a witness. NRS 51.385 provides further guidance for situations in which the

statement is made by a child less than 10 years of age and the statement describes an act of physical or sexual abuse. In determining the trustworthiness of such a statement, the court considers whether: (1) the statement was spontaneous, (2) the child was subject to repeated questioning, (3) the child had a motive to fabricate, (4) the child used terminology unexpected of a child of similar age, and (5) the child had a stable mental state. NRS 51.385(2)(a)–(e).

In Crawford v. Washington, the United States Supreme Court held that the Sixth Amendment Confrontation Clause applies to out-of-court testimonial statements introduced at trial, regardless of admissibility under the rules of evidence, when the declarant does not testify at trial. 541 U.S. 36, 50-51 (2004). The only exception is when the declarant is unavailable and there has been a prior opportunity for cross-examination. Id. at 59. Statements are testimonial if they are made in preparation for trial or if they "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 52.

The victim in this case, an almost three-year-old child, was frequently seen by family and friends with noticeable bruises on her body. After the victim's death, a civilian abuse and neglect investigator with the Las Vegas Metropolitan Police Department met with the mother. The investigator learned from the mother that the victim never wanted to sit next to the appellant at dinner and that the victim always responded to inquiries about her bruises by saying appellant caused them.

During cross-examination by appellant's counsel, the mother testified, however, that the victim really liked the appellant, that she never saw the appellant do anything physical to the victim and that

anytime the victim got a "boo boo" or "owie," the victim would be forthcoming with her about what happened. When asked if she thought the victim ever held anything back about her bruises, the mother said "no." At no time during the cross-examination did the mother say what she told the investigator about who the victim said caused the bruises.

The State then offered the investigator's testimony. However, it prefaced the testimony with the explanation that it was being offered to impeach the mother because she had testified in a manner inconsistent with what she had previously told the investigator. The investigator then testified that the mother told her that the victim had said on multiple occasions that the appellant had caused her bruises. She also revealed that the mother said the victim never wanted to sit next to appellant at the dinner table. Appellant objected on the grounds that the testimony was double hearsay.

The first level of alleged hearsay is the mother's out-of-court statement to the investigator. Here, we conclude that the mother's cross-examination by appellant's counsel opened the door to the investigator's testimony. The mother's responses on cross-examination were inconsistent with her previous statements and exhibited deliberate attempts to evade revealing what she formerly told the investigator. Since the mother had previously made a statement that was inconsistent with her trial testimony, the State had the right to produce evidence of the inconsistency with the investigator's testimony. Accordingly, we determine that the first level of alleged hearsay is not hearsay at all; instead, it falls under the NRS 51.035(2)(a) exclusion for prior inconsistent statements.

The second level of alleged hearsay is the victim's out-of-court statements to her mother. Here, the victim's statements that appellant caused her injuries were nontestimonial because they were not made as part of an ongoing investigation or in preparation for trial. Similarly, the victim could not have anticipated that the statements would be used at trial. Moreover, under NRS 51.385, the victim's statements had adequately strong assurances of trustworthiness. Although the victim was questioned about her bruises, the questions did not implicate or suggest the appellant's involvement. Rather, the victim's accusations were spontaneous responses to open-ended questions. There is no indication that the victim had a motive to fabricate, used language unexpected for her age, or had an unstable mental state. Accordingly, this second layer of hearsay falls under the exceptions provided in NRS 51.315(1) and NRS 51.385 because the victim was unavailable and the accusations had strong assurances of trustworthiness. Additionally, since the accusations were nontestimonial, their admission does not violate the Sixth Amendment Confrontation Clause. See generally Pantano v. State, 122 Nev. 782, 790-91, 138 P.3d 477, 482-83 (2006).

Appellant next complains of alleged hearsay during the State's cross-examinations of appellant and his medical expert witness. In both instances, the State asked these witnesses if they were aware of the mother's prior statement that the victim told her appellant had caused the victim's bruises. Appellant's counsel failed to object to these questions. While failure to object during trial generally precludes appellate consideration, this court has the discretion to address an error if it was plain and affected the defendant's substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

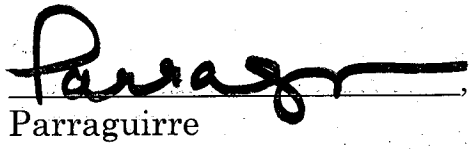
However, this questioning did not constitute plain error. The State contends that with respect to Dr. Plunkett, it did not offer the prior testimony for the truth of the matter asserted, but rather to question the foundation of his opinion. With respect to appellant, the State theorized that if he knew of the prior testimony but remained silent, his silence may have constituted an adoptive admission. Moreover, for the reasons already expressed, we hold that these statements were properly admitted under NRS 51.035, 51.315(1) and 51.385.

The final instance of alleged hearsay occurred during the direct examination of the mother's friend. She testified that during a conversation with the victim, she asked the victim how she got a bruise on her face. The witness then testified that the victim did not respond to the question but instead put her head down and then looked up at appellant without saying anything. Appellant again did not object to this testimony.

The admission of this testimony did not constitute plain error. Although nonverbal conduct intended as an assertion may fall under the definition of hearsay if offered to prove the truth of the matter asserted, it is not clear in this case that the victim's conduct was intended to assert anything. NRS 51.045(2); see also People v. Jurado, 131 P.3d 400, 438 (Cal. 2006). Even if the victim's conduct was hearsay, we conclude that the exceptions in NRS 51.315(1) and 51.385 would apply because the victim was not available, the statement was nontestimonial, and the same assurances of trustworthiness already discussed apply. Therefore, the victim's conduct was not inadmissible hearsay and the testimony about

the conduct did not violate appellant's rights under the Sixth Amendment Confrontation Clause. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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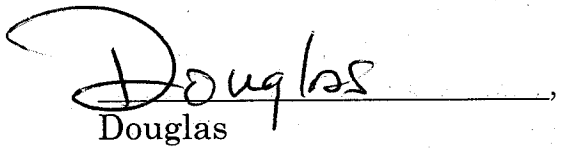
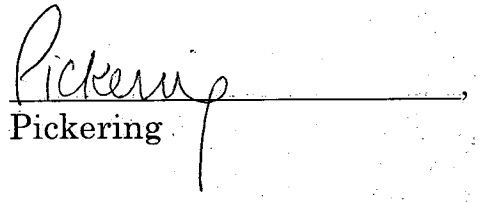
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 8, District Judge
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Eighth District Court Clerk