IN THE SUPREME COURT OF THE STATE OF NEVADA

REGINALD FRANKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50229

FILED

JUL 23 2009

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 five counts of lewdness with a child under the age of fourteen. Eighth Judicial District Court, Clark County; Michael Villani, Judge. The district court sentenced appellant Reginald Franklin to five prison terms of 10 years to life, three of which were ordered to run consecutively.

Franklin contends that two errors by the district court resulted in prejudice and require reversal of his convictions: the district court erred by (1) failing to give a limiting instruction prior to the admission of testimony regarding prior bad acts, and (2) instructing the jury that the victim's testimony need not be corroborated.

Limiting Instruction

First, Franklin contends that the district court erred by failing to give a limiting instruction prior to the admission of testimony of prior bad acts. This court has stated that when admitting evidence of prior bad acts "a limiting instruction should be given both at the time evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury." Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001),

holding modified by McLellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 111 (2008) (modifying Tavares to allow a defendant to waive the limiting instruction). The prosecution bears the burden of requesting a limiting instruction at the time of admittance, although if the prosecution fails to do so, the court should raise the issue sua sponte. Id. at 731, 30 P.3d at 1132. The purpose of requiring a limiting instruction at the time of admittance, and again before deliberation, is to reinforce the purpose for which the evidence is properly admitted and prevent the jury from considering the evidence for an impermissible purpose, such as evidence of bad character and that the accused acted in conformity therewith on the date in question. See Rhymes v. State, 121 Nev. 17, 23, 107 P.3d 1278, 1282 (2005). The district court's failure to give a limiting instruction prior to the admission of bad act evidence will be deemed harmless unless the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." Tavares, 117 Nev. at 732, 90 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

In the present case, the State produced a witness who testified that Franklin had communicated with him online when the witness was thirteen years old, had picked him up from school, and participated in sexual activity with him. Franklin had entered into a plea agreement regarding that incident.[1] The district court did not instruct the jury prior

---

[1]This court previously concluded that the district court erred by initially determining that this evidence was inadmissible. We held that the evidence was relevant because it demonstrated Franklin's motive and intent in contacting the victim in the present case. State v. District Court (Franklin), Docket No. 46253 (Order Granting Petition in Part and Denying in Part, July 7, 2006).

to the testimony, but did instruct on the use of the evidence during its final charge to the jury. This court presumes that the jury followed the district court's orders and instructions. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001).

The district court erred in failing to issue a limiting instruction prior to the testimony regarding Franklin's prior bad act. However, given the evidence presented that supported Franklin's conviction, we conclude that the error was harmless. The victim testified that he began communicating with Franklin on a group phone line just prior to his thirteenth birthday, and that he informed Franklin of his age and Franklin did not express hesitation with continuing the relationship. The victim further testified to two separate incidents involving several sexual acts. The victim's mother and family friend testified that the victim confided to them regarding the sexual encounters.

Non-corroboration instruction

Second, Franklin contends that the district court erred when it instructed the jury that the victim's testimony need not be corroborated because (1) the non-corroborating evidence instruction only applies to sexual assault and rape cases, and (2) the victim consented in the sexual encounter, and was therefore an accomplice to the crime.

As applied to lewdness

Franklin contends that the district court erred by instructing the jury that the victim's testimony need not be corroborated because such instruction only applies to sexual assault and rape cases. We have repeatedly held that "the uncorroborated testimony of a victim, without more, is sufficient to uphold a rape [or sexual assault] conviction." 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); Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994), holding modified on other grounds by Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

Although the offense in question in Gaxiola was sexual assault, the same reasoning would apply to an offense of lewdness with a child. Both offenses, sexual assault and lewdness with a child, involve sexual contact that is punishable as a category A felony. See NRS 200.366(2); NRS 201.230(2). Furthermore, an offense of lewdness with a child presents the same difficulty in proving that a crime occurred as presented in sexual assault cases. Many times the only evidence of a sexual assault or lewd act with a child is the testimony of the victim. As a result, like other sexual assault cases, the victim's testimony alone is sufficient to sustain a lewdness conviction involving children. Accordingly, the district court did not err in instructing the jury in this regard.

Child as accomplice

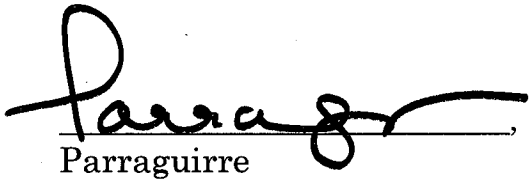
Franklin contends that because the victim consented in the sexual conduct, the victim is an accomplice and corroborating evidence is required when an accomplice testifies.

NRS 175.291(1) states that "[a] conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence." NRS 175.291(2) states that "[a]n accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

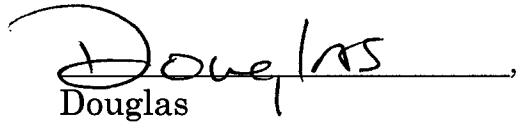
In the present case, the minor child could not be prosecuted for the identical offense of lewdness with a child under the age of 14 as Franklin was, and thus, the victim does not qualify as an accomplice. Thus, the victim's testimony was not required to be corroborated and therefore, the district court did not err in instructing the jury in this regard.

Having considered Franklin's contentions and determined that they have no merit, we

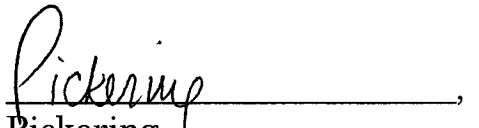
ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Michael Villani, District Judge
Albright Stoddard Warnick & Albright
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk