

IN THE SUPREME COURT OF THE STATE OF NEVADA

CODY THIEDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50164

FILED

DEC 14 2009

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault of a child under 14 years of age, lewdness with a child under 14 years of age, and first-degree kidnapping. Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge.

This case arises from an incident in which appellant Cody Thiede sexually assaulted the victim, S.C. On appeal, Thiede raises the following arguments: (1) the trial judge was not neutral and acted to further the State's case; (2) the prosecutor committed numerous acts of misconduct during opening and closing arguments; (3) the investigating officer Maribah Cowley, bolstered S.C.'s testimony and vouched for her veracity, but against Thiede's veracity; (4) the district court erred when it denied Thiede's motion for a mistrial; and (5) cumulative error warrants reversal. We conclude that: (1) the prosecutor committed misconduct during closing arguments; (2) Deputy Cowley's bolstering of S.C.'s testimony through prior consistent statements was harmful error; (3) the district court did not commit prejudicial error by denying Thiede's request for a mistrial after Cowley mentioned "other victims," but this improper statement did contribute to cumulative error; and (4) cumulative error warrants reversal of the judgment of conviction. Therefore, we reverse the

district court's judgment of conviction and remand for proceedings consistent with this order.

The parties are familiar with the facts of this case, and we do not recount them here except as necessary to our disposition.

DISCUSSION

I. The prosecutor committed misconduct during closing arguments by commenting on Thiede's constitutional right to remain silent

Thiede argues that the prosecutor committed several acts of misconduct, which warrant reversal. We agree with Thiede in part, concluding that the prosecutor did commit constitutional misconduct when he commented on Thiede's constitutional right to remain silent.

This court analyzes allegations of prosecutorial misconduct by determining whether the prosecutor's conduct was improper, and if so, whether it warrants reversal or is harmless error. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008). For constitutional errors, whether an error is harmless depends on whether the misconduct affects the defendant's constitutional rights. Id. If the misconduct affects the defendant's constitutional rights, then the State must demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. Id. For nonconstitutional errors, this court "will reverse only if the error substantially affects the jury's verdict." Id.

Thiede asserts that the prosecutor prejudicially commented on Thiede's refusal to take the witness stand and his refusal to answer Cowley's questions after his arrest. During closing arguments, the prosecutor stated: "And to see the Defendant sitting here with his head in his hands not looking at anybody, not participating in this, is significant." The defense counsel objected and the district court warned the prosecutor to "[b]e careful."

Prosecutorial statements about a defendant's constitutional rights, such as the right to remain silent, trigger the constitutional analysis. *Id.* at ___, 196 P.3d at 477. Thus, referencing the defendant's failure to testify is a constitutional violation, which warrants reversal. Griffin v. California, 380 U.S. 609, 612-14 & n.5 (1965).

The State argues that the prosecutor made the statement regarding Thiede's demeanor to highlight Thiede's disinterest during closing arguments. However, the portion stating "not participating in this" suggests that Thiede's refusal to take the witness stand is significant. The word "participat[e]" could refer to the fact that Thiede elected not to testify at trial.

Thus, we conclude that this statement constituted improper conduct on the part of the prosecutor. Under the constitutional analysis, the State's excuse does not demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. The State suggested that Thiede did not take the stand because he is guilty, and therefore, this error affected Thiede's constitutional right to remain silent. Further, there is a lack of overwhelming evidence in this case. Although S.C. testified against Thiede, other witnesses did not corroborate her testimony, there was other conflicting testimony, and the physical evidence was inconclusive without S.C.'s allegation. As a result, this error requires reversal and remand for a new trial.

II. Cowley's bolstering of S.C.'s testimony through prior consistent statements was harmful error

Thiede argues that the district court allowed Cowley to bolster S.C.'s testimony by testifying in graphic detail about Cowley's investigation, including hearsay statements made by S.C. Thiede did not

object to these statements, and therefore, this court reviews for plain error. Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

Under NRS 51.035(2)(b), a statement is not hearsay if the declarant testifies at trial, she is subject to cross-examination, and the prior consistent statement is “offered to rebut an express or implied charge against [the victim] of recent fabrication.” In Patterson v. State, 111 Nev. 1525, 1527, 907 P.2d 984, 985 (1995), the defendant was convicted of lewdness with a child under the age of 14 years. This court held that the district court’s admission of prior consistent statements was improper because the State failed to show that the victim made the statements before a motive to fabricate arose. Id. at 1533, 907 P.2d at 989. However, this court then held that the error was harmless because there was more than minimal independent evidence of guilt. Id. at 1533-34, 907 P.2d at 989-90.

Conversely, in Smith v. State, 100 Nev. 471, 472, 686 P.2d 247, 248 (1984), the defense alleged various reasons why the victim was lying, and the case rested almost entirely on the victim’s testimony. Over the defense’s objection, the district court admitted two hearsay statements regarding the victim’s prior consistent statements. Id. This court held that the lack of overwhelming evidence meant the admission of prior consistent statements through a law enforcement officer bolstered the victim’s testimony, which was a prejudicial error. Id. at 473-74, 686 P.2d at 249.

In this case, the defense highlighted during opening arguments S.C.’s prior inconsistent statements. Thus, Thiede implied that S.C. was lying about the incident from the very beginning. On the second day of trial, Cowley testified that during her first interview with S.C., S.C.

did not mention any penetration, but she was visibly shaking. Previously, the court had qualified Cowley as an expert in child sexual abuse and assault. Based on her expertise, Cowley concluded that S.C.'s shaking suggested there were more traumatizing details to her story. Cowley testified that she ended the first interview and then spoke with S.C.'s mother and sister. The sister stated that S.C. had told her that penetration occurred. As a result, Cowley followed up with S.C. and S.C. admitted that penetration had occurred.

Again, the State did not show that S.C. made the statement before a motive to fabricate arose. Although this court reviews Thiede's argument for plain error only, we conclude that the State did commit prejudicial error because, like Smith, the testimony at issue involved an investigating police officer and this case contains minimal independent evidence of Thiede's guilt outside of S.C.'s testimony. Suiter's expert report is inconclusive regarding whether the notch on S.C.'s hymen was caused by sexual assault. Further, there were no eyewitnesses and there was conflicting testimony regarding S.C.'s allegations. As a result, Cowley's bolstering of S.C.'s testimony through prior consistent statements was prejudicial and warrants reversal.¹ See Daly v. State, 99 Nev. 564, 569, 665 P.2d 798, 802 (1983) (holding that the admission of prior consistent statements was prejudicial error warranting a new trial because the case rested entirely on the victim's testimony).

¹Thiede also argues Deputy Cowley vouched for S.C.'s truthfulness and against Thiede's truthfulness. We conclude Deputy Cowley did not vouch for S.C.'s truthfulness, nor did she testify to Thiede's veracity. Accordingly, the district court did not abuse its discretion by admitting this evidence.

III. The district court did not commit reversible error when it denied Thiede's request for a mistrial after Cowley mentioned "other victims"

Thiede also argues that the district court erred when it refused to grant a mistrial after Cowley mentioned "other victims" during her testimony. We conclude that the district court did not commit reversible error by denying Thiede's motion for mistrial after Cowley mentioned "other victims," but this improper statement did contribute to cumulative error.

Denial of a motion for mistrial is within the district court's sound discretion, and this court will not reverse a district court's denial of a motion for a mistrial "absent a clear showing of abuse." Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). "A witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

During the trial, the following discussion took place while the prosecutor was questioning Cowley.

Q Now, did you [Cowley] interview others in the course of your investigation in this matter?

A Yes, I did.

...

A There were other victims.

Thiede objected and requested a mistrial. The district court struck the testimony from the record and ordered the jury to disregard the statement. The district court then excused the jury and addressed the issue. After hearing from both sides, the district court held that the

prosecutor did not act intentionally. Thus, it found no need to declare a mistrial.

Although the statement was improper, we conclude that the district court did not abuse its discretion in denying Thiede's motion for mistrial. Such a conclusion is proper because there was an immediate objection and the court struck the statement from the record and ordered the jury to disregard it. Id. However, we also conclude in the final section of this order that the improper statement did contribute to cumulative error. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 478-79 (2008).

IV. Cumulative error warrants reversal of the judgment of conviction

Finally, Thiede argues that cumulative errors in his trial warrant reversal. We agree.

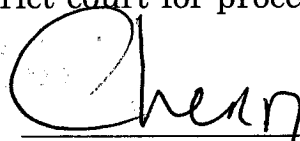
In Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985), this court held that when the issue of guilt is close and the gravity of the charged crime is high, then numerous errors, while not individually egregious, unfairly undermine the defendant's right to a fair trial. In such circumstances, cumulative error warrants reversal. Id.


Here, there were numerous errors at trial. First, the State commented on Thiede's lack of participation in the trial, and it failed to demonstrate beyond a reasonable doubt that the error did not contribute to the verdict. Thus, the State's suggestion that Thiede did not take the stand because he is guilty affected Thiede's constitutional right to remain silent. Second, the State used prior consistent statements without showing that S.C. made the prior statements before she had a motive to fabricate. Thus, Cowley's bolstering of S.C.'s testimony was prejudicial. Third, Cowley mentioned "other victims" in front of the jury. Although the district court did not err when it quickly ordered the jury to disregard the

statement, this statement coupled with the previous two errors makes it likely that the jury was prejudiced against Thiede.

Further, there is a lack of overwhelming evidence in this case. Although S.C. testified against Thiede, other witnesses did not corroborate her testimony, there was other conflicting testimony, and the physical evidence was inconclusive without S.C.'s allegation. As a result, this case contains minimal independent evidence of Thiede's guilt outside of S.C.'s testimony. Therefore, we conclude that cumulative errors warrant reversal.² Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
Lincoln County District Attorney
Lincoln County Clerk

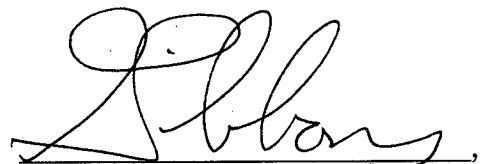
²We also conclude Thiede's other arguments on appeal lack merit. Thiede argues the district court judge was not neutral, and therefore, violated his Fifth, Sixth, and Fourteenth Amendment rights. However, the judge's questioning did not amount to judicial misconduct because Thiede failed to object and to demonstrate that the questions constituted plain error. Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998).

GIBBONS, J., dissenting:

Cumulative error does not warrant reversal of the judgment of conviction. In its cumulative error analysis, the majority first notes that the State commented to the jury during closing argument about Thiede “not participating in this.” The majority concludes this statement constituted an improper reference to Thiede’s constitutional right to remain silent. However, the State’s comment referenced Thiede’s disinterest in the court proceedings. Therefore, I cannot conclude that the State’s comment referred to the fact that Thiede chose not to testify at trial. Also, Thiede had the option of requesting a jury instruction explaining that he had no obligation to testify.

When addressing cumulative error, the majority also concludes that prejudicial error occurred when Deputy Cowley quoted S.C. during her testimony in an effort to bolster the State’s case. However, Thiede did not object to this testimony. As a result, a plain-error analysis is proper and Deputy Cowley’s testimony did not violate Thiede’s substantial rights. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008).

Finally, the majority indicates that Deputy Cowley improperly referenced “other victims” when testifying in front of the jury. This improper statement, according to the majority, did not constitute prejudicial error but did contribute to cumulative error. I conclude this error was harmless, and therefore, it did not contribute to cumulative error. Consequently, reversal is not warranted in this case and I respectfully dissent.

 J.
Gibbons