IN THE SUPREME COURT OF THE STATE OF NEVADA

STANLEY KEITH SPRINGMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50325

FILED

FEB 10 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 lewdness with a child under the age of 14 years. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

This case arises from contact in which Stanley Springman allowed A.E., a child under 14 years, to perform masturbation upon him. On appeal, Springman challenges, among other claims, (1) the competency of A.E. to testify, (2) the district court's limitation of his cross-examination, and (3) the district court's decision to admit three hearsay statements made by A.E. For the following reasons, we conclude that each of Springman's arguments fails and, therefore, we affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

The district court did not err in allowing A.E. to testify

Springman argues that A.E. was incompetent to testify, which prevented a fair trial under the federal Fifth Amendment due process clause. We disagree.

Generally, this court reviews a district court's determination of competency under a clear abuse of discretion standard. Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001). Failure to object, however, precludes appellate review for an abuse of discretion. Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008). The burden of challenging the

competency of the witness is on the opposing party and the court is not required to conduct a competency hearing sua sponte. See State v. Powell, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006). Nevertheless, where a defendant fails to object to the district court's determination, this court has discretion to review the determination for plain error to determine whether the alleged error affected the defendant's substantial rights. Mejia v. State, 122 Nev. 487, 490, 134 P.3d 722, 724 (2006).

Here, Springman and his counsel were present during the preliminary hearing and heard A.E. testify. The district court considered a motion in limine regarding A.E.'s hearsay statements. At the hearing on the motion, the State indicated that A.E. would testify at trial. Springman, however, failed to challenge A.E.'s competency at this hearing or prior to or during trial. Thus, we conclude that the district court did not commit plain error because A.E. was competent to testify and even if she was not the district court was not required to schedule a competency hearing sua sponte.

The "child friendly" limitation on cross-examination was permissible

Springman argues that the steps taken to protect A.E. denied his Fifth Amendment due process rights and his Sixth Amendment right to confront the witnesses against him. We disagree.

Regarding the standard of review, this court recently stated that "issues regarding the admissibility of evidence that implicate constitutional rights [are] mixed questions of law and fact subject to de novo review." Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008).

The federal Sixth Amendment Confrontation Clause applies to the states through the Fourteenth Amendment. Summitt v. State, 101 Nev. 159, 162, 697 P.2d 1374, 1376 (1985). Both the United States

Supreme Court and this court have stated that "the right to confront and cross-examine witnesses may, in appropriate cases, bow to 'accommodate other legitimate interests in the criminal trial process.'" Id. (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). Nevertheless, we closely examine limitations that deny or significantly diminish constitutional rights. Id.

In this case, such an examination leads us to conclude that the district court did not violate Springman's constitutional rights. Here, the district court only required that the defense conduct a "child friendly" cross-examination. The district court's limitation did not significantly interfere with Springman's right to cross-examine A.E. Instead, the limitation addressed the young age of the witness—A.E. was only five years old at trial—and the sensitive nature of the matter. In no way did the district court significantly burden Springman's ability to cross-examine A.E. Also, the fact that the State repeatedly objected to the questioning did not diminish Springman's constitutional rights because Springman still had the opportunity to cross-examine the witness. As a result, we conclude the district court's requirement that Springman conduct a "child friendly" cross-examination was not prejudicial and did not violate his constitutional rights to confrontation or due process.

The hearsay statements

Springman argues that the hearsay statements of Barbara Phillips, Albert Del Vecchio, and Denise Cornell violated his federal Sixth and Fourteenth Amendment rights to confrontation. We disagree.

Generally, "[a] trial court's evaluation of admissibility of evidence will not be reversed on appeal unless it is manifestly erroneous." Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006). In this case, Springman never objected to the admissibility of the evidence, so this

court applies plain error review. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (concluding that the defendant's failure to object to jury instructions generally precluded appellate review). Child victim hearsay statements are admissible if the statements meet the requirements of NRS 51.385 and the United States Constitution. Felix v. State, 109 Nev. 151, 200, 849 P.2d 220, 253 (1993), superseded by rule as stated in Evans v. State, 117 Nev. 609, 624-25, 28 P.3d 498, 509-10 (2001).

The district court properly admitted A.E.'s hearsay statements under NRS 51.385

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. NRS 51.035. If a child is under ten years old, NRS 51.385(1) allows the admission of the child's hearsay statement regarding sexual conduct if: "(a) [t]he court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and (b) [t]he child testifies at the proceeding or is unavailable or unable to testify." The proponent of the statements "bears the burden of affirmatively rebutting the presumptive unreliability of a child's hearsay statements." Felix, 109 Nev. at 181, 849 P.2d at 241. If the child is unavailable or unable to testify, the Confrontation Clause becomes an issue where the admitted hearsay statements are neither admissible through a hearsay exception nor determined reliable by a pretrial hearing. Felix, 109 Nev. at 176, 849 P.2d at 237.

In this case, the district court held a pretrial hearing on the State's motion in limine to admit the three hearsay statements of Phillips, Del Vecchio, and Cornell. The district court found that A.E.'s statements were spontaneous, contemporaneous, and had indicia of reliability. In addition, the content was age inappropriate, but A.E.'s language was age appropriate. Finally, the district court found that neither the police nor

the State subjected A.E. to repetitive questioning and there was no evidence of coaching or fabrication. Thus, we conclude, the district court's hearing was proper, and the court correctly applied NRS 51.385 in determining the reliability of A.E.'s hearsay statements.

Also under NRS 51.385(3), if the child is unavailable or unable to testify, then the State must provide the defense with written notice, at least ten days before trial, of its intent to offer the statement into evidence. On May 31, 2007, the State filed a notice of intent to admit child hearsay statements under NRS 51.385. Springman and his counsel attended the hearing on the motion and actively participated. Thus, Springman was aware of the State's intent to offer A.E.'s statement into evidence 18 days before trial.

Since this court has previously concluded that NRS 51.385 is facially constitutional, Bockting v. State, 109 Nev. 103, 107-09, 847 P.2d 1364, 1366-68 (1993), and that district courts have considerable discretion in making their determinations, Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006), the district court's determinations here did not constitute plain error.

The opportunity to cross-examine the hearsay witness negates any constitutional problems

Although the district court correctly admitted the hearsay statements under the Nevada statute, the admission of the statements must still satisfy the constitutional standard set forth in Crawford v. Washington, 541 U.S. 36, 68 (2004), which requires a determination of whether the statement in question is testimonial in nature. When making a determination regarding whether the statement was testimonial, this court looks to the totality of the circumstances.

There are at least four types of testimonial hearsay: "(1) ex parte in-court testimony or its functional equivalent, such as "pretrial

statements that declarants would reasonably expect to be used prosecutorially," (2) extrajudicial statements, (3) statements that an objective witness would reasonably believe could be used at a later trial, and (4) "statements made to law enforcement in the course of interrogations." Pantano v. State, 122 Nev. 782, 789, 138 P.3d 477, 481-82 (2006).

Under Nevada's testimonial standards, Del Vecchio's and Cornell's hearsay statements were testimonial

Applying a purely objective standard, we conclude that Phillips' hearsay statements are non-testimonial. Statements made in response to a parent or guardian's questions regarding possible sexual contact between the child and another person are non-testimonial. Id. at 791, 138 P.3d at 483. Thus, A.E.'s statements to Phillips, her grandmother and legal guardian, are non-testimonial because the statements were made in response to Phillips questioning after she noticed signs of sexual contact.

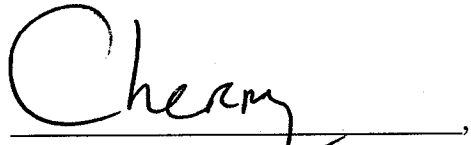
We further conclude that the statements A.E. made to Del Vecchio and Cornell are testimonial. The statements A.E. made to Del Vecchio are testimonial because the statements were made to a police officer or detective interviewing a victim regarding an alleged crime. Id. Regarding Cornell's testimony, the Reno Police Department contracted her to perform the sexual assault exam and, therefore, an objective witness would reasonably believe that the police would use the interview and results of the exam in a subsequent trial. Id. Thus, the statements made to Cornell are also testimonial.

Nevertheless, any constitutional issues under Crawford are negated if the defendant had a prior opportunity to cross-examine the testimonial-hearsay witness, Pantano, 122 Nev. at 789, 138 P.3d at 481, or the defendant is notified before trial of the hearsay statements and he has

an opportunity to cross-examine the witness at trial. Estes v. State, 122 Nev. 1123, 1140, 146 P.3d 1114, 1126 (2006). Because Springman was notified of the hearsay statements prior to trial and had the opportunity to cross-examine A.E there is no violation of the constitutional standards set forth in Crawford. Therefore, we conclude that the admission of Del Vechio's and Cornell's testimonial hearsay statements do not violate Springman's constitutional rights.

Based on the above, we conclude that each of Springman's arguments fails.[1] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

[1]Springman also challenges (1) the sufficiency of the evidence, (2) the district court's admission of cumulative testimony, (3) the district court's release of its sentencing discretion to the Department of Parole and Probation (DP&P) on the basis that it is unconstitutional because it violates the separation-of-powers doctrine, and (4) the constitutionality of the lifetime supervision penalty. Finally, Springman argues that cumulative errors warrant reversal. We conclude that all of these claims are without merit.

cc: Hon. Janet J. Berry, District Judge
Dennis A. Cameron
Stanley Keith Springman
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk